

the use of the smallest pieces of music requires prior consent of the producer of audio recordings, if the original is recognisable.

Artists who are considering adopting small fragments from other protected recordings should think twice before using a sample, without obtaining a licence or the phonogram producer's consent. Only when creating a separate piece of art, when the audio fragment taken is altered in such way that it is not recognisable to the average music listener's ear, can the sampling not violate the producers' rights. It is open to question whether the OLG Hamburg, which will now take its turn to decide the case a third time, will find that the defendants committed acts of exploitation after 22 December 2002. If so, these may likely not be justified.

The conflict between artists and phonogram producers is, however, provisionally settled—to the detriment of artistic freedom. The artist may not rely on a general right of free use under UrhG s.24, while with regard to acts committed *prior* to 22 December 2002 (s)he can invoke this provision. This is because UrhG s.24 was held to be incompatible with EU law and is therefore not applicable after the entry into force of the Copyright Directive in 2002.

Sampling (post-2002) is therefore only permitted under the narrow restrictions set out in the Copyright Directive art.5(3), specifically quotation for purposes such as criticism or review, provided that the source is indicated and the quotation is made only to the extent required by the specific purpose (art.5(3)(d)); for the incidental inclusion of a work or other subject-matter in other material (art.5(3)(i)) or exceptions regarding use for the purpose of caricature, parody or pastiche (art.5(3)(k)). The latter has, however, not been implemented (yet) by the German legislator.

Duchess of Sussex v Associated Newspapers—Allegations of Wrongdoing Struck Out as Irrelevant, Complex and Costly

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☞ Case management; Costs; Dishonesty; Intention; Misuse of private information; Newspapers; Proportionality; Statements of case; Striking out

*HRH The Duchess of Sussex v Associated Newspapers Ltd.*¹ On 24 April 2020, Warby J heard a pre-trial application by which the defendant sought to have parts of the claimant's Particulars of Claim and of the corresponding parts of her Responses to the defendant's Requests for Further Information struck out.

The hearing was heard remotely and judgment was handed down on 1 May 2020. The judgment, which allowed the defendant's application, is a restatement and straightforward application of well-established legal principles in relation to pleading cases. Its significance is two-fold. First, it gives an insight into a case which is of considerable interest in the UK and abroad, given who the claimant is. Secondly, it contains a strong warning from the court as to issues of proportionality and costs.

Background

This is a claim in misuse of private information, breach of duty under Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (GDPR),² and infringement of copyright, based on five articles published by the *Mail on Sunday* and/or *MailOnline* on 10 February 2019, and which reproduced excerpts of a letter sent by the claimant to her father (the Letter). The Particulars of Claim describe the Letter in this way:

“In August 2018, the claimant wrote a private and confidential letter to her father, Thomas Markle, which detailed her intimate thoughts and feelings about her father's health and her relationship with him at that time. The claimant sent the Letter to her father on or around 27 August 2018.”

The claims in misuse of private information and data protection relate solely to “the words in the Articles which report the contents of, or contain extracts from, the Letter”; the copyright infringement claim relates to “the words and images included within the Articles that republished extracts from the Letter” ([10]).

The claims are, in essence, that:

- the information in the Letter was private and confidential, and contained the claimant's personal data; the disclosure of such information in the articles represented a misuse of the claimant's private information and/or processing of the claimant's personal data which was unlawful and unfair, in breach of the duties owed by the defendant under the GDPR; and the defendant has failed to comply with a notice requiring it to cease processing the data ([11]); and

¹ *HRH The Duchess of Sussex v Associated Newspapers Ltd* [2020] EWHC 1058 (Ch).

² Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 [2016] OJ L119/1.

- the Letter is an original literary work of which the claimant was the author; she is the owner of the copyright in the Letter; by reproducing words and images from the Letter, issuing copies to the public and communicating copies of a substantial part via its print and online publication the defendant infringed that copyright.

The procedural background to the proceedings is described in the judgment, at [7]:

“The claim form was issued on 29 September 2019. Particulars of Claim were filed on 14 October 2019. The defendant asked for Further Information about the claim. A response was filed on 11 November 2019 (‘the Response’). A second request was made, and a Response to that was filed on 9 December 2019 (‘the Second Response’). On 14 January 2020, the defendant filed its Defence, and the [strike out] application ... It seeks an order striking out parts of paragraphs 9 and 19 of the Particulars of Claim, and all the corresponding parts of the Response and Second Response. On 17 April 2020, shortly before the hearing, the claimant filed a Reply to the Defence.”

During the course of the hearing, the Application was expanded to take in parts of a recently filed Reply.

Application and judgment

The defendant’s application sought the strike out of parts of the claimant’s pleadings which contained:

- allegations of dishonesty and malicious intent on the part of the defendant;
- allegations that the defendant was “one of the ‘tabloid’ newspapers that had been deliberately seeking to dig or stir up issues between the claimant and her father”; and
- allegations that the defendant had “an obvious agenda of publishing intrusive or offensive stories about the claimant intended to portray her in a false and damaging light.”

The grounds for requesting that these parts of the pleadings be struck out were that:

- they did not form part of, or were not relied on as pleaded causes of action; and/or
- they were unparticularised or improperly pleaded; and/or
- it would be disproportionate to litigate the issues raised (this was otherwise formulated as “it would be a waste of costs and time and oppressive to the defendant to investigate the issues raised” at [31(3)]).

The upshot of the judgment is that Warby J struck out all of the passages of the pleadings included in the Application Notice, and some additional wording in the Particulars of Claim and the Reply, but made it clear that some of the issues included in the parts that had been struck out could be revived in amended pleadings, if adequately pleaded.

In reaching his decision, Warby J made a straightforward application of well-established legal principles. He reaffirmed the Court of Appeal’s finding in *Campbell v MGN Ltd*³ that the defendant’s state of mind is irrelevant to the tort of misuse of private information. At [37], he found that the Court of Appeal’s decision in this regard was “clear”:

“[A] media publisher will be held responsible for publication of information which it is wrongful to publish, even if the publisher acts in good faith; and the publisher will be liable for a publication which is not justifiable in the public interest, even if it believed that it was so justifiable. Both issues are to be determined objectively.”

Responding to the claimant’s Counsel’s submissions on this point, he clarified that motive and purpose were different concepts, illustrating the difference at [44] with a colourful example:

“[T]elling someone about infidelity by their spouse may have a legitimate purpose (the disclosure of wrongdoing to someone with a legitimate interest in knowing about it) but be inspired by a bad motive (to break up the marriage for personal advantage).”

The grounds for striking out part of the claimant’s pleadings (which he characterised as “irrelevant” at [46], [57], and [62], “inadequately pleaded” at [48], “impermissibly vague and lacking in particulars” at [58] and [62], or “speculative” at [62] and, relatedly, at [59]) fall squarely within the scope of the Civil Procedure Rules (CPR) r.3.4(2), which grants the court the power to strike out a pleading or part thereof where it finds:

- that the statement of case discloses no reasonable grounds for bringing or defending the claim;
- that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or
- that there has been a failure to comply with a rule, practice direction or court order.

Comment

Despite not raising any novel points of law, this case is of interest for two reasons: procedurally, because it is proceeding in the Chancery Division; substantively,

³ *Campbell v MGN Ltd* [2002] EWCA Civ 1373; [2003] Q.B. 633.

because it contains an open warning about proportionality and costs in a piece of litigation where the costs could potentially escalate exponentially.

As far as the procedural aspects of the case are concerned, the proceedings were issued in the Intellectual Property list of the Chancery Division. This is somewhat unusual since the driver of the case clearly appears to be the defendant's alleged infringement of the claimant's privacy. That is particularly so since proceedings were issued on 29 September 2019, i.e. a very short amount of time before the new version of CPR r.53 on Media and Communications Claims and its Practice Directions came into force on 1 October 2019. Readers will be aware that CPR 53.1(3) now provides that:

- “(3) A High Court claim must be issued in the Media and Communications List if it is or includes a claim for defamation, or is or includes—
- (a) a claim for misuse of private information;
 - (b) a claim in data protection law; or
 - (c) a claim for harassment by publication.”

The general practice, prior to 1 October 2019, already was to issue in the Queen's Bench Division (QBD) in order that the matter could then be heard by a specialist judge with experience of these types of disputes.

However, the inclusion of a claim for infringement of copyright meant that, strictly speaking, the proceedings had to be issued in the Chancery Division. The Senior Courts Act 1981 Sch.1 para.1(i) provides that: “all causes and matters relating to ... copyright” are assigned to the Chancery Division. CPR r.63.13 confirms this rule which is, on the face of it, mandatory (although this is a rule often honoured in the breach: see, e.g. the case of *Lisle-Mainwaring v Associated Newspapers Ltd*⁴ which included a breach of copyright claim and which proceeded in the QBD).

In the light of these rules, one may wonder whether it is the inclusion of a copyright infringement claim which dictated the decision to issue proceedings in the Chancery Division, or whether it is a pre-existing wish to proceed in the Chancery Division which led to the inclusion of a copyright claim. The latter seems more likely. The claimant's legal team are experienced practitioners and it is at the very least possible (if not likely) that they framed the claim in such a way in order to avoid issuing in the QBD.

Indeed, due to the nature of their practice, Chancery Division judges naturally have a more commercial approach to cases. Their focus may turn to different aspects of a case than those which would have been the focus of a QBD judge. In particular, there is a belief

amongst some media practitioners that they may be less interested in, or attuned to the freedom of expression issues arising from a case coming before them; and they are more likely to award larger sums by way of damages.

This was the case, for instance, in the landmark phone hacking judgment in *Gulati v MGN Ltd*,⁵ in which Mann J awarded a total of £1.2 million in damages to eight claimants. Although the facts of the case were different, and the defendant's behaviour in the phone hacking litigation was admittedly much more serious than that of defendants in previous privacy cases, the *Gulati* award represented a substantially higher sum per individual than the highest award of damages made in the QBD until then (£60,000 awarded to Max Mosley in *Mosley v News Group Newspapers*⁶—an award which was itself significantly higher than any previous sums awarded in any misuse of private information case).

It was also in the Chancery Division that the claimant prevailed in *HRH The Prince of Wales v Associated Newspapers Ltd*,⁷ the facts of which (as summarised at [17] of the judgment under commentary) bear resemblance to this one (and in which, coincidentally, the defendant's legal team was led by Mr Warby QC, as he then was).

If this was something that the claimant's legal team considered when issuing proceedings, the plan was thwarted, since it is a specialist judge of the Media and Communications List—Warby J—who was appointed to sit as the judge in this matter. His judgment, applying well understood legal principles, seems unimpeachable.

Turning to the substantive aspects of the decision, a clear theme which emerges from the judgment is Warby J's message about proportionality and costs in this litigation. He put this rather powerfully at [51]:

“The overriding objective of deciding cases justly and at proportionate cost requires the Court to monitor and control the scale of the resources it devotes to each individual claim. Irrelevant matter should, as a rule, have no place in Particulars of Claim. There may be cases where the court would allow the inclusion of some minor matters that are, on a strict view, immaterial. But where the irrelevant pleading makes serious allegations of wrongdoing which are partly implicit, unclear, lacking in the essential particulars, and likely to cause a significant increase in cost and complexity the case for striking out is all the clearer.”

Despite this, Warby J has left the door open for the claimant to seek permission to amend her pleadings to reinstate some of the issues which had featured in the parts of the pleadings that were struck out (subject to being adequately pleaded). He did so continuing to

⁴ *Lisle-Mainwaring v Associated Newspapers Ltd* [2017] EWHC 543 (QB).

⁵ *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch); [2016] F.S.R. 12.

⁶ *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB); [2008] E.M.L.R. 20.

⁷ *HRH The Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776; [2008] Ch. 57.

remind the parties about the need to keep the pleaded case within the bounds of the principles of “due particularity and proportionality” (at [66]; see also [72]).

Such an amendment is subject to the rules in CPR r.17, and can be done either by consent or by means of an application to the court. Given the submissions made by the defendant’s Counsel, it seems clear that consent is unlikely to be given. This suggests that another disputed application may be forthcoming if the claimant chooses to amend her case. This is particularly so where Warby J accepted that, while lacking in particularity ([64] and [67]) and clarity ([71]), the issues of the journalists’ dealings with the claimant’s father and the defendant’s alleged agenda against the claimant may well be material and relevant to the case (the former in relation to the claim that publication was a justified exercise in freedom of expression, the latter in relation to the claim for aggravated damages).

Overall, the decision is a setback for the claimant, and the defendant wasted no time in telling its readers of the result, citing a claim that it was a “complete disaster” and a “humiliation” in article published on the day the judgment was handed down. However, it is only the first step in a litigation process which can take several months to unfold unless a settlement is reached, and the defendant is unlikely to want to settle the litigation at this stage. This is not only because it has just had its first significant win. Coverage of the ongoing litigation will undoubtedly attract substantial readership for the defendant (as to this, see the claimant’s—on any view pragmatic—contention that the Letter was published with the “sole and entirely gratuitous purpose of satisfying the curiosity of the Defendant’s readership about the Claimant’s private life”, quoted at [18] of the judgment). In addition, this case has potentially wide ranging ramifications in setting the boundaries of how far newspapers can go in their reporting of these type of issues in relation to the small category of high profile individuals that form part of the Royal Family—there have been few such cases which have gone to court, and to date the Royal Family can certainly claim an excellent track record with regard to copyright and media litigation.

It will be a significant victory if the defendant wins, and it would make high profile individuals all the more nervous about committing private thoughts to letters or emails.

Oh, Jeremy Corbyn!—Meaning of Tweet about Labour Leader Held to be Defamatory

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¹ Defamatory meaning; Libel; Ordinary meaning; Social media

Laura Murray, the stakeholder manager in Jeremy Corbyn’s office at the time, complained on Twitter about a retweet by TV presenter Rachel Riley. The preliminary hearing on meaning was decided on the papers. On the court’s reading, the meaning of Ms Murray’s tweet was that Ms Riley (a) publicly stated that the then Labour leader deserved to be violently attacked; and (b) in doing so, Ms Riley had shown herself to be a dangerous and stupid person who risked inciting unlawful violence. Nicklin J found that the first assertion was meant as a statement of fact and the second as an expression of opinion, and that both were defamatory.¹

Background

Earlier, on 10 January 2019, in response to an egg attack on former British National Party leader Nick Griffin, *Guardian* journalist Owen Jones tweeted: “I think sound life advice is, if you don’t want eggs thrown at you, don’t be a Nazi. Seems fair to me”.

Then on 3 March 2019, a Brexit supporter threw an egg at Jeremy Corbyn’s head while the then Labour leader was visiting his local mosque in Finsbury Park. On the day of the incident, Countdown presenter Rachel Riley retweeted Mr Jones’ tweet, adding, “Good advice”, followed by an emoji of a red rose and an egg emoji.

In response, Corbyn’s senior aide Laura Murray tweeted:

“You are publicly encouraging violent attacks against a man who is already a target for death threats. Please think for a second about what a dangerous and unhealthy role you are now choosing to play in public life.”

Ms Murray followed her response with a second tweet stating:

¹ *Riley v Murray* [2020] EWHC 977 (QB).