



Neutral Citation Number: [2021] EWHC 669 (Ch)

Case No: IL-2019-000110

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS
INTELLECTUAL PROPERTY LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

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Date: 22 March 2021

Before:

THE RT. HON. LORD JUSTICE WARBY
(sitting as a Judge of the High Court)

Between:

HRH The Duchess of Sussex	<u>Claimant</u>
- and -	
Associated Newspapers Limited	<u>Defendant</u>

Ian Mill QC, Justin Rushbrooke QC, Jane Phillips and Jessie Bowhill (instructed by
Schillings International LLP) for the **Claimant**
Alexandra Marzec and Gervase de Wilde (instructed by **Reynolds Porter Chamberlain**
LLP) for the **Defendant**

Following written submissions

Approved Judgment

Lord Justice Warby:

1. On 11 February 2021, I handed down judgment explaining why I had concluded that there should be summary judgment for the claimant on liability for misuse of private information and copyright infringement: [2021] EWHC 273 (Ch) (“the Summary Judgment”). On 2 March 2021, there was a hearing to deal with matters consequential on the Summary Judgment. My decisions on those issues and my reasons were provided in rulings made at that hearing, and in my reserved judgment of 5 March 2021: [2021] EWHC 510 (Ch) (“the Consequentials Judgment”).
2. Two of the decisions I made at and after the consequential hearing are relevant for present purposes:
 - (1) I decided there should be an injunction restraining further misuse of private information in the Letter (“the Misuse Injunction”) but subject to a proviso (“the Public Domain Proviso”) which I described in this way (at [21(2)]):

“... a limited public domain carve-out to ensure that it does not prohibit publication of a fair and accurate report of the judgment (or for that matter commentary on the judgment).”
 - (2) I decided I had power, and it was appropriate in all the circumstances, to make an order under PD63 para 26.2 (“the Publication Order”) for dissemination and publication of an account of that part of the Summary Judgment that held that the defendant had infringed the claimant’s copyright in the Letter: *ibid.*, [67-70].
3. No order reflecting the Summary Judgment and Consequentials Judgment has yet been drawn up. That is for two main reasons. I had given the defendant time, after the 2 March hearing, to put in representations about practicalities which remained incomplete at the time judgment was handed down. I had also left some issues of detail for further argument and final resolution. At [69] I referred to the scope for further representations on practicalities. At [72] I made clear that “although I have decided the issues of principle, some matters of drafting remain to be completed” and that the orders I had identified “will not take effect until they have been reduced to writing in final form and issued by way of a formal order of the Court.”
4. My aim was to make clear that this would not be a case within the default rule, that judgments and orders take effect from the time of their pronouncement (CPR 40.7(1)). The intended effect – and I believe the actual effect – was not only that there was, for the time being, no order of the Court prohibiting continued publication and obliging the defendant to publish the Statement. In addition, the parties’ rights to seek permission to appeal were preserved, as these do not crystallise, and time does not begin to run, until a final decision is made. The time of the final decision, in this case, will be the date of hand-down of this judgment and the associated order. That follows the submission of written argument from both sides on the outstanding issues. The parties have agreed that I should resolve those issues “on paper” without a hearing.
5. The matters that remain outstanding are these: (1) one issue about the Misuse Injunction – the form which should be taken by the Public Domain Proviso; (2) four issues about the Publication Order: (a) when the statement should be published; (b) the form it should take; (c) whether I should grant the defendant permission to appeal against the

Publication Order; and (d) whether I should grant the defendant's application for a stay of the Publication Order pending a possible appeal. The fact that all these applications are before me at the same time avoids the difficulties that can arise if a party fails to seek permission to appeal at the time a decision is made: see *Lisle-Mainwaring v Associated Newspapers Ltd* [2018] EWCA Civ 1470, [2018] 1 WLR 4766.

The Public Domain Proviso

6. The issue is a narrow one. The claimant proposes the following wording:-

“provided that nothing in this Order shall prevent the publication, disclosure or communication of any fair and accurate report of the judgment given on the Summary Judgment Application or any fair and accurate commentary on that judgment.”

The defendant objects to the inclusion of the words I have underlined.

7. The objection is that the inclusion of these words would give rise to the spectre of the defendant being threatened with prosecution for contempt for publishing in good faith a report of the judgment merely because the report contained a minor inaccuracy or was seen by the claimant to be unfair. The risk is said to be even greater in respect of commentaries. The claimant's position is that these objections are misconceived because the concepts of fairness and accuracy are well understood in this context and “there would be no difficulty in assessing whether or not a report and/or commentary is fair and accurate” for the purposes of a contempt application.
8. In my judgement, the defendant's submissions are to be preferred. “Fair and accurate” are words I used in the Consequential Judgment but, as the defendant submits, I did so to indicate the aim and purpose of the carve-out, and not by way of definition, still less as a model for the drafting of an order. I was conscious that the wording of such a proviso could pose problems, even in the context of a court report. Unfair or inaccurate reporting might in principle give rise to civil liability. If so, that would be a spur to fairness and accuracy and make the inclusion of those words less important for the due protection of the claimant's rights. In any event, I accept that the risk that reporting may be, or be seen to be, unfair or inaccurate is not one that should carry with it the possibility of contempt proceedings.
9. Further, it would be wrong to limit the scope of the carve-out for commentary to comment which is “fair and accurate”. I do not believe that is the effect of the words I used in brackets in [21(2)] of the Consequential Judgment, and it was certainly not my intention. It would be inappropriate for a number of reasons to impose prior restraint on either “inaccurate comment” (whatever that may mean) or “unfair comment” (as to which no yardstick is available). My intention in referring to comment was to broaden rather than narrow the scope of the Public Domain Proviso. The omission of the words “fair and accurate” reflects that intention, and I therefore approve this aspect of the order in the version proposed by the defendant, which satisfies the cardinal requirement that an order of this kind must be clear and capable of being readily understood.

The Publication Order

Timing

10. The claimant submits that the order should require publication within 7 days of the Court's order. That would mean hard-copy publication on the next Sunday after the Order. The defendant seeks 14 days, in order to have the option of placing the statement in the following week's issue of the *Mail on Sunday*. In the events that have happened, the options would be Sunday 28 March 2021 or Easter Sunday, 4 April 2021. The defendant's argument is that the news agenda for a future Sunday cannot be predicted in advance, and that allowing this limited measure of editorial freedom would not materially prejudice the claimant or undermine the aim of the Order. I agree with those submissions.
11. The claimant submits that there should be no further delay in the matter; she has had to wait long enough and should have certainty. Counsel make the further point that the defendant will be unable to tell on 28 March what the news agenda might be on the following weekend. That is a fair point, as far as it goes. But it does not go all the way. This is not red-hot news, of a perishable kind. I also take account here of the conclusion I have reached on the matter of a stay, to which I shall come. Those conclusions mean that whatever order I make it will not give the claimant certainty at this stage.

Form

Mail on Sunday

12. I accepted the claimant's application for an order that there should be a Notice inside the paper and a Statement on the front page, leading the reader to the Notice. The parties have agreed the form, wording, font, size and placement of the Notice. A mock-up has been prepared and shown to me.
13. The wording of the Statement was prescribed by the Consequential Judgment, but the size of the font and the position of the Statement were left for resolution, to allow reasoned debate. I said (at [69]) that I was "not persuaded that all the detail of what is proposed is necessary and proportionate." The claimant continues to maintain that the Statement should be in the same position, and be in the same size font, as the front-page trailer complained of. The defendant seeks to run it along the bottom of the page as a sub-banner in a smaller font due to the number of words. Again, there is a mock-up before me. It is said that the claimant's proposals would represent a disproportionate amount of the front page and a vastly disproportionate interference with the defendant's freedom of expression rights. The claimant's riposte is that this is a problem of the defendant's own making.
14. I accept the thrust of the defendant's submissions, though not all of the language used. Superficially, the notion that it would be disproportionate to require a Statement in the same font as the front-page trailer to the Articles is unattractive. But the defendant's point is a different one. The Statement is much longer than the front-page trailer was; it contains five times as many words. So, the two are not really comparable. If the Statement was printed in the same font as the trailer it would consume a much, much greater proportion of the front page, becoming the main story of the day, or significantly downgrading that news story.

15. This is clearly a reasonable point. The purposes for which I have decided to make a Publication Order are not compelling enough to justify an interference of the scale or nature described by the defendant. The claimant's legal team have not been able to cast doubt on the defendant's account of the likely effect of the form of order sought. Having studied the mock-up, it seems to me to be sufficiently prominent and eye-catching to serve the purposes of the Publication Order. I therefore approve the defendant's proposed version of this part of the order.

MailOnline

16. I decided that the defendant should publish a Notice on MailOnline for a period of one week, rather than the six months sought by the claimant. I made no decision as to the size of the font or the position of the Notice, given that representations were still pending as to the practicalities.

17. The defendant has now proposed that the prescribed form of words be published on the home page of MailOnline for 24 hours and thereafter for 6 days on a news page. Counsel explain and seek to justify this proposal as follows:-

“This proposed length of publication is longer than the longest period for which any of the Articles was originally featured on the homepage (being 22 hours, 25 minutes). It is also in keeping with the normal practice of *MailOnline*, whereby the content of the homepage changes continually, with most stories moving off the homepage in the course of a day, meaning that regular readers expect to see new information on the page each day. The majority of stories are archived (and therefore searchable) after moving off the homepage and/or the news page. D's proposal gives the Online Notice continued prominence on an important part of the website, ensuring its ongoing availability to readers for the period stipulated by the Court.”

18. The defendant's proposals as to the font-type are agreed, but the claimant seeks an order for publication in a “prominent position”. I do not consider that to be a suitably precise term for an order that carries a penal notice, nor am I persuaded that it is necessary. The defendant has specified pixel sizes in its draft order, and I consider its proposals are reasonable for this purpose. The claimant's team are concerned at the “demotion” of the Statement to a news page for 6 of the 7 days, implying that this would make it inconspicuous. I am not persuaded of this. I am willing to accept the defendant's point, quoted above, that the news page would give the notice adequate prominence. I understand the defendant has confirmed that the online content of MailOnline is available via its app.

Permission to appeal?

19. On 2 March 2021 I heard and rejected an application for permission to appeal against the decisions contained in the Summary Judgment. The present application is separate. By a letter dated 15 March 2021, the defendant confirmed what had earlier been made plain, that it intended to appeal the Publication Order, and applied for permission to appeal this part of the order.

20. Three grounds of appeal are put forward, submitting that I erred (1) in concluding that it is common practice to make such orders in IP litigation and that policy favours doing so; (2) in failing to recognise that the order sought in this case served neither of the two objectives in recital 27 to the Enforcement Directive; and (3) in granting any final relief in respect of the copyright claim “at this stage (i.e. the declaration, the account of profits and the dissemination order) given that there are still substantive issues that remain outstanding in respect of the copyright claim.”
21. It is convenient to consider ground (3) first. I do not consider that this ground of appeal has any real prospect of success. I have found, for the reasons given in the Summary Judgment, that the defendant has no real prospect of defending the copyright infringement claim, which the claimant is bound to win. I accept that there are some aspects of the relief sought that cannot be granted, because of the remaining issues in that claim. That is why I withheld a final injunction: see the Consequentials Judgment at [44]. But I am still unable to see why the Court should withhold relief that reflects its final determination of the merits, and does not depend on the resolution of any outstanding issues. I add that, read in context, it is clear that the words in brackets in the defendant’s ground (3) do not indicate a separate challenge to the declaration I granted, or to my order for an account of profits. This is a ground of challenge to the Publication Order only. Of course, all this relief would be set aside in the event of a successful appeal against the grant of summary judgment on the infringement claim. But that is a different matter.
22. Ground (1) is explained as follows: “The Judge should have recognised that, pursuant to the Court of Appeal’s analysis in *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWCA Civ 1339; [2013] E.C.D.R. 2 at [69], publicity orders of this sort are not the norm and that the remedy should only be granted where it meets the specific objectives in recital 27 of the Enforcement Directive.” I do not consider this ground has any real prospect of success. It seems to me to involve a confusion, and a misreading of paragraphs [51-52] of the Consequentials Judgment. What I said there was that the cases show that such orders were “common practice”. That is not the same as saying they are “the norm”. I specifically cited the paragraph of *Samsung* that is now relied on, as well as other authorities, and made clear it was a discretionary matter to be decided in the light of all the circumstances. As for the second part of the argument, I cannot see how it can be said that I failed to recognise that the Directive limited the purposes for which such an order could be made. At [54] I summarised Mr Speck’s submissions about the legitimate purposes identified in the Directive. At [67], I expressly found that the order I was making “would serve both of the purposes identified by Mr Speck”.
23. Ground (2) is really a challenge to the assessment I have just quoted. As I held (and is not disputed) that is a matter for judicial evaluation, having regard to all the circumstances. My assessment is fully reasoned out in the paragraphs that precede [67], and in paragraph [68]. It is not said that I took account of irrelevant factors or failed to take account of something relevant. I do not see a real prospect that the Court of Appeal would conclude that I had reached an impermissible conclusion.
24. Nor is it suggested that there is any other compelling reason why an appeal should be heard. If permission is to be granted on this issue, it will be the Court of Appeal that does so. The defendant of course has a right to renew the application to that court.

A stay pending appeal?

25. The application notice and supporting evidence for this purpose were filed on 8 March 2021, seeking a stay of the Publication Order “pending the final determination of the defendant’s application for permission to appeal, or appeal if permission is given”, whilst noting that “the Order following judgment is still to be finalised.” There was no need for a stay at that time (see [3-4] above) but when this judgment is handed down and the formal order is made there will be. My refusal of permission to appeal means that any stay would last at least until the single judge has reached a decision on the papers.
26. The grounds for seeking a stay were set out in the evidence, within the application notice. By letter dated 5 March 2021, the claimant’s team had pre-emptively stated the grounds on which a stay would be opposed. Unsurprisingly, the defendant makes the point that its appeal rights would be rendered worthless if it was required to comply with the Publication Order before exhausting those rights. The claimant opposes the application on the footing that (1) the order records historical fact: what I found, some weeks ago, in relation to the copyright claim; (2) if there were a successful appeal the defendant could publicise that; (3) the order would be deprived of much of its utility if publication were deferred for months, if not longer.
27. I see a good deal of force in the claimant’s first two submissions on this point. An order such as this does not create an irretrievable situation. This is not an order for an apology, as I have heard said. It is not an order for a correction, either. It merely publicises the court’s judgment. As I noted in the Consequential Judgment, that is required of publishers who subscribe to the Editors’ Code, when they lose a libel action. That obligation is not qualified if there might be an appeal. Where the defendant is a media publisher it has ready access to the means of publicising court decisions, and if it succeeded in an appeal it could update its readers. There can be no doubt that it would do so.
28. But the defendant’s arguments go beyond this. Their case is that they should not be required to publish such a statement at all, either in principle or as a matter of proportionality and (I think) discretion. The defendants are entitled to ask the Court of Appeal to look at their grounds and decide if those points justify the grant of permission to appeal, and a stay meanwhile. To refuse a stay in the meantime would negate that entitlement. I think the claimant’s third point is overstated, in terms of the likely delay, but in any event it does not really provide an answer to this simple proposition. So I will grant a stay, but only until the matter has been decided by the Court of Appeal.

Time for filing an appellant’s notice

29. At the consequential hearing, I refused the defendant’s application for permission to appeal against the decisions contained in the Summary Judgment but granted a 14-day extension of time for filing an appellant’s notice in respect of those decisions. I now grant the defendant’s application for a similar extension of time for filing an appellant’s notice in respect of the Publication Order, so as to bring the timetables for the two applications into line with one another. This is plainly just and convenient. To have two separate timetables running concurrently would be administratively inconvenient. And the theoretical permutations are several, and inter-related. The Court of Appeal might grant permission on the liability issues and the Publication Order issue, or grant permission on

the Publication Order issue only, or refuse permission on all issues. All these matters should be considered together.