

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 23 September 2009

BEFORE:

HIS HONOUR JUDGE MACDUFF

BETWEEN:

YAO ESAIE MOTTO & ORS

Applicants/Claimants

- and -

TRAFIGURA LTD & TRAFIGURA BEHEER BV

Respondents/Defendants

MR R JAY QC, MR J SMOUHA QC & MR R HERMER QC (instructed by Leigh Day & Co) appeared on behalf of the Claimants

MR E GLASGOW QC, MR C GIBSON QC & MR S WILKEN (instructed by McFarlanes LLP) appeared on behalf of the Defendants

MR D BROWNE QC (instructed by Carter-Ruck) appeared on behalf of the Claimants in action HQ06XO3342

Proceedings

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A JUDGE MACDUFF: Yes, Mr Jay.

MR JAY: My Lord, the settlement having been approved by you in private session, a consent order will be made. The libel proceedings have also been resolved but that is going to follow.

B There is something I would like to say, but I do not know whether you wanted to hear me first or my learned friend. What I propose is going to be very short and maybe Mr Glasgow can say what he is going to say first. I am in your Lordship's hands.

JUDGE MACDUFF: He is conceding the stage to you.

SUBMISSION BY MR JAY

C MR JAY: As you know, I am constrained by obligations of confidentiality as to what I can properly say to you. Consistent with those obligations of confidence, I can say three things.

D Firstly, this litigation would not have reached this point (indeed, any point) had my instructing solicitor not had the courage, in all the senses of that word, to take on this case and, for example, travel out to the Ivory Coast in 2006 when it was one of the most volatile and dangerous places on the planet.

E Secondly, it would not have reached this point (namely resolution of this case two weeks before the scheduled opening day of the trial and only slightly more than three years after these events in Abidjan) had it not been for the spirit of co-operation shown by McFarlanes. The claim had been filed but not bitterly fought and each of my learned friends, all of them but in particular Mr Glasgow and Mr Gibson, has acted in the very best traditions of the bar, that is to say with conspicuous fairness.

F Thirdly, I should and can say consistent with the obligations of confidence I mentioned that my clients are very pleased with the settlement. My instructing solicitors have met some 24,000 of the claimants in this action over the last ten days or so. Each one of them has now accepted the settlement and has warmly welcomed it and the fact that this litigation has now been resolved. Thank you.

JUDGE MACDUFF: Mr Glasgow?

SUBMISSION BY MR GLASGOW

G MR GLASGOW: Very briefly, I agree with my friend and what he said and of course we accept it. I can only express the wish on behalf of all of us that the rewards for Mr Day's courage will be fitting. I am sure he has worked very hard and it will not go unrewarded.

So far as McFarlanes are concerned, of course we are all honoured to represent them and I am very grateful for what has been agreed already in the joint statement.

H The only matter on which we would very briefly add anything to what you have already rightly been told about the settlement is the media coverage in advance of today's hearing. (I go back no further than that.) That publicity has been seriously

misleading and grossly unfair to many of those concerned. The true position is now at last set out in the joint statement. That is an agreed joint statement. It is truthful and it is accurate.

A

JUDGE MACDUFF: Mr Glasgow, I know that for myself. It will not come as a surprise to anybody to know that I have been following what has been happening in the media, both in the newspapers and on television and radio. I have myself witnessed how wildly inaccurate some of the statements have been. It can all be put right with the final joint statement.

B

Speaking for myself, I hope that the members of the press who have reported this hitherto and who have made statements which now turn out to be wrong will take note of the joint statement. I know what is in it because you provided me with a copy.

MR GLASGOW: My Lord, my learned friend Mr Jay and I thought it right that you should see it. That joint statement has, of course, been available since Sunday night. It was released at the proper time and (overspeaking) at the end but, lest there be any doubt, will you forgive me for reading it? It is of some importance.

C

JUDGE MACDUFF: It is of great importance.

MR GLASGOW:

D

“The parties have since August 2006 expended considerable time and money investigating in detail the events in Abidjan in 2006. As part of that process, in excess of 20 independent experts in shipping, chemistry, modelling, toxicology, tropical medicine, veterinary science and psychiatry have been appointed to consider all the issues relating to those events.

E

These independent experts are unable to identify a link between exposure to the chemicals released from the slops and deaths, miscarriages, still births, birth defects, loss of visual acuity or other serious and chronic injuries. Leigh Day & Co, in the light of the expert evidence, now acknowledge that the slops could at worst have caused a range of short term low level flu like symptoms and anxiety.

F

From these investigations, it is also clear that there are many claims which have been made for symptoms, in some cases perhaps understandably, which are unconnected with any exposure to the slops.

G

In the light of the expert evidence, Leigh Day & Co withdraws the comments made on its website on 8 November 2006 and subsequently, which alleged, among other things, that the slops had caused a number of deaths and miscarriages. Trafigura and Leigh Day & Co have accordingly resolved the libel proceedings brought by Trafigura.

H

Leigh Day & Co deny that any of their clients have made any deliberately false claims. In the light of assurances given to their senior leading counsel and in view of his advice, Leigh Day withdraw any allegation that there has been impropriety on the part of Trafigura or any of its legal advisors, (including McFarlanes) in

investigating the claims.

A Leigh Day & Co acknowledge the substantial assistance that Trafigura provided to the Government and people of the Côte d'Ivoire, including the provision of medical supplies and payments for de-contamination of dumpsites and the establishment of a compensation fund.

B It remains Trafigura's position that it did not foresee, and could not have foreseen, the reprehensible acts of Compagnie Tommy in dumping the slops in and around Abidjan in August and September 2006, and that Compagnie Tommy acted entirely independently of, and without any authority from, Trafigura.

Nevertheless, Trafigura regrets that this incident occurred and is pleased the matter is now resolved."

C They are, through me, pleased that the clients of my learned friend are delighted with the settlement. Of course they are. We sincerely believe that it is a generous one.

D On what is probably the most important of the issues, the medical conditions which could have resulted from the slops that were dumped, the statement that I have read to you represents not the views of lawyers or their arguments. It represents and reflects the agreed conclusions of wholly independent scientists and doctors, who were providing your Lordship with their reports. That is something which is not always understood. They were the people who would have given to you in accordance with their opinions.

E The reason I stress the truth of those two statements in particular, the opinion of the experts and the concession now made by Leigh Day, is that the wholly false picture which was graphically painted by the media has been damaging, as you have acknowledged very helpfully. We are grateful. I will not plough through them because it does not help and it is sometimes unfair.

F But just by way of one example because it graphically illustrates what really concerned us, on Thursday last week the Independent produced a large photograph on its front page of a woman who is, sadly, suffering from what we understand to be lupus, which appears to be prolific in that part of the world. There is no doubt about the condition from which she suffers. The photograph of this lady was produced by the Independent with no credit as to where it came from in the usual way and under the headline:

"British trading giant agrees to pay millions to victims maimed and scarred by dumping of polluted sludge."

G It is not clear to us who would have provided that picture or how or why this woman was persuaded that it was in her interests that it should be used in her way and, of course, we do not blame her.

What is, however, now clear beyond argument is that anyone who is telling people in the Côte d'Ivoire that such chronic conditions, deaths, miscarriages or birth defects were caused by the slops is acting irresponsibly and with cruelty.

H Equally misleading is the widely publicised suggestion that this settlement is only concerned with minor injuries, despite those described in the joint statement and the more serious and chronic injuries are not before you. That too was, sadly, perpetrated by the Independent (although, in fairness to them, echoed by a number of other newspapers). The wholly irresponsible suggestion was:

A “The settlement [which is coming before your Lordship] ... will mean that claims of more serious injuries caused by the waste - including miscarriages, still births and birth defects - will now not be tested in the £100 million court claim [which you were about to try].”

B Few things could have been more unfair to both sides or more irresponsible. Yes, it is right that the claim was indeed originally for £100 million. As the experts and the agreed settlement now show, the litigation is not and never should have been about such injuries.

Equally and lastly unfortunate has been the claim particularly in the Guardian on the very same day that the settlement was achieved as a sudden result of media pressure. That is the way it was put. The media brought pressure on Trafigura and they had settled. I will not resort to colourful language.

C I will simply say that that was wrong and your Lordship knows it was wrong. Firstly, as you know, these claims could not have been settled until at least the list of claimants had been finalised. We did not even know how many there were. That was settled in accordance with your order at the end of July. Once the total number of people had been settled, the agreement between the parties was negotiated, despite the damage being done by press publicity, as soon as it reasonably could have been following the closure of the list. It was finally signed on 8 September, as you know, nine clear days before the Guardian and other newspapers claimed that the victory was as a result of media pressure.

D We accept that some of the misstatements may have resulted from media speculation about what might be agreed. That kind of speculation might well sell newspapers, but it actually gets seriously in the way of *bona fide* attempts to settle claims by proper lawyers. It is, however, even more unfortunate that the speculation has continued even after the settlement has been agreed and even after the joint statement was put out, which was presumably misunderstood on a very wide basis. In the last three days, since the joint statement was published, there have been continued questions raised.

E Here, regrettably, it is perhaps unfortunate that Leigh Day’s response to them has been to make no comment. I am assured by my learned friend that that will stop as of today, that the Leigh Day website will properly carry this joint statement and that if questions are asked, they will be very straightforwardly answered, “Yes, the joint statement is joint and is accurate”, and there is no shrinking from it.

F My Lord, we are extremely grateful to you for hearing us and for fitting us in. We know it was inconvenient. We apologise for the inconvenience that has been caused with a massive de-listing of something that was going to take a great deal of your time. All counsel would like to acknowledge the help you have given us both in London and in travelling outside London to accommodate us in difficult circumstances throughout this matter. The parties on both sides are very grateful to your Lordship for that accommodation, which was not taken for granted.

G
H JUDGE MACDUFF: Thank you very much. Adding my voice to some of what you have just said for my own part, Mr Glasgow, my concern as I read the media reports in recent times was that I knew from my reading of the papers that the experts were quite clear. The slops could not give rise to the sort of symptoms and illness which was being claimed in some of the press reports. I hope that the media will take account of the joint statement and put things right and put things in

perspective. I need to say no more, except to underline that, from where I sit and from what I have seen of the papers, the joint statement is 100 per cent truthful.

A

MR GLASGOW: We are very grateful to your Lordship again. Thank you.

MR JAY: I am not going to repeat what my learned friend said, save to make one short point.

B

My learned friend mentioned some negotiations. They are covered by a cloak of confidentiality. To my knowledge, Leigh Day have abided by that confidence at all material times. I thought I should tell your Lordship that.

JUDGE MACDUFF: Mr Brown?

SUBMISSION BY MR BROWN

C

MR BROWN: As Mr Jay has already said, my instructions relate simply to the libel action that Trafigura started against Leigh Day in November 2006, coincident with the commencement of the personal injuries action. That libel action has also been settled as part of the global settlement and to that global settlement Leigh Day is a party.

D

You have a white bundle there and the consent order which was signed by the parties' solicitors this Monday can be found behind tab 1. I now have to seek your Lordship's approval to that consent order. You will see that on the first page over three paragraphs it contains both negative undertakings and positive ones.

E

The negative undertakings are not hereafter to republish in the words which are complained of in the particulars of claim. I am not going to read them all, but you will see those if you go to tab 2 and paragraph 3 of the particulars of claim and to the first paragraph. Those words included the allegation that the dumping had resulted in widespread death and injury. The last sentence of that first paragraph reads:

“The dumping of the toxic waste in Abidjan led to the death of 10 Ivory Coast residents, and injured up to 100,000 local people.”

F

We now know from what Mr Jay and Mr Glasgow have said that that was not true. That is the first thing covered by the undertaking not to republish.

G

In the draft amended particulars of claim at tab 3, from paragraph 11 on page 8 of the pleadings onwards, there were certain further defamatory publications canvassing the merits of the litigation, including broadcasts on the BBC and on French and Dutch television during the second half of 2007. They are covered by the undertaking not to republish, as is, at tab 4 of the bundle, a press release by Leigh Day of 24 October 2008. That referred to the basis upon which this matter was to come before your Lordship and, in the third paragraph, referred to threats of libel against the media by Trafigura and to actually taking libel proceedings against Leigh Day.

H

Your Lordship knows that the statement that Mr Glasgow read verbatim is to be published on the defendant's website for a period of at least 21 days. There is a further undertaking to remove from the website all the other publications, including the ones I have mentioned, which refer to the claimant or to the litigation.

A On that basis, the parties have agreed that the action should be stayed with each side bearing their own costs. The object of Trafigura, as was made clear in their letter before action, was to secure apologies and to put the matter right. They have done that. They sought an apology and, when it was not forthcoming, they had to resort to litigation. On that basis, they can now rest content that the matter has been put right. Thank you very much.

JUDGE MACDUFF: Mr Brown, thank you very much.

B MR SMOUHA: My Lord, if I may indicate in relation to libel proceedings, you will appreciate that I am not a specialist in libel matters. But we had understood that Mr Brown was attending in case you had any questions for him.

We had also understood in relation to the discussion before your Lordship that there was going to be no application to you under Civil Procedure Rule 53 for the claimant to make a statement in open court. There are inaccuracies in the points that have just been made to you. There was no apology.

C You were taken to the particulars of claim. There are, of course, a number of allegations in the particulars beyond those that were referred to by my learned friend. There were a number of defences of justification. It would not be appropriate for your Lordship this morning to canvass the merits and demerits of the claims and the defences.

D You will have noted that the consent order we invite you to make seeks an order that there should be no order for costs.

MR BROWN: My Lord, all those allegations, as Mr Smouha knows, have been withdrawn. To leave it hanging in the air, that in some way there are matters for which an apology has not been given but which may be true --

E JUDGE MACDUFF: This is beginning to descend into something quite unseemly. The allegations have been withdrawn, Mr Smouha.

F MR SMOUHA: They have, my Lord, but it is quite unfair for my learned friend to suggest that an apology has been tendered when there was an agreed formal order before you, the words of which I was very carefully briefed on and which make no reference to an apology. We were simply inviting your Lordship to make the order. The Civil Procedure Rules are quite clear. If a claimant wishes to make a statement in addition to the subject matter of the order which the court has been invited to make, an application will have to be made to your Lordship for that statement to be made. All we are doing is inviting you to approve the order in the form before your Lordship and nothing further needs to be said.

G JUDGE MACDUFF: Nothing needs to be said. I agree. I will make the order in the form in which it has been placed before me and not what has been said. Thank you very much.

(Hearing concluded)

H