



Neutral Citation Number: [2022] EWHC 1394 (Ch)

Case No: HC-2000-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
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Fetter Lane
London, EC4A 1NL

08/06/2022

Before :

THE HON. MR. JUSTICE FANCOURT

Between :

**Various Claimants
- and -
MGN Limited**

Claimants

Defendant

David Sherborne, Julian Santos (instructed by **Thomson Heath** as lead solicitors, and **Charles Russell Speechlys LLP, Hamlins LLP and Taylor Hampton** for the individual claimants) for the **Claimants**

Richard Spearman QC, Richard Munden (instructed by **RPC**) for the **Defendant**

Hearing date: 27 May 2022

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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THE HON. MR JUSTICE FANCOURT

Mr Justice Fancourt :

1. On 27 May 2022 I handed down a judgment on MGN’s applications for summary judgment and alternatively to strike out part of the claimants’ claims (neutral citation number [2022] EWHC 1222 (Ch)). I dismissed the summary judgment application but struck out what I called the ‘publication claims’. This further short judgment relates to the question of which parts of the claimants’ Particulars of Claim should be struck out in consequence of my decision in principle that the publication claims should be struck out, and the costs of the applications. It uses the same terms and abbreviations as in the main judgment and should be read with that judgment, as necessary.

Statements of case

2. As I identified in my judgment, there were essentially two types of cause of action pleaded in the claimants’ claims, albeit technically each incident of UIG and each article published gave rise to a separate right of action. The two types were the publication claims, for loss and damage caused by the publication of the articles complained about, and the underlying UIG claims, for loss and damage caused by the underlying unlawful information gathering activities alleged to have been carried on by MGN.
3. MGN accepts my conclusion that although the publications claims have been struck out, the fact of publication of the articles is nevertheless relevant, and can remain in the Particulars of Claim, because the articles are relied on by the claimants as evidence that UIG activities were being carried on at about the relevant time and were the source of the stories that was published. That, MGN accepts, is also potentially relevant to the quantum of damages that could be awarded, if UIG is found at trial, because it is evidence that the UIG was being conducted for the purpose of publishing the private information for financial gain. But MGN disputes that harm caused to a claimant by the publication itself can any longer be claimed, since the claim based on publication has been struck out. Accordingly, MGN submits that paragraphs of the Particulars of Claim that allege that:
 - i) the articles represented the fruits of the UIG;
 - ii) the information published was information in respect of which the claimants had a legitimate expectation of privacy;
 - iii) publication is relied on separately from the UIG;
 - iv) the publication increased the distress and damage suffered by reason of the UIG; and
 - v) harm was caused to each claimant by publicationshould all be struck out.
4. The claimants submit that the only sub-paragraph of the Particulars of Claim that should be struck out is para 26(d) of the Sanderson statement of case (and its equivalent in the other 5 claims), which reads:

“...the Claimant relies on the publication of the Articles ... as giving rise to a freestanding cause of action for misuse of private information, in which the circumstances of the publication and the information which was obtained for it (namely by voicemail interception and/or blagging) were deliberately concealed by MGN, both at the time and subsequently”.

5. The claimants submit that only that freestanding cause of action was found to be statute-barred and that they are free to rely not just on the published articles as evidence of UIG but also as being the “fruits of the unlawful activity”, which they submit means that losses resulting from publication of the articles can be reflected in the damages awarded for UIG. Mr Sherborne stressed again that the articles would not have been published “but for” the UIG, so that there was an indelible connection between the UIG and the way in which it was exploited.
6. Mr Sherborne submitted that the approach of awarding damages for the way that the unlawfully obtained private information was exploited is established by the judgment of Mann J in *Gulati*. He also submitted that to exclude the ability to recover damages for the way in which MGN exploited the private information that it unlawfully obtained would be inconsistent with my own judgment, where I held that the allegations of UIG were irrelevant to the pleading of the publication claims.
7. The part of *Gulati* on which the claimants rely is para 224 of the judgment, which I set out in full:

“The answer to the point seems to me to be twofold. The first is that the defendant’s deemed admission does not admit to any particular level of privacy, and it is open to me to find that the privacy is at a trivial level if the facts require it in any particular case. The second is to recognise that merely identifying triviality does not necessarily mean that no substantial (i.e. other than nominal) compensation is payable in respect of that item. In respect of the bulk of the articles (the “admitted” articles) the defendant’s admission about source and causation has to be borne in mind – it has been admitted that they would not have been published but for the prior invasion of privacy from hacking (or, perhaps, other allied wrongs). That means that the article is the exploitation of a wrong, and could attract compensation even absent any real privacy level in the information itself, albeit that a low, or even non-existent, privacy rating is likely to lead to low compensation. Insofar as it is realistic to assume that the particular piece of information was acquired as a result of activity which itself was an infringement of privacy (which is in most if not all cases) then a useful parallel would be treated as if it were covered by an express confidentiality obligation. The publication of such an item would be a breach of obligation. The significance of the information would be capable of affecting the compensation payable, but one would also have to bear in mind the fact that, on the admissions in the case, the article would not have been published had it not been for the wrongful act. That means one has to take into account the effect on the victim of the

disclosure, who was in the circumstances entitled to have the matter not disclosed, and even if there might be a question-mark about the privacy of the item, if the effect is serious then substantial damages ought to be payable even if someone else, discovering the information from a different route, and publishing it, might not be liable.”

8. Mr Sherborne naturally emphasises the phrases “the article is the exploitation of a wrong” and “one has to take into account the effect on the victim of the disclosure”. The context is all-important. Mann J was addressing here what the right approach to damages should be if what was published was either arguably non-private or private only in a trivial way. He held that that did not mean that the damages could only be nominal, because the publication was making use of and disclosing information (even if not private) that had been obtained by unlawful means. The disclosure could be compensated even if the information was only marginally private or not private at all, because it amounted to an invasion of the victim’s rights to autonomy in dealing with their information.
9. That was being addressed in a broader context where (a) there was no question of publication or other claims being statute-barred and (b) the Judge’s approach to assessing damages was to award a specific sum for each article published, and then a general sum for the hacking that the claimant had suffered over a longer period that was not directly connected with publication of information. What the Judge did, in assessing damages for UIG and publication, was to wrap up the damages for publication for each individual article and its associated UIG in a single figure. When assessing damages for publication of articles in that case, the Judge is therefore taking into account, in fixing the damages, any additional compensation that should be given for the way in which the information was obtained (for which there was also a claim by way of a separate right of action) and the use made of that information. The point being made in para 224 is that nominal compensation for the publication of barely private information does not mean that damages cannot be awarded to reflect disclosure of information by publication that had been obtained by unlawful means.
10. That, of course, was in the context of awarding damages for both publication of an article and the underlying UIG that produced the article. It is that context that the Judge was emphasising that the article was the exploitation of the preceding wrongdoing. Nevertheless, it does seem to me to accept in principle that damages for UIG could be awarded to reflect the wrongful use of the unlawfully obtained information that was then made, including use by publishing it, irrespective of the damages for the publication itself.
11. Mr Spearman QC accepted in argument that the damages for the UIG could reflect the fact that the UIG was conducted with a view to exploiting the information obtained by publishing it, as evidenced by what happened in the case of the claimants’ articles, but he did not accept that any losses, such as anguish, embarrassment and loss of relationships, caused by the publication itself, could be awarded as damages for the surviving UIG claims once the publication claim has been struck out. Those losses are caused only by the publication, not by the UIG.

12. As I have said, Mr Sherborne relied on my own judgment as precluding a conclusion that the fruits of the UIG (i.e. the publication of articles) could not be relied upon in assessing the amount of damages payable in respect of the surviving rights of action.
13. Regardless of the rather repetitive and confusing way in which the claims are pleaded in the Particulars of Claim, there are – as my judgment explains – only two types of claim for misuse of private information being advanced: publication claims and underlying UIG claims. There is not, as Mr Sherborne appeared at one stage to want to have it, a third type of claim based on exploitation of the fruits of hacking activity or PI researches by publishing private information. The headings “MGN’s unlawful acts against the Claimant” and “Publication in MGN’s newspapers” in the Particulars of Claim identify the two different types of claim that do exist.
14. In para 101 of my judgment, I said that “Whether the publication could have happened without the underlying UIG – the “but for” case that Mr Sherborne frequently alluded to ... [is] irrelevant to the publication claims” and that “the fact of UIG might well be relevant to the quantum of damages”, but this was not a recognition of a different cause of action based on a “but for” causation argument apart from the publication claim, or a conclusion that damages for publication could include damages for UIG and vice versa . It was stating that, in the context of the test specified in s.32(1) of the Limitation Act, only the essential or “relevant facts” needed to be known or be discoverable for time to start running. Evidence going to the amount of the damages was not a “relevant fact” for a publication right of action.
15. In para 104 of my judgment I said that it was right that “the articles will not disappear from the evidential picture just because the separate causes of action based on them are struck out”. That is because, as is accepted, the articles are evidence of UIG and of the purposes for which MGN was conducting UIG. Whether the articles are also relevant because damages for UIG can reflect the use made of the information is a different question.
16. The question seems to me to be whether acts of UIG relating to an article that was subsequently published can be said to have caused the particular losses alleged by the claimants as a result of the publication of the article. Mr Spearman accepted that the question of what losses were recoverable was at least partly a question of causation, and he suggested that the publication of the article breaks the chain of causation, so that losses resulting from the publication are only caused by the publication, not by the UIG. I am very doubtful that the reason he gives is right. A tortfeasor’s own wrongful conduct will not usually be accepted as breaking the chain of causation, on the basis that a wrongdoer cannot rely on their own wrongful conduct. The publication of the articles was (on the facts pleaded) tortious even if the claimants are barred from bringing a claim in respect of it. The act of publication therefore cannot be relied on as an answer in itself. The question is, more broadly, whether the tortious conduct of UIG for which the claimants can still claim caused the claimants to suffer the post-publication losses that they did suffer.
17. In my judgment, contrary to my initial reaction when hearing argument, the answer to that question is not so clearly in the negative that I should strike out allegations about publication and post-publication losses. The mere fact that there was a separate cause of action for the wrongful publication does not seem to me to compel a conclusion that losses resulting from publication were insufficiently caused in fact or law by the

unlawful UIG. Rather, the question is what losses were factually caused by and are fairly legally attributable to that tort. Mann J was clearly willing to countenance an award of damages reflecting wrongful disclosure even if there was no claim based on misuse of private information by publication. If it is right (which I do not decide) that losses caused by unlawful disclosure can be reflected in damages awarded for UIG then it may be the case that other consequences of publication are sufficiently causally connected. Whether the claimants are right to say that their post-publication losses, or any of them, are sufficiently caused by the underlying UIG is a matter for trial, not for resolution summarily when dealing with the pleading consequences of the dismissal of the publication claims.

18. I therefore agree with the claimants that there should not be struck out the pleaded allegations that MGN contends should be struck out other than para 26(d) in the Sanderson Particulars of Claim, which the parties agree is the consequence of my judgment, and para 25, which in my judgment relates solely to the claim for wrongful publication of private information. The focus of the underlying UIG claims must be on the nature of the information that was unlawfully gathered and losses thereby caused. In my judgment, the words “(as opposed to the unlawful accessing or obtaining of the Claimant’s Information)” in para 26 should also be struck out, as these serve only to distance the matters pleaded in para 26 from the underlying UIG claims. The equivalent paragraphs in the other sets of Particulars of Claim will also be struck out. The parties have agreed in principle that the same conclusions will apply to the other claims in respect of which MGN issued applications for summary judgment.

Costs

19. The claimants say that they are the successful party and should have all their costs of the applications that I heard. MGN submits that the claimants succeeded on the summary judgment applications but that it succeeded on the strike out application, and that an appropriate order would be that MGN pays the claimants 50% of their costs of the applications, reflecting overall that MGN had 25% success and the claimants 75% success.
20. As emerged from the arguments before me at the hand down of my judgment, MGN’s argument on costs was predicated on my acceptance of its argument about the extent of allegations that should be struck out at this stage. For the reasons explained to me, that would have amounted to a substantial success for MGN in terms of reducing the scope of matters in issue at trial, so much so that I am slightly surprised that MGN was only suggesting that it had enjoyed 25% success overall.
21. I consider that the claimants are, overall, the successful party on these applications but they have clearly not succeeded on all issues and some reduction is appropriate. The matters on which MGN succeeded may or may not turn out to be important, depending on how the issue of causation that I have identified above is decided at trial. There was not very much space or time taken dealing with the alternative strike out basis of the applications. I am not impressed by the rival arguments on poor conduct associated with bringing or arguing the applications. Such arguments are almost routinely invoked in any hearing between these parties. I see no reason to make any adjustment either way

in that regard, save as indicated below. No relevant offers have been brought to my attention.

22. In all the circumstances, I consider that MGN should pay the claimants 85% of their costs of the applications. The claimants should have accepted at the outset that the discrete publication claims were statute-barred and addressed the consequences of that at an earlier stage, instead of contending that the application to strike them out was factually and legally hopeless. This would have brought clarity at an earlier stage on the issue that I have addressed in the first part of this judgment and which was only addressed on the hand down of the principal judgment. That, and the fact that MGN succeeded on its strike out application in any event, in my judgment justifies a reduction of 15%. I will determine with the parties' assistance an appropriate payment on account of those costs. MGN is entitled to its costs of the publication claims in any event (save for its costs of the applications themselves, which I have dealt with by reducing the proportion of the claimants' recoverable costs of the applications). The claimants will pay the costs of and occasioned by the consequential amendment of their Particulars of Claim to reflect the paragraphs that I have determined should be struck out.

Footnote

23. A complete first draft of this judgment was prepared late on 27 May 2022, immediately following the hearing. Its publication has been delayed by the High Court vacation. On 30 May 2022, during the vacation, the claimants' counsel sent to my clerk and Chancery Listing, copied to MGN's counsel, further written submissions referring to a new authority. There was no indication that MGN had agreed to this course being taken and I assume that they had not. Although the further submissions were no doubt intended to assist the court as well as to support the claimants' case, it is not appropriate for argument to be treated as open-ended in this way. Further submissions made after judgment is reserved must be either with the consent of the other party or with permission. I wish to make it clear to MGN that – other than to open the attached document on the afternoon of 6th June to see what it was that the claimants were raising – I did not read the further argument or the authority, or take anything in the further submissions into account in reaching my decision.