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Case No: HQ15X03623

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2016

Before :

MR JUSTICE WARBY

- -

Between :

Vladimir Bukovsky	**Claimant**
- and -	
Crown Prosecution Service	**Defendant**

- -
- -

Greg Callus (instructed by **Withers LLP**) for **The Claimant**
Aidan Eardley (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 25 July 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE WARBY

Mr Justice Warby :

1. In this action an individual who faces criminal charges sues the Crown Prosecution Service for libel, misfeasance in public office, and breach of the Human Rights Act, in respect of a public announcement that those charges were to be brought. The announcement was made in a CPS press release issued on 27 April 2015 ("the Charging Announcement").

2. The claimant is Vladimir Bukovsky, well-known as a Soviet dissident who has lived in this country for many years. He is 73. His case is, in summary, that the Charging Announcement falsely suggested that he was accused of being personally involved in the sexual abuse of children: that there was sufficient evidence to justify a prosecution for being present at the scene, making or taking indecent photographs. If the Charging Announcement did bear meanings to that effect, there is no suggestion that it was true. Mr Bukovsky has not been charged with or accused of being a participant in or present at the scene of any child sex abuse, or of taking photographs of such abuse. The CPS has not alleged, and does not allege, that he was guilty of or reasonably suspected of any such conduct.

3. The charges Mr Bukovsky does face are different. They allege the "making" of five "indecent photographs" of children, the "possession" of five "indecent images" of children, and the "possession" of one "prohibited image" of a child. In short, the case against Mr Bukovsky is that he accessed and kept child pornography. The CPS maintains that these charges are properly brought, and supported by sufficient evidence. Mr Bukovsky denies the charges. A jury will in due course determine whether he is guilty or not guilty. These charges are serious. But it is common ground that they are significantly different from, and less grave than, charges of personal involvement in child sex abuse. It is accepted that a defence of truth could not succeed, if Mr Bukovsky is right about the meaning of the Charging Announcement.

4. The main answers offered by the CPS, if the Charging Announcement bore the meanings complained of, are in summary: that a public interest defence would defeat the claim in libel; that the misfeasance claim would fail as there was no wilful or reckless wrongdoing; and that the Human Rights Act claim fails for essentially the same reasons. Mr Bukovsky takes the opposite view. He has issued an application for summary judgment, on the basis that if the court agrees with his case on meaning he complains of, the CPS would have no real prospect of successfully defending any of his claims.

5. But none of that falls for decision at this stage. The only issue before me for decision now is whether or not Mr Bukovsky is right as to the meaning(s) of the words used by the CPS in the Charging Announcement. That issue has been listed for trial as a preliminary issue.

6. The case for the CPS is that the Charging Announcement did not bear the meanings complained of by Mr Bukovsky. It bore less serious meanings, to the effect that Mr Bukovsky was to be charged with certain specific offences, as identified in the Charging Announcement; and that there was sufficient evidence to prosecute him on *those* charges, and it was in the public interest to do so. Unsurprisingly, and consistently with their stance in the criminal proceedings, the CPS maintain that these meanings are true. Mr Bukovsky accepts that if the court agrees with the CPS on meaning his claim cannot succeed.

7. The Charging Announcement reads as follows:

> "Vladimir Bukovsky to be prosecuted over indecent images of children
>
> 27/04/2015
>
> [1] The Crown Prosecution Service (CPS) has authorised the prosecution of Vladimir Bukovsky, 72, for five charges of **making indecent images of children**, five charges of possession of indecent images of children and one charge of possession of a prohibited image.
>
> [2] Jenny Hopkins, Chief Crown Prosecutor for the CPS in the East of England, said: "Following an investigation by Cambridgeshire Police, we have concluded that there is sufficient evidence and it is in the public interest to prosecute Vladimir Bukovsky in relation to the alleged **making and possessing of indecent images of children**. It is alleged that, collectively, the images meet the definition of categories A, B and C, as defined by Sentencing Council Guidelines.
>
> [3] "The decision to prosecute was taken in accordance with the Code for Crown Prosecutors."
>
> [4] Vladimir Bukovsky has been summonsed to appear at court on the following charges:
>
> * Five counts of **making an indecent photograph of a child** contrary to section 1(a) of the Protection of Children Act 1978, on or before 28 October 2014
>
> * Five counts of possession of indecent photographs of children contrary to section 160 Criminal Justice Act 1988, on or before 28 October 2014
>
> * One count of possessing a prohibited image contrary to section 62 (1) of the Coroners and Justice Act 2009
>
> [5] Ms Hopkins continued: "Vladimir Bukovsky will appear before Cambridge Magistrates' Court on 5 May 2015.
>
> [6] "May I remind all concerned that Mr Bukovsky has a right to a fair trial. It is extremely important that there should be no reporting, commentary or sharing of information online which could in any way prejudice these proceedings."

8. I have added the paragraph numbering, and placed in bold text the words of which Mr Bukovsky complains.

9. The Charging Announcement was published on the CPS website, and on its official blog, and a link to the blog was published on the CPS Twitter account. It remains online. The substance of the Announcement was widely republished in the media, on the websites of national newspapers including *The Guardian*, *Daily Mail*, and *Daily*

Telegraph, and by broadcasters including the BBC and ITV. The CPS accepts responsibility for bringing about this widespread repetition of the contents of the Charging Announcement. There is no dispute that the Charging Announcement bears a meaning that is defamatory of the claimant. My task is to identify the defamatory meaning(s).

10. The approach of the law to the determination of meaning is well-established. It was set out by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 [14]:

> "(1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation …" … (8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense." *Neville v Fine Arts Company* [1897] AC 68 per Lord Halsbury LC at 73."

11. The second principle should not be misunderstood. It is not an instruction to the Judge; it describes a characteristic of the ordinary reasonable reader. That reader will not always select the bad meaning, but nor will they always select the less derogatory meaning: *Lord MacAlpine v Bercow* [2013] EWHC 1342 (QB) [66] (Tugendhat J), approved in *Elliott v Rufus* [2015] EWCA Civ 121 [11] (Sharp LJ). The seventh principle is strictly speaking applicable only where the issue is what meanings words are capable of bearing. That is an issue rarely contested nowadays, though it may be relevant to some defences of public interest or honest comment (see *Barron v Vines* [2015] EWHC 1161 (QB) [63]; *Economou v de Freitas* [2016] EWHC 1853 (QB) [154]-[156]). For present purposes however this principle does provide a valuable reminder of the outer limits of the exercise.

12. Defamation law recognises two categories of defamatory meaning. The natural and ordinary meaning is the meaning which any ordinary reasonable reader would take from the offending statement, bringing to bear their general knowledge. An innuendo meaning is one that the statement would convey to a reader who knows some relevant facts, which are not matters of common knowledge.

13. The Particulars of Claim set out Mr Bukovsky's case. Today, Mr Callus appears for the claimant. He did not plead the claim. That was done by a Mr Stroilov, who is not a lawyer. But as all are agreed, it was done with considerable skill. In paragraph 10 it is alleged that the words bore the following natural and ordinary meanings about Mr Bukovsky:

(a) That it was alleged against him that he was present at the scene of a sexual abuse of a child, and/or an act or acts of indecency being committed on a child, and made at least five photographs of that abuse and/or acts of indecency; and/or

(b) That it was alleged against him that at least on five occasions he was present at the scene of a sexual abuse of a child, and/or an act or acts of indecency being committed on a child, and photographed that abuse and/or acts of indecency; and

(c) That the allegations set out in subparagraphs (a) and/or (b) were credible, and the evidence in support thereof was sufficiently convincing to justify a prosecution of Mr Bukovsky.

14. These meanings are close to, but somewhat graver than, what defamation lawyers normally call a "Chase Level 2" meaning: an imputation that a person is reasonably suspected of some wrongdoing. There is no real contest that the level of gravity was somewhere between Chase Level 2 and "Chase Level 1", namely guilt of wrongdoing. The issue is: what wrongdoing?

15. Mr Bukovsky also asserts a true innuendo meaning. It depends on the reference in the Charging Announcement to "categories A, B and C, as defined by Sentencing Council Guidelines". His case is that readers familiar with the relevant Sentencing Guidelines (the Definitive Guidelines on Sexual Offences, in force from 1 April 2014) would have known that a "Category A" offence of "making" a photograph under s 1(1)(a) of the Protection of Children Act 1978 is one that involves "Creating images involving penetrative sexual activity / Creating images involving sexual activity with an animal or sadism".

16. The innuendo meaning is not at the heart of the present issue. Mr Callus concedes that it would only have been conveyed to a limited number of readers. For his part, without conceding numbers, Mr Eardley accepts that the overall number of readers is such that it can properly be inferred that there were some who knew the significance of the words "Category A … as defined by the Sentencing Council Guidelines". I conclude that to those readers, however many there were of them, the words bore the true innuendo meaning that Mr Bukovsky had been accused, on the basis of evidence sufficiently convincing to justify a prosecution, of child sex offences involving penetrative sexual activity or sexual activity with an animal or sadism.

17. The real issue remains: what *kind* of child sex offences will a reader have taken the Charging Announcement to suggest?

18. Section 1(1)(a) of the Protection of Children Act 1978 provides that, subject to certain other provisions, it is an offence for a person "to take, or permit to be taken or to make, any indecent photograph or pseudo-photograph of a child…" So the offence may be committed by "taking" or by "making" a photograph. A "photograph" for these purposes includes a copy: s 7 of the 1978 Act. It will probably be obvious by now, but it is worth spelling out, that the offence of "making" an indecent photograph contrary to these provisions can as a matter of law be committed in a variety of ways that do not involve being present at the scene. The offence can be committed by wilful acts such as downloading, caching, and even enlarging a thumbnail on screen while

web-browsing. *R v Bowden (Jonathan)* [2001] QB 88, *DPP v Atkins* [2000] 1 WLR 1427 and *R v Smith (Graham Westgarth)* [2003] 1 Cr. App. R. 13 are all authority to that effect. In all three cases the Court of Appeal (Criminal Division) considered that it was applying the "natural and ordinary meaning" of the verb "to make", which includes "to cause to exist; to produce by action; to bring about". So a charge under s 1(1)(a) can be, and in this case has in fact been preferred without any need to prove that the defendant took a photograph, or "made" an original photograph, or was present at the scene of the indecent act depicted in the photograph, or that he was involved in any way other than as (for instance) a downloader of the indecent picture.

19. As Mr Callus points out, however, these are points of law. In a defamation action meaning is a question of fact. The natural and ordinary meaning of words issued to the public at large in a press release is not determined by the meaning which the law may attach to those same words as a matter of statutory construction. Mr Callus submits: "the very same words can and will have different meanings as a matter of fact than they do (in a particular context, to those who are legally-trained) as a matter of law". It is certainly true that in principle the same words *could* have a meaning for the purposes of defamation law which is different from their technical legal meaning. Whether these words do have a different meaning is the question for me to decide.

20. That is not a question of law. Nor is it a policy decision. It is a question of fact that turns on the application of the principles identified above. If the answer arrived at is inconvenient to the CPS that is nothing to the point.

21. As I think Mr Callus came close to conceding, there is one category of readers who clearly would not have drawn the meanings complained of from the Charging Announcement: reasonable readers who knew the relevant law. Just as I infer that some readers knew the meaning of a "Category A" offence, so I can and do infer that some knew that a charge of "making" an indecent photograph can be based on downloading it. Indeed, it seems to me that in reality there is likely to be a complete overlap between these two classes. For this reason, the innuendo meaning seems to me to be in reality self-defeating. Anybody who knew the special facts that give the words their additional meaning will also have known other special facts that tend to defeat the natural and ordinary meaning alleged by Mr Bukovsky.

22. Readers in this special category will have been aware that there is a wide range of charges which the CPS might prefer against people involved in the production of child pornography. Some at least will have known that "taking" and "making" an indecent photograph are separate acts, for the purposes of s 1(1)(a). Such readers will not have taken the charge to be alleging personal involvement or presence at the scene. They will have concluded, if they thought about it, that the charge described in the Charging Announcement probably involved an allegation of downloading for viewing online or similar conduct. In my judgment the kind of child sex offence that was suggested by way of innuendo was the making and not the taking of indecent photographs. Any expert who thought about it will have concluded that what the CPS was alleging was probably an offence committed by downloading or digitally storing images, or some similar conduct. The headline, focusing on the images, will have contributed to such a conclusion.

23. But this expert group is agreed to represent a relatively small subset of readers. What of the non-expert? In paragraph 9 of the Particulars of Claim it is pleaded that:-

> "The natural and ordinary meaning of the words "making indecent images of children", "making and possessing of indecent images of children", and "making an indecent photograph of a child" is that the person was present at the scene of a sexual abuse of a child, and/or an act or acts of indecency being committed on a child, and photographed that abuse and/or acts of indecency."

24. Mr Callus argues that this is a very simple case. He advances the following submissions:

    (1) That to an ordinary reasonable reader of the mainstream media outlets who published the Charging Announcement, "making" a photographic image means using some kind of camera equipment to produce a 2-D depiction of something that the photographer is witnessing in their immediate environment. There may be occasions that photographs are taken remotely, but the more usual meaning is of a person capturing their real-life surroundings in an image.

    (2) The reasonable reader would notice that "possession" of the images was to be charged independently of "making" the images, thus suggesting two separate and distinct acts both contrary to the criminal law: one of producing the forbidden item, and one of continuing to possess it. The inference a reader would naturally draw is that the person must have been present at least to witness the indecent acts and sexual abuse featured in the images they made. Mr Callus goes on to submit that the inference that the person was party to, or at least morally complicit in, the sexual abuse of children follows quite naturally.

    (3) Absent "the words of the statute, a hat-trick of appellate authorities, and several years legal training", no reader of the Charging Announcement would have read 'making' as meaning only the digital act of reproduction caused by viewing an image online or storing it digitally.

25. For the CPS, Mr Eardley submits that there are three fallacies in the argument for Mr Bukovsky: it relies on a few words in paragraphs [1] and [2], taken out of their context, thereby ignoring the principle that the ordinary reader is assumed to read the entire publication; it fails to give effect to the requirement to attribute to the ordinary reasonable reader a suitable degree of general knowledge; and it assumes a reader who is unduly suspicious, in violation of the second *Jeynes* principle.

26. Mr Eardley's submission is that the Charging Announcement does not simply refer to allegations of "making" indecent photographs. It clearly identifies the specific offences with which Mr Bukovsky is to be charged, and it does so by reference to a specific statutory provision: s 1(1)(a) of the Protection of Children Act 1978. It is a matter of general or common knowledge that words in statutes can have special technical meanings. Moreover, in this instance the language used is not natural. People do not ordinarily speak of a photographer "making" a photograph. The usual term is "taking". Other words are used, such as "developing", "copying", and "sharing", but not "making". The use of such awkward language would make a reasonable reader all the more wary of "jumping to conclusions" about the nature of the conduct alleged by the Crown. The meaning that the reasonable reader would draw from the Charging Announcement, submits Mr Eardley, was that Mr Bukovsky

had been accused of the named offence, whatever the elements of that offence might be according to the relevant law. The ordinary reader would not venture into the question of exactly what conduct was alleged to amount to "making an indecent photograph".

27. In my judgment the words complained of did not bear the meanings attributed to them by Mr Bukovsky. Their natural and ordinary meaning was that:

(1) Mr Bukovsky was to be charged with offences of making indecent photographs of children contrary to section 1 of the Protection of Children Act 1978, possessing indecent photographs of children contrary to section 160 of the Criminal Justice Act 1988, and possession of a prohibited image contrary to section 62 of the Coroners and Justice Act 2009;

(2) The evidence in support of such charges was sufficiently convincing to justify a prosecution of Mr Bukovsky, and it was in the public interest to do so.

28. The reaction of the ordinary reasonable reader to the wording of the Charging Announcement would take into account its nature and its source. It would be recognised for what it was: a formal public announcement by a public authority of a considered decision to bring specific criminal charges under specified statutory provisions against a named individual.

29. The words stated in terms that there was sufficient evidence to justify charges, and that it was in the public interest to prosecute. The Code for Crown Prosecutors is also referred to. Although ordinary readers would be unlikely to know the detail of the Code, their thinking would be that the CPS would only bring charges if it considered there was a good or reasonable prospect of convincing a jury. The ordinary person knows that the standard of proof at a criminal trial is a very demanding one.

30. The ordinary reader would approach the description of the criminality alleged in the same way, appreciating that the decision-making of the CPS is a highly rule-governed activity. They would expect the words chosen by the CPS to be precise, and to follow the contours of the applicable law. They would attach weight to the references to the statutes under which the charges were laid. I agree with Mr Eardley that the public at large know that words can have special and precise meanings when used in statutes, and by lawyers. They know that this can apply to words that seem quite ordinary, such as "making" and "possession". I do not accept that the ordinary reasonable reader would treat the ordinary English words in this announcement in the same way as they would treat them if spoken or written by a journalist, or by a friend in ordinary conversation.

31. The phrase "making [a] photograph" is in any event not one that ordinary people would readily recognise as a description of pressing the button on a camera. It looks like technical usage, not everyday language. Mr Callus argues that some professional photographers use such language to describe what they do. I am sure that is so. But that does not help one decide what the ordinary reader would take away from the use of the term to describe a criminal charge against Mr Bukovsky. In my view, this unusual use of language would put the ordinary reader on guard.

32. Everybody knows that the process of making, that is creating or producing, a photograph can involve a wide range of activities. A person "makes" a photograph if they develop it from film, for example, or if they participate in the process of printing it from a digital image. There is nothing in the Charging Announcement to indicate that in levelling this charge at this defendant the CPS were alleging any particular role, or adopting any particular meaning of "making", limited to or involving the physical presence of the defendant at the indecent scene in the guise of photographer. In my judgment the reasonable reader, not avid for scandal, would not infer that this is what the CPS was alleging. It would not be naïve for a reader to say to themselves or another that it was clear from the Charging Announcement that the CPS was alleging some form of participation in the creation of an indecent photograph, but unclear precisely what the factual allegation was. It is possible, I suppose, that some reader might think that Mr Bukovsky played the role of the photographer. But that would represent supposition or speculation. There is nothing in the wording to justify the conclusion that this was the CPS's case. At best it would represent a "strained, forced or unreasonable" interpretation of the Announcement.

33. Having reached these conclusions, it is strictly unnecessary for me to consider the further and alternative submission of Mr Eardley: that if the ordinary reader did give any further thought to the question of what conduct was being alleged they would reach, on the basis of general knowledge, much the same conclusion as the expert reader. But I shall briefly address the argument.

34. The submission is that it is the downloading of unlawful images that looms largest in the public imagination when they see references to child pornography, indecent images and the like. As a matter of general impression, prosecutions of those who download images are commonplace and receive frequent media attention, whereas prosecutions of those who actually take indecent photographs in the first place do not seem to crop up with anything like the same regularity or profile. Thus, if a reader were to have formed any view of the nature of conduct underlying the charges, he or she is most likely to have assumed that it concerned downloading, not taking photographs.

35. A Judge needs to be a bit cautious when assessing whether matters of this kind - what goes on in court - are or are not matters of general knowledge. There are two particular risks: one is that the Judge's own professional experience colours what he or she thinks is generally known, leading to overestimation; the other is to underestimate the extent to which members of the general public know such details. Having given myself these warnings, I do consider there is force in Mr Eardley's argument.

36. As Mr Callus acknowledged in the course of his argument, it is a notorious fact that over recent years a number of well-known public figures have been charged with and some convicted of child sex offences. The details of the charges, the evidence, and the convictions have received wide publicity. Some have been accused of downloading pornographic images. Others have been accused of carrying out acts of sexual abuse on children, and not of "making" pornographic images. The general public is reasonably well educated about these matters. If, contrary to my view, the ordinary reasonable reader would have read into the Charging Announcement some implication about what exactly Mr Bukovsky was alleged to have done, they would have concluded that he was accused of downloading or otherwise creating digital

copies of child pornography. Once again, the headline would contribute to that conclusion, concentrating as it does on the pornography. The thoughtful reader would consider that if the allegation was one of personal participation in or attendance at the indecent event, the focus would be different.

37. In conclusion, I should mention two things. First, the summary judgment application. This was listed for hearing by me at the same time as the issue of meaning. But on the previous Friday Mr Callus proposed, and by the start of the hearing the parties had agreed, that it should be adjourned subject to one point. Mr Callus invited me to determine one issue raised by the application: whether the CPS had any real prospect of successfully resisting the contention that the publication of the words complained of caused serious harm to the reputation of Mr Bukovsky. I declined to deal with that issue.

38. It would be easy to infer that the widespread publication of an allegation of the kind complained of, or indeed an allegation of the kind that I have found the words to convey, would cause serious harm to a person's reputation. But there are some potential complications. The application only arose if I ruled in Mr Bukovsky's favour on meaning. It would leave for determination the many other issues raised by the summary judgment application as originally brought. I saw no useful purpose in addressing a single aspect of the application, and some potential hazards.

39. Secondly, Mr Callus invited me to entertain an application for an interim declaration of falsity. I declined to do so, for a number of reasons. The application was novel; I am not aware of such an order being sought before, let alone granted, in an action for libel, misfeasance or breach of s 6 of the HRA. There is no doubt that the Court has jurisdiction to grant interim declarations in appropriate cases, but the question of whether to do so in a case such as this deserves careful consideration. It would seem to have potentially wide ramifications. The first notice given of such an application in Mr Callus's Skeleton Argument, filed and served on Friday afternoon, the working day before the hearing. Mr Eardley, understandably, did not come prepared to argue the merits of such an application. As I understood it, the declaration was only sought in the event that the claimant won on meaning. And importantly, it was open to me to make clear in my public judgment, as I have, that there is no suggestion that Mr Bukovsky is guilty or reasonably to be suspected of taking photographs of indecent acts with children, or personal presence at the scene of any child sex abuse. For all these reasons I concluded the matter was best held over, without prejudice to the claimant's right to return to the issue, if so advised, once my decision on meaning was known.