England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2013] EWCA Civ 149
Case No: A2/2011/3321

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
HIS HONOUR JUDGE PARKES QC
HQ11D01984

Royal Courts of Justice
Strand, London, WC2A 2LL
05/03/2013

B e f o r e :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE RIX
and
LORD JUSTICE LEWISON

Between:

Mr Mashood Iqbal	**Appellant / Claimant**
- and -	
Dean Manson Solicitors & Ors (No 2)	**Respondent / Defendant**

Mr Mashood Iqbal (litigant in person)
David Hirst (instructed by Dean Manson Solicitors) for the Respondent

Hearing dates : Wednesday 31st October 2012

HTML VERSION OF JUDGMENT

Lord Justice Rix :

1. This appeal, which raises an issue of absolute privilege in defamation proceedings, arises out of litigation of a most unfortunate kind, in which each side asserts that the other is conducting a personal vendetta against it. The merits of those assertions have yet to be adjudicated and nothing I say in this judgment must be taken as trespassing on such an adjudication, if it ever comes to pass. Nevertheless, even at this still interlocutory stage, the narrative is striking.

2. The claimant and, in this court, the appellant is Mr Mashood Iqbal, a solicitor-advocate who represents himself. The defendants, and here the respondents, are Dean Manson Solicitors, a small firm of solicitors, represented on this appeal by Mr David Hirst. There are other defendant respondents, but they are all, I think, connected with the firm, and it will be sufficient to refer to the firm, which I shall call "Dean Manson".

3. The background to this litigation can be found in my judgment in this court in *Iqbal v. Dean Manson Solicitors (No 1)* [2011] EWCA Civ 123, [2011] C P Rep 26. In summary, Mr Iqbal had until 31 March 2006 been employed as a part-time assistant solicitor by Dean Manson. They must have been pleased with him because they offered him full-time employment, but he declined. Some years after he had left their employment and started his own firm under the name of Ahmads' Solicitors of Putney, he had been engaged by a Mr Butt, whom Dean Manson sued in January 2009 in the Leeds county court as alleged guarantor of the fees of their former clients, Mr and Mrs Tahir. Dean Manson appear to have become enraged at this opposition. They wrote to Mr Iqbal three letters, the second and third of which were also copied to Leeds county court, in which they accused him of having intentionally taken Mr Butt's instructions in order to settle scores because of a personal vendetta against the firm. They said that he had been summarily dismissed from the firm for insubordination and reckless conduct. They accused him of poaching clients and inciting them to initiate malicious complaints. They said that he suffered from a conflict of interest because he had worked on the files of Mr and Mrs Tahir when he had been with the firm. They told him to advise Mr Butt to pay their claim. They accused him of breach of immigration laws and of professional misconduct in forming a partnership with a Mr Sajjid Ali, whom they said had no permission to remain and work in the UK.

4. This attack led Mr Iqbal to issue proceedings against Dean Manson in March 2009 in the Croydon county court for harassment pursuant to the Protection from Harassment Act 1997 (the "1997 Act"). He claimed an interim injunction to restrain Dean Manson from further acts of harassment aimed at damaging his professional and personal integrity.

5. Later in March 2009 Dean Manson served their defence, personally verified by Mr Muzaffar Mansoor (the first respondent). The defence alleged inter alia that he had wanted to become a partner of the firm "to regularise his immigration status", but his attitude "suddenly turned to grave insubordination and arrogance"; and that in March 2006 he had married a British citizen in order to change his immigration status, but that after he had secured that object he had left his wife, contracted a bigamous marriage and brought his second wife to the UK in breach of the immigration laws. The defence also accused Mr Iqbal of forgery, malice, bad faith, and a revengeful vendetta.

6. In May 2009 Mr Iqbal applied to strike out the defence as an abuse of court, but failed.

7. In July 2009 Dean Manson's application to strike out Mr Iqbal's harassment claim succeeded before His Honour Judge Ellis. Permission to appeal was granted by Eady J. Mr Iqbal's appeal came before Mr Justice Teare who upheld the strike out, although for largely different reasons ([2010] EWHC 1249 (QB)). Permission to appeal was granted by the full court and the appeal was allowed (*Iqbal v. Dean Manson (No 1)*). The four issues on appeal are stated in my judgment at [29]. For present purposes all that matters is that this court held that the letters had demonstrated a course of conduct which was capable of amounting to harassment. No issue of absolute privilege was raised by Dean Manson. I said (and Lady Justice Smith and Lord Justice Richards agreed):

> "[41] The judge was perhaps concerned, and rightly so, not to set up every complaint between lawyers as to the conduct of litigation as arguably a matter of harassment within the Act. It must be rare indeed that such complaints, even if in the heat of battle they go too far, could arguably fall foul of the Act. However, in my judgment, these three letters,

> particularly when viewed in the light of each other, and especially the last two, arguably amount to a deliberate attack on the professional and personal integrity of Mr Iqbal, in an attempt to pressurise him, by his exposure to his client and/or the court, into declining to act for Mr Butt or else into advising Mr Butt to meet the demands of Dean Manson. It cannot, at any rate arguably, assist Dean Manson that such letters were written in the context of litigation and in an attempt to improve their position in that litigation, or in an attempt to raise even serious and proper concerns as to possible conflicts of interest. Arguably, the letters go way beyond such concerns. Indeed, Mr Brown conceded in argument that if the above was, even arguably, the view which could be taken of these letters, as distinct from the view of them which he submitted was the correct one, namely that they were simply and solely raising legitimate queries as to conflicts of interest between Mr Iqbal and his client and as to breach of confidence between Mr Iqbal and Dean Manson, then Mr Iqbal's claim could not be struck out…
>
> [42] In sum, in my judgment, each of these letters does, when considered side by side, arguably evidence a campaign of harassment against Mr Iqbal. They are arguably capable of causing alarm or distress. They are arguably unreasonable, or oppressive and unreasonable, or oppressive and unacceptable, or genuinely offensive and unacceptable. Arguably, they go beyond annoyances or irritations, and beyond the ordinary banter and badinage of life. A professional man's integrity is the lifeblood of his vocation. If it is deliberately and wrongly attacked, whether out of personal self-interest or malice, a potential claim lies under the Act."

8. I also said (with reference to Dean Manson's defence):

> "Whatever the hardships involved in litigation, it is not the occasion for irrelevant and abusive dirt to be thrown as part of a malicious campaign. Just as even the freedom of the press may be abused in a rare case (*Thomas v. News Group Newspapers Ltd* [2001] EWCA Civ 1233; [2002] EMLR 4; *Times, July 25, 2001*), so even litigation, whose natural contentiousness also requires its own freedom of speech, can exceptionally be abused. I would, however, equally deplore satellite litigation."

9. At the close of the hearing of that appeal, at which we announced our decision but reserved judgment, we recommended mediation to the parties who are members of the same community in London (para [67] of my judgment refers). We directed that the Civil Appeals Office should issue the parties with its standard letter regarding the Court of Appeal Mediation Scheme (CAMS). On this appeal we enquired as to the outcome of that recommendation. Mr Hirst told us, on instructions, that mediation did not take place because it had been declined by Mr Iqbal. Mr Iqbal, however, told us that on 6 December 2010, having received the CAMS forms from the Civil Appeal Office, he had invited Dean Manson to join with him in mediation, but had received no reply. He further told us that on 29 July 2011, at a directions hearing, he had again asked Dean Manson to consider a mediated settlement, but had been told by Dean Manson's counsel, on instructions, that Dean Manson were not amenable to mediation.

10. In the meantime there had been ongoing costs proceedings arising out of Dean Manson's claim against Mr Butt. The guarantee claim against Mr Butt had been struck out on 20 October 2009 by His Honour Judge Belchar and Mr Butt had been awarded his costs subject to detailed assessment. On 14 June 2010 Master Gordon-Saker, in the Senior Courts' Costs Office ("SCCO") had issued an interim costs certificate to Mr Butt in the sum of £6,000. In order to try to stay the costs proceedings and to set aside this certificate Mr Ejaz Baig (the second respondent) made a witness statement dated 28 June 2010 on behalf of Dean Manson ("document 20"). This witness statement repeated some of the allegations against Mr Iqbal which had been the subject-matter of the harassment proceedings, for instance that he was conducting a personal vendetta against the firm, that he was under investigation by the Solicitors Regulation Authority ("SRA"), and that he had put forward Mr Ali as a partner when Mr Ali had no permission to stay or work in this country (but it did not say that Mr Iqbal had knowingly breached any immigration laws). The statement referred to the pending application for permission to appeal to this court in the harassment proceedings and submitted that the costs assessment against Dean Manson should await the outcome of that application: on the basis that the SRA investigation against Mr Iqbal was itself awaiting that outcome and that the finalisation of the investigation would be relevant to the

costs proceedings. In the event, Dean Manson agreed to pay £12,000 in full and final settlement of the costs awarded to Mr Butt, and a consent order was made to this effect dated 4 August 2010.

11. However, the claim against Mr Butt was not finally resolved by Judge Belchar's decision of 20 October 2009, for Dean Manson were permitted by the judge to amend their particulars to claim from Mr Butt a *primary* liability to pay the Tahirs' fees to Dean Manson. A trial was fixed for 19/20 January 2010. On 18 January 2010, however, on the eve of trial, Dean Manson discontinued their claim against Mr Butt. District Judge Flanagan awarded Mr Butt his costs, subject to detailed assessment, which was transferred to the Wandsworth county court. That court issued a default costs certificate to Mr Butt on 20 December 2010 in the sum of £12,384.

12. In order to set aside that default costs certificate on 3 February 2011 Ms Catijah Cooraban (the fifth respondent) made a further witness statement on behalf of Dean Manson ("document 21"). She alleged that the August 2010 settlement also embraced the liability for costs under the second order made by DJ Flanagan. She also said that the costs claimed were "extortionate". Of particular concern to Mr Iqbal, however, was the statement that Mr Iqbal had left his firm's premises at 329-339 Putney Bridge Road on 30 November 2011 and that its then current whereabouts were unknown. She wrote: "It appears Mr Iqbal of Ahmads' Solicitors is deliberately holding out to the general public, the profession and the Courts by applications on notice a wrong address for service knowingly he has no legal right to do so after the end of the lease…". Mr Iqbal explains that there are 45 units at 329-339 Putney Bridge Road, and that at the end of November 2011 he moved from his former premises in one unit into a new unit there, and he quotes a letter from his landlord dated 28 June 2011 stating that he did not leave that address until 12 February 2011. He regards the reference to deliberate, complicit conduct of the kind alleged as a further attack on his professional integrity and one that was entirely gratuitous in that it bore no relationship to the grounds on which Dean Manson had sought to set aside the default certificate.

13. I should say something further about the SRA's involvement. On 22 May 2009 and 10 June 2009 Dean Manson complained to the SRA about Mr Iqbal. Their complaint is not in evidence, but the SRA's reply to Dean Manson dated 10 June 2009 is. The SRA summarily declined to act on Dean Manson's complaint, saying:

> "I have decided that there is no need for this office to take any action because I do not consider there sufficient evidence to show that Mr Iqbal has breached any of the rules of professional conduct from the information contained within your report.
>
> This office does not believe it to be an issue in itself for Mr Iqbal to take instructions on behalf of the two clients at the same time as taking proceedings in his own capacity against you.
>
> The onus here would be on you to provide this office with clear evidence to show that Mr Iqbal's interests *conflict* with those of that of his clients.
>
> So far, no such evidence has been provided…"

14. The SRA said that its file was closed, but that Dean Manson could ask the Legal Services Ombudsman to conduct an independent assessment. As far as I know, Dean Manson did not make such a request, but what they did do was to raise a fresh complaint with the SRA by their letter dated 7 September 2009. They did so after succeeding before Judge Ellis in striking out Mr Iqbal's harassment claim. They now sought again to enlist the SRA's support in halting Mr Iqbal from acting for Mr Butt. They claimed that his conduct was unbefitting a solicitor and that he was using unlawful means "to outlaw the partners of [our] firm". They copied to the SRA Judge Ellis's judgment stating that "there has been unreasonable conduct by the claimant to a high degree" deserving of indemnity costs (presumably overturned by the second appeal to this court).

15. On 20 October 2009 the SRA wrote to Mr Iqbal to inform him of Dean Manson's renewed complaint of professional misconduct. The SRA sought further information from him. On 17 December 2009 the SRA's adjudicator made an Interim Direction that the file "be closed" pending Mr Iqbal's appeal from Judge Ellis: and that on the conclusion of the litigation "leave be granted" to reopen the file. On 22

April 2010, following Mr Iqbal's unsuccessful appeal to Teare J, Dean Manson wrote to the SRA asking it to reopen its file, which it did. On 26 May 2010, the SRA wrote to say that the file remained closed pending Mr Iqbal's further appeal to the court of appeal. Thereafter there is no renewed correspondence in evidence before us. I assume that after the judgment from this court Dean Manson did not try to reopen the file again. The position therefore lies, to all practical purposes, with the SRA's summary disposal (of Dean Manson's original complaint) of 10 June 2009.

16. I revert to Mr Iqbal's claims. Either because he was emboldened by this court's judgment in February 2011, and/or because he was unable to persuade Dean Manson towards mediation, Mr Iqbal next took the dangerous step of initiating a second claim against Dean Manson, this time in the High Court, for defamation. The libel claim form was issued on 31 May 2011 and particularises 21 allegedly defamatory instances of publication between January 2009 (the first of the three letters relied on in the harassment proceedings) and 3 February 2011 (Ms Cooraban's witness statement, document 21).

17. There is a one year limitation period in defamation, subject to the power of the court to disapply the limitation period pursuant to the Limitation Act 1980, section 32A. Dean Manson drew to Mr Iqbal's attention that the first 19 publications relied upon were outside the one year period. Mr Iqbal thereupon applied under section 32A for the court to disapply the limitation period. Dean Manson cross-applied to strike out the whole claim and/or for summary judgment on grounds inter alia that (i) publications 1-19 were statute barred, and (ii) all 21 publications were made on occasions of absolute privilege. These applications came before His Honour Judge Parkes QC in July 2011. His judgment was handed down on 26 August 2011, [2011] EWHC 2261 (QB). It is from Judge Parkes' judgment that the current appeal to this court arises, with the limited permission of Lord Justice Hooper.

Judge Parkes' judgment

18. Judge Parkes held that the first 19 publications were statute barred and he declined to disapply the limitation period. There is no permission to appeal from that decision.

19. Judge Parkes also held that all 21 publications (with the possible exception of publication 8) were covered by absolute privilege.

20. Hooper LJ was unwilling to grant Mr Iqbal permission to appeal from the judge's discretionary decision with respect to the disapplication of the limitation period. He was however willing to grant him permission to appeal on the issue of absolute privilege. Necessarily, however, that permission was in the circumstances limited to publications 20 and 21, to which I have referred above as "document 20" and "document 21" (see at paras [10] and [12] above).

21. Judge Parkes referred in passing, at para [39] of his judgment, to *Jameel (Yousef) v. Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946, where a foreign claimant sued a foreign defendant in this country on the basis of minimal publication here to only a handful of readers. That authority raised for the judge the question whether proceedings in respect of a publication to a very small number of people who might be thought unlikely to have any recollection of the matter after two years might be struck out for abuse of process on the basis that the tort of defamation complained of had to be real and substantial. However, as the judge remarked, "the issues of abuse of process canvassed in *Jameel*… were not argued before me".

22. Dean Manson have however issued a respondents' notice in order to take the *Jameel* point. They are well out of time in issuing their notice. The point was not taken below. It is not a pure point of law. It raises issues of fact and, like any argument of abuse of process, requires a careful assessment of all the circumstances of the case. At the time of the hearing we could not see how such a point could be fairly raised anew on appeal, and we refused permission to extend time to make the application. Even if the respondents' notice had been in time, we would have refused permission to raise the new point.

The harassment proceedings, to date

23. Meanwhile Mr Iqbal's harassment claim had been making its own halting progress. On being remitted back to the county court, it was transferred to the Central London county court. Trial was listed for 6 June 2012, but on that day Her Honour Judge Diana Faber adjourned the trial because neither claimant

nor defendants were ready and the one day listing would be insufficient. Moreover Mr Iqbal said that he wanted to amend to add further particulars of harassment postdating his pleaded case.

24. Those amended particulars came forward on 22 June 2012. They included reference to the material which had been pleaded as particulars of defamation in Mr Iqbal's libel claim which had already failed before Judge Parkes in August 2011 .

25. On 22 August 2012 Dean Manson issued an application to strike out the amended particulars of the harassment claim on the basis of (i) an absolute immunity from suit for statements made in the course of litigation, and (ii) abuse of process and/or res judicata in that they had already been struck out by Judge Parkes in the libel claim.

26. Judge Faber heard that application on 26 September and 2 October 2012. At the time of the hearing of the appeal before this court from Judge Parkes' judgment in the libel claim, Judge Faber's judgment was awaited. It appears that it had already been distributed to the parties prior to the hearing before this court on 31 October 2012, but was not formally handed down until 6 November 2012. It was not referred to before this court.

27. Judge Faber struck out all of the amendments on the basis that they had been pleaded in the defamation claim but had been held time barred and subject to absolute privilege. She therefore considered it an abuse of process (amounting to harassment of Dean Manson) for Mr Iqbal to introduce them into the harassment claim. That applied even to documents 20 and 21 which were subject to this appeal. As for immunity from suit, the question was raised as to whether such an immunity for "documents brought into existence for judicial proceedings" applied outside defamation and was applicable to the letters relied on in Mr Iqbal's original (unamended) particulars of claim. She held that those letters were not immune from suit. She considered that Dean Manson's good faith was in question. She went on to say of other allegations which had not featured in the defamation claim (at para [102]) that she would not strike out the relevant paragraphs, since she could not apply a policy in favour of immunity to protect a defendant from suit on statements which "could so easily have been checked for accuracy and which have already been withdrawn and/or are demonstrably false". Finally, at para [116] she granted an interim injunction to Mr Iqbal against Dean Manson to prevent the firm from "making again those allegations which it has withdrawn or which are demonstrably false". Those statements were:

    a. That a civil restraint order has been made against the Claimant;

    b. That he made a bigamous marriage;

    c. That in any respect he has infringed immigration law;

    d. That he was sacked from employment by the Defendant;

    e. That he practises as a barrister without authorisation to do so.

28. I understand that Dean Manson have appealed Judge Faber's judgment to the High Court with her permission, and that Mr Iqbal has a cross-appeal.

Absolute privilege

29. Documents 20 and 21 which are the sole publications in issue on this appeal are both witness statements made in the costs assessment proceedings arising out of Dean Manson's claim against Mr Butt. There is absolute privilege from suit in defamation for witness evidence given in the course of proceedings. *Gatley on Libel and Slander*, 11th ed, puts the matter thus:

> "13.11 No action will lie against a witness (whether an expert witness or a witness of fact) for defamatory words used in his character of witness with reference to the inquiry upon which he is called or required to give evidence, even though such words were irrelevant and spoken maliciously and without reasonable or probable cause…

> 13.12 The privilege which protects a witness from an action for defamation in respect of his evidence in a judicial proceeding applies not only to evidence given *viva voce*, but also to statements contained in an affidavit, a witness statement, or in a document handed in by a witness at the close of his examination…"

30. As stated in that extract, the test is not one of relevance, but reference, to the proceedings in question. The authorities were reviewed by this court in *Smeaton v. Butcher* [2000] EMLR 985. There Clarke LJ restated the principles as follows (at para 26):

> "(1) A statement by a witness or prospective witness, whether made to a solicitor for the purposes of the preparation of a statement, proof of evidence or affidavit, or made in a statement, proof of evidence or affidavit, is absolutely privileged unless it has no reference at all to the subject-matter of the proceedings.
>
> (2) In deciding whether the statement has any reference to the subject-matter of the proceedings any doubt should be resolved in favour of the witness."

31. The rationale of the rule, as a matter of public interest, was explained by Fry LJ in *Munster v. Lamb* (1883) 11 QBD 588 at 607 as follows:

> "The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."

32. Even so, the width of the privilege has given cause for comment, and the courts have sometimes spoken, although usually in obiter fashion, in an attempt to formulate the outer limits of it. What has emerged from the cases is that it is not enough for the defamatory language to be *irrelevant* to the matter in hand for it to fall outside the privilege, it must have *no reference at all* to the subject-matter of the proceedings. The distinction, and the limits of the privilege, can be illustrated by some citation.

33. In *Munster v. Lamb* an advocate, Lamb, had suggested to Munster, in a criminal case, that he might be keeping drugs at his house for criminal purposes. Munster, a barrister, had prosecuted Lamb's client for burglary of Munster's house. It was held that the challenge to Munster's credit, in the course of a trial, was absolutely privileged. Brett MR indicated the width of the privilege in the following passage (at 599):

> "For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client: I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were *irrelevant* to every issue of fact which was contested in the court in which they were uttered; nevertheless, inasmuch as the words were uttered *with reference to*, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been." [Emphasis added.]

34. At 601, Brett MR stated the rule as follows:

> "…with regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the Court – whether what they say is relevant or irrelevant, whether what they say is malicious or not – are exempt from liability to any

> action in respect of what they state, whether the statement has been made in words, that is on viva voce examination, or whether it has been made upon affidavit."

Subsequently the rule of absolute privilege as it affected witnesses was extended to cover statements made by potential witnesses in preparing for a trial: *Watson v. M'Ewan* [1905] AC 480 (HL).

35. In *Trotman v. Dunn* (1815) 4 Campbell 211 there was uncertainty as to whether the defamatory statement of the defendant employer, sued by his employee for wages, that "He has been transported before, and ought to be transported again. He has been robbing me of nine quartern loaves a week" had been spoken as part of his defence ("in a judicial mode", *per* Lord Ellenborough at 212), or only subsequently in an aside. That was left to the jury. As explained by Cockburn CJ in *Seaman v. Netherclift* (1876) 2 CP 53 at 56:

> "I quite agree that what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case before Lord Ellenborough."

36. Thus what is said by a witness *outside* his status or character as a witness will not be covered by the privilege. In *Seaman v. Netherclift* Cockburn CJ explained the matter and gave another example of an extraneous slander outside the privilege, when he said (*ibid*):

> "For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say dehors the matter in hand, is necessarily protected…Or if a man when in the witness-box were to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked: Were you at York on a certain day? and he were to answer: Yes, and A.B. picked my pocket there; it might certainly be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege."

37. It is not clear whether in that example AB is a third party outside the scope of the proceedings. In the same case, Bramwell JA gave a further example (at 60):

> "Mr Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose while a witness is in the box, a man were to come in at the door, and the witness were to exclaim, "that man picked my pocket." I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box, wantonly and without reference to the inquiry."

In that example, the victim would as I understand it be a third party to the proceedings.

38. In *Seaman v. Netherclift* a handwriting expert gave evidence in one trial that the will in issue was a forgery. The jury found the will was valid, and the judge made disparaging remarks about the expert's evidence. Later, in a second case, the expert gave evidence of the genuineness of a document. On being referred to the earlier case, in a cross-examination going to his ability as an expert, he said: "I believe that will to be a forgery, and shall believe so to the day of my death." He was sued for slander, but the decision was that his evidence was privileged. As Bramwell JA put it (at 60): "the statement of the defendant was made as witness and had reference to the inquiry".

39. In *Samuels v. Coole & Haddock* (CA, unreported, 22 May 1997) a claim was struck out as being within the privilege. It had been brought by the buyer on hire purchase of an unsatisfactory car against the solicitors who had acted for persons, employed by the car dealer, whom the plaintiff had joined to proceedings brought by the finance house. The plaintiff triumphed against the finance house. However, the third parties' solicitors had made an affidavit in support of an application to strike out the third party claim against their clients, on the ground that the plaintiff's cause of action was against the finance house, not the dealer. In the course of their affidavit the solicitors had alleged that the plaintiff had so threatened and abused one of their clients at their offices, and over such a long period, that his health had been affected. The self-drafted claim against the solicitors was regarded as one for the tort of

malicious falsehood or defamation. On the solicitors' application to strike out the claim as being absolutely privileged, the judge at first instance had refused the application on the basis that the allegations had "no real relevance" to the litigation and was simply intended to poison the court's mind, and was within the exceptions spoken of in *Seaman v. Netherclift*.

40. However, this court disagreed. Holman J said:

> "[The judge] converted the test of whether the statement had "some reference" to the inquiry into one of "no real relevance". In my judgment there is a world of difference between those two tests. "No real reference" is far too high a test. It is not justified by authority and would dangerously imperil the vital public interest which witness immunity serves to protect…Whether true or false, what Mr Jones was describing in paragraphs 7 to 19 of his affidavit was narrative as to subsequent dealings between various people in connection with the subject-matter of the legal proceedings themselves, namely the car, and therefore it did have "some reference" widely and loosely defined, to the inquiry."

41. In *Seaman v. Butcher* this court considered such authorities, summarised the principles to be obtained from them (as stated above) and applied them so as to find that the privilege obtained in that case. There a tenant sued a landlord for unlawful eviction. The landlord's defence was that payment of the deposit was a condition of the tenancy and the tenant's deposit cheque had been dishonoured. The landlord sought to strike out the claim and in his evidence referred to a property owned by another party where he alleged that the claimant had acted similarly and was operating a scam. The tenant sued the landlord in defamation, not for use of it in his own proceedings against the landlord (the "Watford proceedings") but for publication of the affidavit to the other landlord who used it in the claimant's proceedings against him (the "Brentford proceedings"). Clarke LJ reasoned:

> "35…The statements in the affidavit as published to Ms Dornan [the second landlord] or indeed as subsequently published in connection with the Brentford proceedings were made with reference to the subject-matter of those proceedings. In my judgment the contrary is not arguable."

42. The limits of the privilege have also been drawn in other contexts. Thus the privilege does not apply to a prosecution for perjury or to contempt of court proceedings, or to malicious prosecution: see, for instance, *Roy v. Prior* [1971] AC 470 (HL). In *Taylor v. Director of the Serious Fraud Office* [1999] 2 AC 177 (HL) absolute immunity was extended to out of court statements which could fairly be said to be part of a crime or a possible crime with a view to prosecution: but a dictum in the High Court of Australia in *Mann v. O'Neill* (1997) 71 ALJR 903 at 905 was cited by Lord Hoffmann at 214C with approval to the effect that the ultimate rationale of the doctrine may not be on broader grounds of public policy as distinct from necessity, and that in any event "the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated'." Thus "statements which are wholly extraneous to the investigation – irrelevant and gratuitous libels" are excluded from the immunity (at 215B).

43. In *Duke v. Puts* [2004] SKCA 12, [2004] 6 WWR 208 the Saskatchewan court of appeal declined to find absolute privilege for some of the statements complained of in defamation proceedings brought by a pharmacist, Mr Duke, against a doctor, Dr Puts. Dr Puts pursued a "bizarre vendetta" against Mr Duke "which resulted in the pharmacist being literally driven out of town" (para [1]). At trial damages were awarded for "Dr Puts' outrageous and malicious conduct" (at [6]). Part of Dr Puts' campaign against Mr Duke found its way into allegations of professional misconduct that Dr Puts made against another doctor, Dr Jones, in a complaint to the College of Physicians and Surgeons. Dr Puts relied on absolute privilege with respect to these allegations. The Saskatchewan court of appeal reviewed much of the English jurisprudence cited above. However, it distinguished defamatory remarks made about a *third person* not connected with the litigation concerned. It also cited from treatises, viz *Salmond and Heuston on the Law of Torts*, 18th ed 1981, at 152, to the effect that a defamatory observation made "in respect of some entirely extraneous matter" would no longer be made in a protected capacity, citing *More v. Weaver* [1928] 2 KB 520 at 525 (CA). The court concluded (at paras [57]-[58]):

> "Thus, there is authority for the proposition that although comments made in the context of judicial or quasi-judicial proceedings need not be relevant in the sense that they contribute to the resolution of the matter they must have some nexus or be connected to the proceedings. The issue then becomes whether there is a nexus between the purpose of the letter sent to the College of Physicians and Surgeons by Dr Puts in connection with the complaint about the professional conduct of Dr Jones and the defamatory comments made about Mr Duke."

44. The court then distinguished between allegations which were made against Dr Jones *and* Mr Duke together (about a joint scheme to defraud), which were absolutely privileged, and other allegations of dishonesty, professional misconduct and fraud which were made against Mr Duke alone and which were "totally unrelated to any claim or comment about Dr Jones" (at [61]). These were not only irrelevant but gratuitous statements which had nothing to do with and had "no reference to" the complaint against Dr Jones (para [61]). These allegations were not privileged.

45. I am indebted to *Gatley* for reference to this authority (see footnote 119 to para 13.13) – but also to Mr Hirst, who, when asked if there was any *decision* as distinct from dictum which fell on the other side of the line drawn in the authorities, replied that there was no *English* decision and referred us to footnote 119.

Document 20

46. With this jurisprudence in mind, I revert to the circumstances of document 20 (see at para [10] above). It is a witness statement and therefore prima facie within the ambit of the principles of absolute privilege.

47. Document 20 does not contain any of the more startling allegations about Mr Iqbal which Judge Faber has made the subject-matter of her interim injunction. Judge Parkes said (at para [25] of his judgment):

> "I quite accept that paragraph [17] [concerning Mr Ali], in common with many others in the witness statement, seems to be of no real relevance to the application...The test, however, is not "no real relevance"…The allegation at [17] is part of the deponent's account of Mr Iqbal's alleged professional misconduct, which appears to be designed to give the court a full picture of Mr Iqbal's behaviour in considering an application by [Dean Manson] for discretionary relief to which his conduct in the course of proceedings arguably had some relevance. In my view there is nothing in the witness statement which can be said to have no reference at all to the proceedings."

48. The essential single ground of Mr Iqbal's limited appeal is that Judge Parkes misstated and therefore misapplied the *Smeaton v. Butcher* principles when he spoke of document 20 having "no reference at all to the proceedings". Mr Iqbal submitted that the correct principle is "no reference at all to the subject-matter of the proceedings". If the question was asked: "Why should the interim costs certificate be set aside or varied, or the costs assessment be adjourned pending the harassment claim appeal?", Mr Baig's answer in his witness statement was simply that there were serious issues about the conduct of Mr Butt's solicitor. However, submitted Mr Iqbal, those were wholly extraneous, irrelevant, and gratuitous libels (to pick up the words of Lord Hoffmann in *Taylor v. Director of Serious Fraud Office*) and without reference at all to the subject-matter of the proceedings.

49. In my judgment, however, the burden of document 20 is to address the complaint of the paying party, Dean Manson, that the receiving party's (Mr Butt's) solicitor, Mr Iqbal, had a conflict of interest which was relevant to the assessment of costs. It was also suggested that a vendetta by Mr Iqbal against Dean Manson, illustrated by his harassment claim which had been struck out but was subject to appeal, was equally relevant to the assessment of costs and its timing. Although Mr Iqbal was not, of course, Mr Butt, he was nevertheless Mr Butt's solicitor and in that sense responsible for the costs expended and claimed against Dean Manson. However weak the relevance asserted, it is difficult to say that the document as a whole has no reference to the subject-matter of the costs assessment proceedings in play. It plainly did.

50. It is true that the reference to Mr Ali ("despite him having no permission to stay, engage in business or work in the country") appears to be a gratuitous insult to a third person, Mr Ali, if untrue, but it is not Mr Ali who complains. In his oral submissions on appeal Mr Iqbal did not refer to this aspect of document 20 but concentrated rather on what was said about the SRA: but, however unsatisfactory those allegations were, it cannot be said that they were not made without reference to the costs proceedings. Mr Iqbal had no answer to the suggestion made by the court to him that the whole document was a complaint made against him in his capacity as Mr Butt's solicitor and not in some other capacity. In these circumstances I see no relevant distinction between the *Smeaton v. Butcher* formulation and the judge's shortened expression of it.

Document 21

51. I refer to para [12] above. Document 21 is another witness statement in the costs proceedings. The judge said (at his [26]):

> "Since the deponent had still not heard anything from Mr Iqbal's firm after receiving notice that the hearing would take place on 5th January 2011, an employee of Dean Manson was instructed to attend Mr Iqbal's firm's address and deliver the Notice of Hearing by hand. Her report, according to the deponent, was that his firm was not to be found at that address and that his true professional address was not known. The deponent concludes that Me Iqbal appears to be deliberately providing a false address for service knowing that he had no right to do so after the end of his lease on 30th November 2010. Mr Iqbal complains that this allegation is defamatory of him. It may be, but in my judgment there can be no possible argument that it has no reference to the proceedings."

52. I agree. The facts are disputed, but that is not the point. Mr Hirst's skeleton asserts that the facts are true, and that "deliberately" and "knowingly" were "simply adjectives" describing true facts. Those adverbs nevertheless contain the gravamen of the allegation, but that is not the point either. Closer to the point is that this has nothing to do with the purpose in hand, which was to set aside a default costs certificate. However, the document as a whole plainly addressed that application and the complaint about Mr Iqbal's address for service, although in one sense an unnecessary insult, if untrue, was both relevant and with reference to the ongoing proceedings in which Mr Butt's solicitor plainly had to provide an accurate address for service.

53. Mr Iqbal made similar submissions about this document to those he had made about document 20. However, in my judgment, they are really to the effect that Ms Cooraban's reference to a false address for service was irrelevant to the question "Why should the default costs certificate be set aside?" and do not amount to a successful challenge to the judge's conclusion that the whole of her statement addressed, whether or not relevantly, truthfully or coherently, and was with reference to, the subject-matter of the proceedings, namely the detailed assessment of Mr Butt's costs.

Conclusion

54. In sum, this judgment contains the reserved reasons for which at the time of the hearing of this appeal I joined in the court's decision, announced at the time, to dismiss it. The court proceeded to make its order on the appeal with consequential orders as to costs. That order was drawn up, sealed and entered on 1 November 2012.

Mr Iqbal's Re Barrell application

55. Some ten days or two weeks later, however, Mr Iqbal submitted to the court a supplemental skeleton argument invoking the court's power to reconsider and revise its judgment pursuant to what has been known as the jurisdiction to be found discussed in *Re Barrell Enterprises* [1973] 1 WLR 19 (CA).

56. What appears to have prompted Mr Iqbal's supplemental skeleton was the combination of the handing down of Judge Faber's judgment in the harassment proceedings on 6 November 2012, and Dean Manson's service on Mr Iqbal of a statutory demand dated 5 November 2012 in respect of a default costs assessment in the sum of £83,033 (which Mr Iqbal had previously applied on 5 October 2012 to

set aside). Mr Iqbal fears that, on the eve so to speak of his harassment claim finally coming to trial, he will be made bankrupt by Dean Manson and prevented from continuing his career as a solicitor advocate. He now relies of Judge Faber's judgment as vindicating his submissions to this court on absolute privilege. Mr Iqbal's supplementary skeleton is dated 9 November 2012 and was received in the Civil Appeals Office on 12 November 2012. We have received no submissions in answer.

57. In his supplementary submissions Mr Iqbal asks the court to reconsider its judgment. Unfortunately for Mr Iqbal, his request came too late to forestall the entering of our order, which (subject to *Re L and B (Children)* [2013] UKSC 8, see below) removed any opportunity to reconsider it under the *Re Barrell* jurisdiction.

58. In any event, the points raised by Mr Iqbal would not have justified reconsideration of our decision. First, there are no good reasons why the court's decision should be revisited. Judge Faber's judgment does not afford any such reason. Judge Faber was considering wider arguments in a different setting. The context there was a claim in harassment, which is a crime as well as a tort. It is arguable, but I am certainly not prepared to enter upon that argument here, that absolute privilege does not apply, or does not apply in quite the same way, in such a context: just as it does not apply in the case of perjury or contempt of court. Moreover, the allegations involved in the harassment proceedings both arise out of letters which are not, or arguably are not, matters of a witness's evidence in the course of proceedings, and arguably have a degree of wantonness and egregiousness which may stand outside any reference whatsoever to the subject-matter of any proceedings. Moreover it is perhaps arguable that where there is a form of persecution, as in the case of *Duke v. Puts*, which is the one authority which is closest on its facts to the allegations made by Mr Iqbal in the harassment claim, in effect an attempt to drive a professional man out of his livelihood, public policy demands a judicial inquiry unless it is plain that even so absolute privilege prevails. Even there, however, it will be recalled that the allegations in the complaint against Dr Jones which involved aspersions on a conspiracy involving both Dr Jones and Mr Duke were held to be within the privilege. None of that, however, arises in terms of the much more limited submissions which can be made in respect of documents 20 and 21. I repeat, however, that such issues are not properly before this court, have not been argued between the parties before this court, and I intend to make no observations whatsoever with respect to them.

59. Secondly, Mr Iqbal's supplemental skeleton raises a number of points which are either a revisitation of submissions and authorities to which I have referred above or are entirely new points not raised in the grounds for which permission to appeal was granted or were not in any event argued at the appeal (for instance, I quote from para 23 of Mr Iqbal's supplementary skeleton: "The Appellant does not hide his embarrassment that he should have argued it in the appeal hearing…"). To exemplify further: it is not the case that in my judgment in *Iqbal v. Dean Manson (No 1)* I considered an issue of absolute privilege in stating that many of the allegations complained about were irrelevant in their setting. Nor is it the case that *Trotman v. Dunn*, as explained in *Seaman v. Netherclift*, is an authority in Mr Iqbal's favour on this appeal. Nor is this appeal the place to explore the limitations of the doctrine of absolute privilege to be found in dicta or cases discussing the exceptional cases of perjury, contempt of court, malicious prosecution and possibly other such cases (discussed for instance in an extra-judicial lecture given by Justice Peter Garling to the Medico- Legal Society of New South Wales on 14 March 2012). Nor would it be relevant, in the light of the limited issues which arise out of documents 20 and 21, nor would it be fair at such a late stage even if the order had not yet been perfected, to raise an issue based on *Osman v. UK* [1998] ECHR 101.

60. In a still later submission ("Further Supplemental Arguments by the Appellant *(Re Barrell Jurisdiction)*") sent to the court by Mr Iqbal on 21 February 2013, reliance is placed on the very recent decision of the Supreme Court in *Re L and B (Children)* published on 20 February 2013. That decision appears to do at least two things. First, it states that what has been called the *Re Barrell* jurisdiction should no longer be confined by any need for exceptionality, but only by the balancing demands of the interests both of justice and finality. Secondly, it suggests, in an obiter section of the judgment, that at any rate in care proceedings the sealing of an order is not necessarily definitive where a court has power to vary or revoke its order under CPR 3.1(7). As Lady Hale SCJ said (at para [37]): "Where there is a power to vary or revoke, there is no magic in the sealing of the order being varied or revoked. The question becomes whether or not it is proper to vary the order." She went on to say (at para [41]) that "In this respect, children cases may be different from other civil proceedings, because the

consequences are so momentous for the child and the whole family". That the position may be different elsewhere in civil proceedings can be illustrated by this court's decision in *Tibbles v. SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591, where the jurisprudence under CPR 3.1(7) was discussed..

61. However, for the reasons stated above, I do not consider that Mr Iqbal's supplementary submissions, even if relevant to the wider questions which may arise in connection with the harassment proceedings, justify reconsideration of the present, much narrower, case. Mr Iqbal had the opportunity of telling us about Judge Faber's decision, even if it required her permission to do so pending her handing down of that judgment, but he did not seek to rely on it. It is now itself apparently under appeal. There can be no encouragement, in the light of *Re L and B (Children)* and *Tibbles*, for Mr Iqbal to apply under CPR 3.1(7) to this court to revoke its order. However, it must be for Mr Iqbal to decide whether to apply to do so after he has read the court's judgments.

62. Finally, in his latest submissions Mr Iqbal complains about the means employed by Dean Manson in their latest moves to enforce a default cost certificate against him. However, such matters are not before us and their details are unknown to us. Speaking in the abstract, I would have sympathy for Mr Iqbal if difficulties over costs prevented him from submitting his case to trial. Both in 2011 and again in this appeal, Mr Iqbal has addressed the court with restraint and ability. However, financial misfortune over costs is a peril of litigation.

Lord Justice Lewison :

63. I agree.

The Chancellor of the High Court :

64. I also agree.
