

[2001–02 Gib LR 320]

FORD v. LABRADOR

COURT OF APPEAL (Neill, P., Clough and Staughton, JJ.A.):
September 16th, 2002

Tort—defamation—test—whether words would tend to lower claimant in estimation of right-thinking members of society generally—comments on claimant’s different cultural background and language barrier may be neither defamatory nor insulting if reasonably expressed

The appellant brought an action against the respondent in the Supreme Court claiming damages for defamation.

The appellant, who was born in Russia, was an international-class athlete employed by a rowing club in Gibraltar (of which the respondent was the secretary) as a “caretaker-coach.” As part of her duties, she was required to deal with a delicate problem involving members and their children, and one member made a written complaint about the “shameful, rude and almost aggressive manner” in which she had behaved towards his wife.

The club committee considered the complaint and the respondent prepared a minute expressing satisfaction with her work but commenting on her “different approach and language barrier” which sometimes gave the impression of disrespect. Similar sentiments were expressed in a letter of apology sent on the committee’s instructions to the complaining member. At some point, the appellant obtained access to the minutes and later took exception to the suggestion that she had done so illegally or improperly. She was subsequently dismissed.

C.A.

FORD V. LABRADOR (Neill, P.)

She brought the present proceedings claiming defamation, “national discrimination” and damage to her professional reputation, basing her claim on both the minuted comments and the suggestion of impropriety on her part in obtaining access to them. The respondent entered a defence but also applied to have the proceedings struck out as disclosing no cause of action and being an abuse of process.

The Supreme Court (Schofield, C.J.) rejected the appellant’s claim based on the minute, holding that the words did not amount to defamation, but allowed her to continue with the claim to the extent that it relied on the allegation of impropriety. Leave to appeal was refused.

On further application for leave to appeal, the appellant submitted that the Supreme Court had been wrong in holding that the contents of the minute were not defamatory. The respondent submitted in reply that (a) the Supreme Court had been correct in its main holding; and (b) although his own application for leave to appeal against the other part of the holding was out of time, it had merit and should be granted.

Held, dismissing both parties’ applications for leave to appeal:

(1) The Supreme Court had been correct in holding that the minute prepared by the respondent was not defamatory and leave to appeal would be refused. Applying the classic test—“Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?”—the answer was that they would not. The words used were neither defamatory nor insulting but represented a genuine attempt to mollify the member who had complained and to support the appellant (paras. 26–28).

(2) The respondent’s application for leave to appeal would similarly not be granted. Whilst it agreed that a cause of action technically existed, the court would exercise its discretion to refuse leave as the application had been made long out of time (paras. 29–33).

Case cited:

(1) *Sim v. Stretch*, [1936] 2 All E.R. 1237; (1936), 52 T.L.R. 669, *dicta* of Lord Atkin applied.

The appellant appeared in person.
E.C. Ellul for the respondent.

1 **NEILL, P.:** The appellant in these proceedings is Mrs. Liubov Ford. Mrs. Ford was born in the then Soviet Union.

2 It is apparent from the papers that we have seen that she has had a distinguished career as an athlete. As a girl she was an excellent swimmer and a member of the Russian National Team. Later she found that she had a similar talent in rowing and in 1990 at the age of about 24 she obtained a Master’s degree in rowing in Lithuania.

3 Some years ago, Mrs. Ford left Russia and travelled extensively to various parts of the world including the Caribbean. About three or four years ago she met and married Mr. Daniel Ford. Mr. and Mrs. Ford now live in Gibraltar. On June 15th, 2001 Mrs. Ford became employed by the Calpe Rowing Club. At that time the Hon. Secretary of the Calpe Rowing Club was Mr. Richard Labrador, the respondent to this appeal.

4 There is an issue between the parties as to the precise scope of Mrs. Ford's duties at the club. But it is to be noted that according to the written notice of terms of engagement, dated June 1st, 2001, her employment was described as "caretaker/coach."

5 At the time of Mrs. Ford's employment at the Calpe Rowing Club there was some controversy about the charge that the club was making for the use of the club facilities by the children of members. It seems that a charge for children had been in existence for many years but had not been strictly enforced. In the summer of 2001, the committee decided to enforce the rule and at the same time the annual charge was raised to £30 from £20. It seems that Mrs. Ford was given the difficult task of ensuring that children for whom the fee had not been paid should not be allowed access to the club. We have seen a letter dated July 24th, 2001 that Mr. Labrador sent to the club members on the subject.

6 On July 24th, 2001, a committee meeting of the Rowing Club took place. At that meeting there was some discussion about the appellant. A minute of the discussion was taken by Mr. Labrador as part of his duties as secretary. The minute was typed by Mr. Labrador and placed by him in the minute book. At the next meeting of the committee the minute was signed by the respondent and by the president of the club and dated August 20th, 2001.

7 At some stage in the days following August 20th, 2001, Mrs. Ford read the minute. She was affronted by its terms. There is a dispute between the parties as to the circumstances in which Mrs. Ford was able to read the minute, and for the purpose of the present appeal it is unnecessary to make a finding as to what happened. Suffice to say that, shortly after she read it, Mrs. Ford consulted solicitors.

8 On September 14th, 2001, solicitors acting on behalf of Mrs. Ford wrote to Mr. Labrador. The letter was in the following terms:

"I am instructed by Ms. Ford.

On August 20th, 2001, you published minutes of a meeting of the committee of the Calpe Rowing Club. In those minutes, you referred to a 'Liuba' as having a 'language barrier.'

The above words referred or were understood to refer to my client, and meant and were understood to mean that my client does not

C.A.

FORD V. LABRADOR (Neill, P.)

speak English, alternatively, that she does not speak English well enough to be understood by an attentive native speaker of English.

This is untrue, and constitutes a libel upon my client, both generally and in her profession as a rowing coach, in that a sports coach should have good communication skills.

If I do not receive, within 14 days of the date of this letter—

- (a) your apology for the above libel on my client;
- (b) your undertaking that the above libel or its like will not be repeated; and
- (c) your offer to pay my client reasonable damages for the above libel, together with her legal costs,

my client reserves the right to issue a claim form against you for the above libel, without further reference to you.”

9 On receipt of this letter, Mr. Labrador consulted solicitors. It seems clear that at that stage the solicitors were consulted on behalf of the Rowing Club. By a letter dated September 19th, 2001, the solicitors replied. They drew attention to the fact that Mrs. Ford’s employment had been terminated and asserted that Mrs. Ford had never carried out any duties as “rowing coach.”

10 The letter continued:

“We consider your client to be acting maliciously and frivolously and in abuse of the process of the court. The words complained of by your client, whilst possibly injuring her feelings, cannot be said to be libellous. Furthermore, given the context under which the said words were used, our clients were totally justified in using them.

However, the words complained of were never ‘published’ by our clients. They were used on a privileged occasion during a committee meeting of the club when it became necessary, as part of their duties and obligations as committee members to the members of the club, to discuss the conduct of your client. The matters discussed were recorded by the secretary in a minute for the purposes of maintaining a record of such meetings. The said minute was kept within the minute book of the club, but as such was throughout a privileged and confidential document.

Your client, without the consent or authority or knowledge of our clients, wrongfully and unlawfully obtained access to the records of the club and it was under these circumstances that she saw the said minute and the contents of which she is now complaining. Such behaviour on the part of your client is a breach of the trust in which

our clients held her and an abuse of her position within the club and conduct which entitles our clients to summarily dismiss her without compensation.

Should your client decide to issue proceedings, please note that we shall be willing to accept service on behalf of our clients, when an application will be made to strike out such proceedings as being frivolous and an abuse of the process of the court and we shall also seek our clients' full costs. Should the matter proceed, we shall seek an order for the deposit of funds by your clients with the court as security for our clients' costs."

11 The correspondence between the solicitors continued during the course of the next three months. The matter was not resolved, however, though it became clear that Mrs. Ford's complaint was against Mr. Labrador personally rather than against the club and that the complaint was confined to the terms of the minute and did not extend to the discussion that had taken place in the committee. But it also became clear that she was greatly upset by the allegation that she had obtained a sight of the minute "unlawfully."

12 Towards the end of November 2001, Mrs. Ford decided to act for herself. Her solicitor, Mr. Hughes, wished her good luck in pursuing her claim. On November 28th, 2001, Mrs. Ford issued a claim form. The brief details of the claim were as follows: national discrimination, defamatory allegations, damage to professional reputation. The value of the claim was stated to be £4,999.

13 The particulars of claim were attached and were in these terms:

"Whilst my employment with Calpe Club, Mr. Labrador was publishing and saying, that because of my nationality I have somewhat different approach to the people, language barrier, that I later broke unlawfully to the committee room and stolen some papers. Also Mr. Labrador used me for what I was not hired—cleaning, *etc.* I was hired as caretaker-coach. I have a master degree in rowing. I have to clear my name. His allegations are totally untrue and because of this I lost my job."

14 On December 19th, 2001, Mr. Labrador filed his defence. By his defence, Mr. Labrador denied that he had said or written anything that could be construed as defamatory of the claimant and maintained that the claim disclosed no cause of action. For the purpose of this appeal, it is unnecessary to refer to the defence in detail. On January 4th, 2002, Mrs. Ford filed a reply.

15 Meanwhile on December 19th, 2001, on the same day as the defence was filed, solicitors acting for Mr. Labrador issued an application notice

seeking an order that the proceedings should be struck out on the basis that they showed no cause of action and were an abuse of the process of the court and frivolous.

16 The application to strike out was heard by the Chief Justice at an oral hearing on February 25th, 2001. At the conclusion of the hearing, attended by Mrs. Ford in person and by Mr. Eric Ellul as counsel on behalf of Mr. Labrador, the Chief Justice reserved his judgment. He handed down his decision on May 1st, 2002.

17 In his judgment, the Chief Justice made some reference to the history of the matter and referred to the terms of Mrs. Ford's claim. He continued:

“I have reviewed the claim and the correspondence and material before me and I am satisfied that the claim, drafted by the claimant herself, does not include a claim for wrongful dismissal. The claim is an action in defamation.”

This part of the Chief Justice's decision is not challenged by Mrs. Ford and the ruling that the claim was a claim in libel only was in accord with the letter from Mr. Hughes dated November 24th, 2001, in which Mr. Hughes referred to Mrs. Ford's claim as being “your libel claim.”

18 In his judgment, the Chief Justice continued:

“The circumstances leading up to the claim are as follows. Members of the committee of the club received verbal complaints from club members about the claimant's attitude to them. There was a written complaint to the defendant complaining of the ‘shameful’ way in which the wife of a member was treated and saying the claimant behaved in a ‘rude and almost aggressive manner.’ The letter was dated July 17th, 2001, and was considered by the club's committee on July 24th, 2001. The minutes of the discussion on the letter are recorded under the hand of the president of the club and the defendant, dated August 20th, 2001.”

19 The Chief Justice then set out the terms of the minute. The minute, which must be read as a whole, was as follows:

“A letter had been received from Mr. Ernest de Torres complaining at the way in which Liuba, the caretaker, had addressed his wife. The Committee was reasonably satisfied at the way Liuba was performing and the Hon Secretary was to reply to Mr. de Torres explaining that Liuba, being a Russian national, had a different approach and language barrier which sometimes came across as being disrespectful. Liuba had explained this was not her intention and this explanation had been accepted by the committee.”

20 In his judgment, the Chief Justice then set out the terms of the letter which had been sent to Mr. de Torres following the committee meeting. The letter dated July 24th, 2001 was in these terms:

“I refer to your letter dated July 17th, 2001, which was discussed at the committee meeting held today. The committee is very sorry at the incident and the stress it must have caused. Liuba, as you will understand, has a very difficult task to perform: part of her brief and instructions are to control access to the club and to keep discipline within the club particularly insofar as children are concerned. She is a stranger to the club and indeed to Gibraltar, her culture is different and so is the way she approaches people. Often her ways and the terms she uses are misinterpreted, leading members to believe that she is being disrespectful. Liuba is very sorry at what happened and has explained that it was certainly not her intention to offend anyone.

The committee fully understands how you feel and very much regrets what has happened. However, it is satisfied at the level of commitment that Liuba is putting into her difficult job and this is confirmed by the number of favourable comments that are being received. The committee would therefore ask you to accept this explanation since it is satisfied that with better understanding this sort of incident will not be repeated.”

21 A little later, the Chief Justice continued his judgment as follows:

“As I understand the claimant’s claim, she alleges that the defendant has defamed her in two ways. First, she claims that the discussion by the committee on July 24th, 2001 and the recording and publishing of it contains comments which are defamatory of her. Secondly, she complains that the allegation that she improperly pried into the minute book and took copies thereof is also defamatory of her.

Looking at the minutes of the club’s committee meeting and the letter which followed therefrom to the club member making complaint, I cannot see that either could amount to defamation. The minutes and letter must each be taken as a whole. There was a complaint against the claimant that she had been rude to the club member. The explanation, whilst perhaps not [being] the most felicitously worded, was by way of excuse for the claimant’s behaviour to the member. Read as a whole, the explanation was an excuse for a misunderstanding and could not be read as negatively affecting the reputation of the claimant. I would dismiss her claim in that regard.

I would look at the second allegation, that the claimant pried into the minute book and took copies thereof without authority, in a different way. There is a factual dispute in this regard, but assuming that the

claimant could prove that she was entitled to access to the minute book, an allegation that she offended club rules and behaved improperly within her employment is capable of damaging her reputation and may give rise to a just cause of action. I do not think it proper to dismiss that claim and will allow it to stand.”

22 On June 20th, 2002, the Chief Justice dismissed a summons issued by the appellant, treating it as an application for leave to appeal against his decision of May 1st. He ordered the appellant to pay the costs of her application limited to £100.

23 The appellant has now applied to this court for leave to appeal. There is also an application on behalf of Mr. Labrador for leave to appeal against that part of the Chief Justice’s decision that allowed Mrs. Ford to continue her claim in respect of the allegation of obtaining a copy of the minutes improperly. I shall return to the application on behalf of Mr. Labrador later.

24 At the hearing of the application for leave to appeal Mrs. Ford gave us a careful explanation of the background to the matter. In addition she put before the court documents, to some of which I have referred, giving information about her career.

25 The first question for our decision is whether the minute of the committee meeting dated August 20th, 2001, is capable in law of being defamatory of Mrs. Ford. At this stage we are not concerned with other possible defences to the action because it seems clear that the Chief Justice based his ruling on his finding that the words were not defamatory. It is to be noted, however, that, if the matter were to proceed, there would be serious issues to be considered as to the extent, if any, of the publication of this minute to third persons.

26 English judges have made many attempts to find a wholly satisfactory definition of what is meant by “defamatory.” But for the purpose of the present appeal, I think it is sufficient to refer to the well-known words of Lord Atkin in *Sim v. Stretch* (1), where he used the test ([1936] 2 All E.R. at 1240): “[W]ould the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?”

27 If one applies Lord Atkin’s test to the words of the minute read as a whole, I have no hesitation in agreeing with the conclusion of the Chief Justice that these words were not defamatory of Mrs. Ford. In my view, they would not lower her in the estimation of right-thinking members of society generally. The minute recorded an instruction to Mr. Labrador as secretary to reply to the member concerned and to explain the position to him. The words were not an insult but were intended to mollify the member and to support Mrs. Ford.

28 I much regret that Mrs. Ford has been upset by the terms of this minute. She is clearly a very talented lady. I am satisfied, however, that the minute is not defamatory of her and for my part I feel bound to dismiss her application for leave to appeal.

29 I turn to the application for leave to appeal by Mr. Labrador. Mr. Ellul accepts that his application is out of time but draws attention to the fact that the court has jurisdiction and a discretion to entertain it. I see the force of Mr. Ellul's argument that had Mrs. Ford been acting in person in September 2001 the letter would have been read by her alone and there would have been no publication of the words complained of. Nevertheless, it is clear that at that time she was acting by solicitors and that there was a publication, albeit a very technical one, to a person other than Mrs. Ford herself. Mr. Ellul further argued that the letter was not written by Mr. Labrador but by someone else, but it seems to me that at the time the solicitor was clearly acting as an agent.

30 There will also be a strong argument at the trial that the letter was written on an occasion of qualified privilege, though as no proceedings had begun in September 2001 it could not be argued that the privilege was absolute.

31 Mr. Labrador applied at an earlier stage for the surviving part of Mrs. Ford's claim to be struck out for want of prosecution, but this application was dismissed by the Chief Justice.

32 Mrs. Ford will no doubt wish to consider very carefully whether the limited publication of the words complained of to her own solicitor merit the continuation of these proceedings, but I am unable to disagree with the Chief Justice's decision that a cause of action exists.

33 But in any event, I would for my part be unwilling to extend the indulgence of the court and to allow this application to be heard so long out of time. The decision was given on May 1st, 2001. In these circumstances, I would dismiss Mr. Labrador's application for leave to appeal.

34 **CLOUGH** and **STAUGHTON, J.J.A.** concurred.

Applications dismissed.