



Neutral Citation Number: [2023] EWHC 106 (KB)

Case No. QB-2021-004135

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**MEDIA AND COMMUNICATIONS LIST**

Royal Courts of Justice, Strand, London WC2A 2LL

Date: 26 January 2023

**Before :**

**THE HONOURABLE MR JUSTICE PEPPERALL**

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**Between :**

- (1) NICOLE DAEDONE  
(2) RACHEL CHERWITZ  
(3) ONETASTE INCORPORATED  
(4) THE INSTITUTE OF OM LLC  
(5) OM IP CO.

**Claimants**

**- and -**

**BRITISH BROADCASTING CORPORATION**

**Defendant**

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**Sara Mansoori KC and Zoe McCallum (instructed by Mishcon de Reya) for the Claimants**  
**Catrin Evans KC and Ben Gallop (instructed by BBC Litigation Department) for the Defendant**

Hearing date: 7 July 2022

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**Judgment No. 1**  
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### **Approved Judgment**

This judgment was handed down remotely at 1pm on 26 January 2023 by circulation to the parties and by release to the National Archives.

#### **THE HONOURABLE MR JUSTICE PEPPERALL:**

1. Between 10 November and 16 December 2020, the BBC published an introductory episode and ten full-length episodes of a podcast entitled “The Orgasm Cult.” The series focused on the activities of OneTaste Inc. and its co-founder and former Chief Executive Officer, Nicole Daedone, in promoting and selling classes and programmes dedicated to the art of “Orgasmic Meditation.” By this action, it is alleged that the podcast was defamatory in that it suggested that Ms Daedone, Rachel Cherwitz and OneTaste controlled a destructive sex cult which, under the false pretence of being a wellness organisation promoting empowerment for modern women, deliberately manipulated and exploited vulnerable women causing them lifelong trauma for the purpose of making themselves wealthy. It is alleged that the podcast was defamatory in that it suggested that Ms Daedone, Ms Cherwitz and OneTaste bore responsibility for serious criminal acts including the repeated rape of a vulnerable woman, sex trafficking, and facilitating and benefiting from prostitution and violations of labour law. Further, it is said to be defamatory in asserting that allegations published by Bloomberg in 2018 were true.
2. On 9 November 2021, the claim form was issued in the sole names of the Institute of OM LLC and OM IP Co. Such claim was issued within the one-year limitation period prescribed by s.4A of the Limitation Act 1980 for libel claims.
3. On 4 March 2022, the claimants’ solicitors, Mishcon de Reya, filed an amended claim form adding Ms Daedone and Ms Cherwitz as additional claimants. Further, the amendment added claims under s.12 of the Defamation Act 2013 (that the BBC should be required to publish a summary of the judgment in these proceedings); by Ms Daedone and Ms Cherwitz for alleged breaches of the General Data Protection Regulation 2016/679/EU, the Data Protection, Privacy & Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019 and the Data Protection Act 2018; and by Ms Daedone and Ms Cherwitz for alleged misuse of private information. This amended claim form was not served.
4. On 7 March 2022, Mishcon de Reya filed a re-amended claim form seeking also to add OneTaste as a further claimant and making other modest re-amendments. The re-amended claim form was served under cover of a letter dated 9 March 2022.
5. By an application notice dated 24 March 2022, the BBC seeks an order disallowing the amendments on the grounds that the libel claims now pursued by Ms Daedone, Ms Cherwitz and OneTaste are statute barred. By a cross-application dated 14 April 2022, the claimants seek a direction pursuant to s.32A of the Limitation Act 1980 disapplying the time limit in s.4A.

6. I was provided with open and confidential bundles in respect of this hearing but asked not to read the confidential bundle pending further argument. In the event, it was agreed that there was no need for the court to consider the contents of the confidential bundle and I have not done so.

### **THE LEGAL PRINCIPLES**

7. Section 4A of the Limitation Act 1980 provides that no action in libel shall be brought after the expiration of one year from the date when the cause of action accrued. The harshness of the one-year period is mitigated by s.32A of the Limitation Act 1980 which provides:

“(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

- (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.

(2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A—
  - (i) the date on which any such facts did become known to him, and
  - (ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
- (c) the extent to which, having regard to the delay, relevant evidence is likely—
  - (i) to be unavailable, or
  - (ii) to be less cogent than if the action had been brought within the period mentioned in section 4A ...”

8. New claims in pending actions are dealt with by s.35 of the Limitation Act 1980. The relevant parts of the section provide:

“(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—

- (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
  - (b) in the case of any other new claim, on the same date as the original action.
- (2) In this section a new claim means any claim by way of set-off or counterclaim and any claim involving either—
- (a) the addition or substitution of a new cause of action; or
  - (b) the addition or substitution of a new party ...
- (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim ...
- (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
- (5) The conditions referred to in subsection (4) above are the following—
- (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
  - (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.
- (6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either—
- (a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or
  - (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.”

9. Thus:

- 9.1 The amended and re-amended claim forms in this case pleaded “new claims” of libel within the meaning of s.35 since they added additional claimants: s.35(2)(b), Limitation Act 1980.
- 9.2 Such new claims were deemed to amount to a separate action that was commenced on 9 November 2021: s.35(1)(b).
- 9.3 The original claimants were entitled to amend the claim form at any time before service: r.17.1(1), Civil Procedure Rules 1998.

- 9.4 By r.17.2, the court may, however, disallow an amendment made where permission of the court was not required. Once an application is made under the rule in a case where the amendment is made after the expiry of a relevant limitation period, it is for the claimants to establish their entitlement to bring the new claim, whether pursuant to rules 17.4 or 19.5 or, in the context of a defamation claim, by obtaining a direction pursuant to s.32A disapplying s.4A of the 1980 Act: Qatar Airways Group QCSC v. Middle East News [2020] EWHC 2975 (QB), at [241], Saini J.
- 9.5 There is no suggestion in this case that the new parties were added to correct a mistake in the names of the original claimants. Accordingly, the amendments were not within s.35(6)(a), r.17.4(3) or r.19.5(3).
- 9.6 Equally, there is no suggestion that the new parties were added because the original claim could not be maintained by the existing claimants without the joinder of the new parties. Accordingly, the amendments were not within s.35(6)(b) or r.19.5(3)(b).
- 9.7 The new claims were statute barred at the time of service of the re-amended claim form and should be disallowed unless the court exercises its discretion pursuant to s.32A of the Act: see s.35(3) read together with s.32A.
10. It is therefore common ground that the court should first consider the claimants' application pursuant to s.32A to disapply s.4A of the Act. Should the court exercise its discretion in favour of the claimants then the BBC's application to disallow the amendments falls away. Conversely, if the court does not disapply s.4A, then the claimants concede that the new libel claims must be disallowed.
11. Section 32A is, of course, similar to the discretion given to the court by s.33 of the Act to disapply the three-year limitation period in personal injury claims. There are obvious parallels:
- 11.1 First, the discretion under both sections is largely unfettered. The court must have regard to all the circumstances of the case including the specific matters mentioned in s.32A(2) in a defamation case and s.33(2) in a personal injury case.
- 11.2 Secondly, the principles enunciated by Lord Diplock in the personal injury case of Thompson v. Brown [1981] 1 W.L.R. 744 are of general application: see Steedman v. BBC [2001] EWCA Civ 1534, [2002] E.M.L.R. 17, at [17]-[18]. Thus:
- a) A direction under the section is always highly prejudicial to the defendant.
  - b) The expiry of the limitation period is always in some degree prejudicial to the claimant.
  - c) The extent of the prejudice will depend on the strength or otherwise of the claim and/or defence.
  - d) Even where the claimant has, if the action were not allowed to proceed, a cast-iron case against his solicitor, the claimant will suffer some

prejudice, albeit it may be minor, in instructing new solicitors and suing his former solicitor rather than the true tortfeasor.

- e) In exercising its discretion the court has not only to consider the respective degrees of prejudice, but also the specific circumstances set out in s.32A(2) and all the other circumstances of the case.
  - f) The court must then consider whether it is equitable to allow the action to proceed.
12. There are, however, important differences in the approaches to the two sections. Principally, there is the policy consideration that genuine libel claims must be pursued with vigour: Adelson v. Associated Newspapers Ltd [2007] EWHC 3028 (QB), Eady J. In Bewry v. Reed Elsevier UK Ltd [2015] 1 W.L.R. 2565, Sharp LJ, as she then was, explained at [5]:

“... the purpose of a libel action is vindication of a claimant’s reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications. These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why the disapplication of the limitation period in libel actions is often described as exceptional.”

13. Further, the mere fact of being sued for defamation can amount to a serious interference with freedom of expression and is a factor to be taken into account when assessing the balance of prejudice: Lonzim plc v. Sprague [2009] EWHC 2838 (QB), Tugendhat J, at [33]; Zinda v. Ark Academies (Schools) [2011] EWHC 3394 (QB), Eady J, at [27].

## **THE EVIDENCE**

14. Four witness statements have been filed upon these cross-applications.

### **ELIZABETH GRACE**

15. Elizabeth Grace is the sole witness relied upon by the BBC. She is an in-house solicitor employed by the BBC and helpfully exhibits the key correspondence. She explains that Ms Daedone, Ms Cherwitz and OneTaste were all given advanced notice of the intended publication of the podcast series and a right of reply. On 22 October 2021, the BBC received a detailed letter before action from Mishcon de Reya who then acted for the original claimants (the Institute of OM LLC and OM IP Co). The letter, which together with its annex ran to 17 pages, asserted the OM companies’ claims for libel. It added that the podcast was “seriously defamatory” of OneTaste and asserted that OneTaste had informed the law firm that it had never retaliated against its critics.
16. The BBC responded in detail on 17 December 2021. A threshold point made by the corporation was that the OM companies’ claims would fail for lack of reference; the

essential point being that the business was operated by OneTaste at the time of the events described in the podcast and the original claimants were not actually referred to. Further, the BBC disputed that either of the then claimant companies had suffered serious harm.

17. By letter dated 5 March 2022, Mishcon de Reya first indicated that the firm was also acting for Ms Daedone and Ms Cherwitz in respect of a data protection claim. The letter failed, however, to mention that the claim form had already been amended in order to join them as additional claimants, or indeed that they might also seek to pursue claims in libel and for misuse of private information. The re-amended claim form was then served under cover of Mishcon de Reya's letter of 9 March 2022 adding claims by Ms Daedone, Ms Cherwitz and OneTaste.

**NICOLE DAEDONE**

18. Ms Daedone was the co-founder of OneTaste and its Chief Executive Officer until 3 March 2017. She accepts that she was aware of the planned podcast and that the BBC would make defamatory allegations from pre-publication approaches from 3 September 2020. She listened to the podcast on the various dates when it was first published.

19. She then explains her inaction at the time:

“The primary reason I did not engage in pre-action correspondence and did not commence proceedings until 4 March 2022 was because of the ongoing FBI investigation in the United States into OneTaste. In mid-October 2018, I learned that the FBI was investigating allegations made in a Bloomberg article published in June 2018 ... I also learned of an article published by Bloomberg on 13 November 2018 ... The November Article said the FBI was investigating ‘whether the company pressured workers into sexual encounters to help close a sale.’ It said agents from the New York field office of the FBI ‘have sought out and interviewed multiple people associated with OneTaste.’ I am certain that OneTaste did nothing wrong, but nonetheless I was alarmed.”

20. She assumed that she was also the subject of the FBI investigation and “understood the standard practice when you are under criminal investigation is to stay silent, keep your head down and not engage with the media.” That, she says, is what she did.

21. She then explains that the longer she waited, “the more that these false, negative stories seemed to feed on themselves.” Each story, she asserts, repeated the same falsehoods that customers and employees were pressured to do things against their will. She says that the exact opposite is true, adding:

“The allegations made in the podcast were a direct assault on my life's work, into which I have poured so much of myself and on who I am at the very core of my being.”

22. In December 2021, Ms Daedone says that she was approached by VICE News and asked to comment about a documentary they were making about the same allegations. She says that it became clear to her that the false allegations were not “going away” and that the BBC’s reputation was lending credence to them. She then explains the actions that were taken:

“In December 2021, OneTaste began a vigorous investigation of the allegations that were first made in the BBC podcast. The investigation was delayed at first because the BBC producers allowed nearly every person who made allegations against the company to shield their identity by using a false name. It was also difficult because, until people realized the falsehoods in the BBC podcasts were spurring more false media stories, including the VICE documentary, many people were reluctant to talk about these topics for fear they would get dragged into these false stories.

However, through January and February 2022, I became aware that information such as contemporaneous text messages had been discovered that directly undermined several of the BBC’s most serious allegations, including the allegations of rape made by the woman who was the focus of episode 9 of the podcast. The discovery of this critically important new information in January and February 2022 is the reason I decided to be a part of this litigation.

On 29 January 2022, I instructed Mishcon de Reya to advise me on bringing a libel claim against the Defendant and joining to the action brought by IOM LLC and OM IP Co.

On 4 March 2022, my lawyers, acting on my behalf, amended the claim form which had been issued by the Fourth and Fifth Claimants on 9 November 2021. The amendments added me as a claimant in the libel claim already commenced. It also introduced a claim by me for breaches of data protection law and for misuse of private information.”

**RACHEL CHERWITZ**

23. Ms Cherwitz describes herself as an OM practitioner. She was employed by OneTaste and its subsidiaries between 2010 and 2018. Ms Cherwitz explains that she had engaged a criminal defence attorney in June 2018. She first became aware of the planned podcast when, in early October 2020, a BBC producer tried to arrange to speak to her. On legal advice, she ignored repeated telephone messages and emails from the BBC over the next few weeks. Ms Cherwitz was then afforded a right of reply from 5 November 2020. She again followed her lawyer’s “very strong” advice against engaging with the podcast.
24. Ms Cherwitz listened to the podcast when it was first published. She says that she suffered serious reputational harm in the immediate aftermath of the podcast and that that was clear to her “within a very short time of publication.” She said that she faced a “barrage of painful and humiliating press coverage” and was shunned by a number of friends. On 11 April 2021, she was dismissed from a new job and believes that that was because of media coverage about her.



25. Ms Cherwitz says that she was in a “very difficult place” mentally as a result of the podcast and FBI investigation. She was working hard and her personal and professional life “fell apart.” She then explains:
- “It was only when I learned about a possible VICE documentary in December 2021 that I came to appreciate (a) that the harm caused by the BBC podcast was only increasing over time; and (b) that I would be drawn into proceedings in any event, regardless of whether I was a party or a witness. In those circumstances I finally made the decision to try to do something other than hide from the media. I took the decision early March 2022 that I would join proceedings.”
26. On 14 February 2022, Ms Cherwitz found out about these proceedings. She explains that she then felt “surprised, hopeful and inspired.” She says that until that date she did not realise that it was even possible to bring a defamation claim. She sought specialist legal advice about the possibility of a claim in early March 2022 and joined these proceedings by amendment to the claim form on 4 March.
27. Ms Cherwitz says that, if she is unable to bring her libel claim, she fears that the damage will prove impossible fully to repair. She says that she has passed up six different professional opportunities because she feared that the podcast and associated media coverage would be discovered. Commenting on Ms Grace’s assertion that it was unlikely that the allegations in the October 2021 letter before action were made without reference to her, Ms Cherwitz repeats that she knew nothing of the legal claim before 14 February 2022.

#### ONETASTE

28. Kevin Williams is the General Counsel of OneTaste. It is also apparent from the claim form that he holds the same position for all three corporate claimants. He says that OneTaste did not engage with the podcast because of the ongoing FBI investigation. He says that the company did not want to give “further oxygen” to the investigation by bringing proceedings against the BBC. It was, he asserts, hoped that “the storm would pass.” He also cites the December 2021 approach from VICE News as the moment at which the company’s leadership team “realised that these false allegations were not going away and needed to be dealt with.” It was then decided to undertake a wide-ranging analysis of the BBC’s allegations with a view to demonstrating their falsity. Such investigation took a significant time because of the mass of material and the fact that many of those who featured in the narrative had been anonymised. Mr Williams adds that a number of people were fearful of speaking out in support of OneTaste for fear of being dragged into “the false narratives being peddled.”
29. Mr Williams says that the investigation produced “significant results” and that by February 2022 the company had contemporaneous emails and texts that directly undermined several of the most serious allegations including that of rape in episode 9. He adds that by that time it had also become clear that the BBC’s allegations were causing damage to the value of the company’s trademark.

30. As to prejudice, Mr Williams says that OneTaste considers that the damage caused by the publication of the podcast cannot be remedied unless it is able to join the claim.

## **ARGUMENT**

31. Sara Mansoori KC and Zoe McCallum, who appear for the claimants, accept that the authorities require libel claims to be pursued with vigour but stress that such requirement is frequently linked to observations about the ephemeral nature of most media publications. They cite Sir Anthony May P's observation in Brady v. Norman [2011] EWCA Civ 107, [2011] E.M.L.R. 16, that the reduction in the time limit for defamation claims no doubt had regard to the fact that "libel and slander can often be torts of transient effect." They contend that such reason for demanding that libel claims be pursued with vigour has less weight where, as here, the publication was by podcast which remains available indefinitely. Citing Hodges v. Naish [2021] EWHC 1805 (QB) and Gentoo Group Ltd v. Hanratty [2008] EWHC 627 (QB), Ms Mansoori submits that the court will attach less weight to the swift-vindication principle where the delay has caused no prejudice to the availability of evidence at trial.
32. Further, Ms Mansoori relies on the relatively short length of the delay in this case; the reasons for such delay given in the evidence; the seriousness of the alleged defamation; the extent of its likely publication; the importance of vindication, which she submits can only be achieved through a defamation claim; the fact that the BBC will in any event face the OM claimants' defamation claims and the new data protection and private information claims brought by Ms Daedone and Ms Cherwitz; and the lack of any significant prejudice that would be suffered by the BBC.
33. For the BBC, Catrin Evans KC and Ben Gallop submit that a deliberate, if surprising, decision was initially made to issue this claim in the names of the OM claimants. That it was a choice is evidenced by the fact that Mr Williams acted for all three corporate claimants. Ms Evans observes that neither Ms Daedone nor OneTaste deny Ms Grace's suggestion that the obvious inference is that they were each involved in the letter before action and aware of the steps being taken to pursue the original claim. Further, Ms Evans invites the court to be sceptical of the claimed reasons for the volte face in December 2021 and points to the fact that it was in that month that the BBC identified the potential weakness of the original claim pursued by the OM claimants.

## **DISCUSSION**

### **THE LENGTH OF AND REASONS FOR THE DELAY**

#### *The length of the delay*

34. The re-amended claim form was served 16 months after the publication of the introductory episode and a few days short of 15 months after the publication of the

last two episodes in the series. Each publication gave rise to a separate cause of action. The delay here was therefore 3-4 months. Such delay was not terribly long, but must of course be considered in the context of the 12-month limitation period and the policy requiring defamation claims to be pursued with vigour: Cornwall Gardens PTE Ltd v. RO Garrard & Co. Ltd [2001] EWCA Civ 699, at [56].

35. In Steedman, David Steel J observed, at [22], that the court's approach to delay had undergone a sea change following the then recent introduction of the Woolf reforms and that delay itself, whether or not it is prejudicial to the defendant, is now rightly treated as prejudicial to the administration of justice. There has of course been a further substantial shift in attitudes towards delay following the 2013 Jackson reforms and the redrafting of rule 3.9 of the Civil Procedure Rules 1998. That said, the Act requires the court to consider the balance of prejudice as between the parties.

*The reasons for the delay*

36. In my judgment, no cogent reasons have been advanced for OneTaste's delay in bringing its claim:
- 36.1 OneTaste was aware of the planned podcast from pre-publication approaches. Further, its executives listened to the episodes of the podcast as they were aired.
- 36.2 OneTaste is plainly associated with the original claimants. As already noted, Mr Williams is the General Counsel for all three corporate claimants. I infer that OneTaste knew of the claim when it was issued in November 2021 but then made a conscious decision not to join the proceedings. Indeed, Mishcon de Reya had plainly engaged with OneTaste in October 2021 in order to be able to state the company's then policy of not retaliating against its critics.
- 36.3 Once the Institute of OM LLC and OM IP Co. brought libel proceedings, it makes no sense for OneTaste to assert that its own restraint in electing not to join such proceedings was in order not to give "further oxygen" to the FBI investigation. Inevitably such oxygen would be provided by the claim with or without OneTaste's involvement. In any event, nothing appears to have changed in respect of the FBI investigation.
- 36.4 It is claimed that the board had a change of heart when OneTaste realised in December 2021 that the "storm" would not pass and that the allegations "needed to be dealt with." Again, this is curious since the allegations were being addressed by the OM claim. Of course, something else had happened by December 2021 in that the BBC had made the point that the claim as originally constituted was flawed for want of reference to the OM claimants or evidence of substantial harm to such companies. I infer, in the absence of any other sensible explanation for the change of position, that concern that the claim might have been issued in the name of the wrong claimants was at least a factor.
- 36.5 Further, there is no evidence as to what became of the VICE News investigation.
- 36.6 It is then said that there was a need to investigate the merits of the claim during January and February 2022. Mr Williams does not explain why, as General

Counsel, he was satisfied without such further investigation that it was both possible and appropriate for the OM claimants to write a detailed letter before action and then issue proceedings in November 2021 but a different view was taken as to OneTaste which was more obviously the subject of the podcast. Accordingly, there is no sensible explanation for the further delay to 7 March.

37. Further, I find that there were no cogent reasons for Ms Daedone’s delay in issuing her libel claim:

37.1 Ms Daedone was aware of the podcast weeks before its publication and listened as each episode of the podcast was aired.

37.2 It is clear from the evidence that Ms Daedone still has connections with OneTaste. She has not, however, been clear as to the nature of her continuing connection with the company or its key executives. Furthermore, unlike Ms Cherwitz, Ms Daedone’s witness statement is conspicuously silent as to her knowledge of this claim.

37.3 I infer that Ms Daedone was aware of the issue of this claim in November 2021 and made a conscious decision not then to engage.

37.4 Ms Daedone does not explain what changed in respect of the FBI investigation.

37.5 I am sceptical of her claim that she had a change of heart after being contacted in December 2021 by VICE News. Again, I observe that it was in December 2021 that the BBC pointed out that the original claim might be flawed. Further, there is no evidence that anything came of the VICE News investigation.

37.6 In any event, there are no sensible reasons for the further delay to March. Specifically, I do not accept that there was then any need for further investigation since, on her case, Ms Daedone clearly knew that the podcast was defamatory from the outset.

38. The lack of cogent reasons for delay is an important finding. Drawing on Steedman, Sharp LJ, as she then was, said in Bewry v. Reed Elsevier UK Ltd [2014] EWCA Civ 1411, [2015] 1 W.L.R. 2565, at [8]:

“The onus is on the claimant to make out a case for disapplication: per Hale LJ in Steedman at [33]. Unexplained or inadequately explained delay deprives the court of the material it needs to determine the reasons for the delay and to arrive at a conclusion that is fair to both sides in the litigation. A claimant who does not ‘get on with it’ and provides vague and unsatisfactory evidence to explain his or her delay, or ‘place[s] as little information before the court when inviting a s.32A discretion to be exercised in their favour . . . should not be surprised if the court is unwilling to find that it is equitable to grant them their request’, per Brooke LJ in Steedman, at [45].”

39. Further, I consider that it is significant in this case that Ms Daedone and OneTaste essentially took a stand in deliberately deciding not to join these proceedings from the outset. In the imperfectly reported case of Hunter v. Rxworks.com Ltd [2005]

All E.R. (D) 162 (Jun), it appears that Mann J refused to extend time where a party initially took a considered decision not to sue: see also Limitation Periods (9<sup>th</sup> Ed.), at para. 8.116.

40. I find that the reason for Ms Cherwitz’s delay in bringing her claim was her initial reliance on the advice of her American criminal lawyer:
- 40.1 Ms Cherwitz was also aware of the podcast before its publication and listened as the podcast was aired.
- 40.2 I accept that Ms Cherwitz took and relied upon legal advice from her American criminal attorney not to “engage” with the podcast. Such advice might well have been sound from a criminal perspective, but it is unfortunate that the lawyer did not make plain the limitation of her expertise and recommend that Ms Cherwitz should take advice from specialist lawyers both in the United States and the United Kingdom as to the possibility of a defamation claim.
- 40.3 I accept that it was only on 14 February 2022 that Ms Cherwitz learnt of this action and discovered that a defamation claim was even possible.
41. Ms Cherwitz’s ignorance of the limitation period, or indeed that one can bring a defamation claim at all, is not a significant factor. In Bewry, Sharp LJ observed, at [36], that ignorance of the limitation period could only be relevant in “the most marginal type of case.”

*The need for swift vindication*

42. The rationale for the original shortening of the six-year limitation period in libel cases to three years by the Administration of Justice Act 1985 was later explained by Neill LJ, as he then was, in a report issued by a working group under his chairmanship:
- “This was no doubt based on the general recognition that claims to protect one’s reputation ought to be pursued with vigour, especially in view of the ephemeral nature of most media publications.”
43. Neill LJ concluded that the same reasoning justified an even shorter period of one year. He observed that memories fade, journalists and their sources scatter and become, not infrequently, untraceable while notes and other records are retained only for a short period. Such recommendation was accepted and s.4A was amended with effect from 3 September 1996 to reduce further the limitation period for libel claims to one year. As already noted above, the same point about the ephemeral nature of most media publications (Bewry) or the often transient effect of the tort (Brady) has been repeatedly made by the Court of Appeal.
44. I do not, however, accept the submission that the court might in general accept a less vigorous pursuit of a claim arising from a podcast simply because of the enduring nature of the publication. Of course these days a newspaper story is no longer just tomorrow’s fish and chip paper but often remains available online indefinitely after first publication. What, however, remains ephemeral in an electronic age is the

immediate burst of publicity whether on publication of a newspaper or book, posting a story online, broadcast of a programme or publication of a podcast. While publications may remain available online, they tend to get swamped by newer content over time. Indeed, an entire industry is built around search engine optimisation as businesses compete to ensure that their latest content achieves a prominent position in any online search.

45. In any event, Ms Mansoori is not aware of any authority countenancing the less vigorous pursuit of claims in respect of podcasts. I accept that the nature of the publication is part of the circumstances of the case and can be properly taken into account under s.32A(2), but I do not accept that in general the court should accept a less vigorous pursuit of claims in respect of podcasts.
46. Further, I do not accept the submission that the court should or does attach less weight to the swift-vindication principle in a case where the defendant will not suffer significant prejudice. The proper analysis is not that less weight should be given to the delay but rather that the lack of significant prejudice to the defendant will mean that there is less to be put in the scales against the exercise of the discretion.

#### DELAYED KNOWLEDGE

47. The claimants concede that this is not a case where they were not aware of the facts relevant to their claim at the time of publication.

#### EFFECT ON AVAILABILITY & COGENCY OF THE EVIDENCE

48. Equally, the BBC accepts that the delay has not adversely affected the availability or cogency of the relevant evidence in this case.
49. As to this factor, David Steel J observed in Steedman, at [23]:

“... whilst the effect of any delay on the ability of the defendant to defend a defamation action remains important in the assessment of the justice of the matter, it is not to be regarded as in any way decisive (save perhaps where the defence can fairly be described as a windfall ...)”

50. To similar effect, Eady J observed in Gentoo Group Ltd v. Hanratty [2008] EWHC 627 (QB), at [12], that the defendant’s ability to defend the claim is simply one factor to be considered and should not be regarded as a “trump card” for the claimant.

#### ALL THE CIRCUMSTANCES OF THE CASE

##### *The relevance of other claims*

51. In Maccaba v. Lichtenstein [2003] EWHC 1325 (QB), Gray J allowed two additional claims in slander to proceed where the defendant was in any event facing seven other in-time claims for slander and a claim for harassment. He observed, at [19]-[20]:

- “19. In my judgment it is an important and unusual feature of this case that the prejudice which would be occasioned to this defendant by disapplying the limitation period is greatly reduced for two reasons. The first is that the action will proceed against the defendant, even if the application under s.32A is refused. The degree of prejudice to the defendant by reason of his having to face nine claims in slander instead of seven is limited, especially when one bears in mind that the sting of all the alleged slanders is very much the same and the defence to each of the slanders is likewise similar.
20. The second and more cogent reason why the prejudice to the defendant is lessened in the present case is that even if the two claims in slander were to be dismissed on the ground that they are statute-barred, the defendant would still face claims in harassment founded on the self-same facts. I am not saying that there will be no prejudice to the defendant if the limitation period is disapplied, but I do think that the prejudice would in the unusual circumstances of this case and for the reasons I have given be slight.”
52. Mr Lichtenstein was, however, facing a defamation claim in any event from Mr Maccaba. Instead of facing seven allegations of slander, he was now to face nine. All of the alleged slanders were to a similar effect in respect of Mr Maccaba’s alleged promiscuity.
53. Similarly in Hodges v. Naish [2021] EWHC 1805 (QB), His Honour Judge Richard Parkes QC allowed an additional publication to proceed in a slander case where Mr Naish already faced similar allegations of slander in respect of publications to two other people. All of the alleged slanders were to a similar effect in alleging that Mr Hodges used his position as a dance teacher to groom young girls.
54. Here, I take into account the fact that the proceedings will continue in any event:
- 54.1 First, the libel claims brought by the original claimants were in time and the BBC must meet such case. That said, the issues of reference and serious harm arise in the OM claims in a way in which they would not in claims pursued by Ms Daedone, Ms Cherwitz and OneTaste.
- 54.2 Secondly, the BBC accepts that the new claimants can pursue their data protection and private information claims in any event. While these claims raise different issues, they nevertheless concern the same factual allegations.
- 54.3 There is, however, a difference between this case and cases such as Maccaba and Hodges where the claimant who seeks to pursue the out-of-time claim has him or herself already pleaded in-time allegations of defamation arising from very similar publications.

*The seriousness of the case*

55. While the court cannot determine the merits of a claim at a trial of the preliminary issue of limitation, it is sometimes possible to form a view as to its strength. In such

cases, it may be that the claimant will not suffer significant prejudice in not being able to pursue an out-of-time claim that appears to be weak: Steedman, at [26]-[27]; Zinda v. Ark Academies (Schools) [2011] EWHC 3394 (QB), Eady J; Qatar Airways Group QCSC v. Middle East News [2021] EWHC 2178 (QB), Saini J.

56. Here, I am not invited to, and cannot properly make any assessment as to the strength of the libel claim upon the materials before me. Indeed, I should have rejected any such invitation for the sound reasons given by Gray J in Maccaba, at [12]. I do, however, accept that the allegations made in the podcast were very serious and, while there are no audience figures before me, I infer in the claimants' favour that publication was very extensive. Such matters should properly be taken into account in assessing the balance of prejudice in this case.
57. While the seriousness of the case weighs in the claimants' favour, it is of course all the more reason why the court could properly expect the claim to have been pursued with vigour.

*The importance of vindication*

58. The importance of vindication is also a relevant factor in the claimants' favour: Steedman, at [27] & [34]; Hodges, at [111]. That said, if the claimants are right that the original claim can and will continue to trial in any event at which Ms Daedone and Ms Cherwitz will give evidence, then – should this prove to be a good claim - vindication can be obtained through the existing claim.

**CONCLUSIONS**

59. This is not a case where the delay has affected the availability or cogency of the evidence. Nevertheless, any decision to disapply the limitation period is always highly prejudicial to the defendant. While the delay in this case was not very long, it is not adequately explained by either Ms Daedone or OneTaste. Further, it is highly material that both were fully aware of the facts required to bring their claims from the date of first publication and that they were aware of the claim issued in November 2021 but then made deliberate decisions not to join the proceedings. Accordingly, and notwithstanding the fact that other claims may in any event proceed, the seriousness of the allegations in this case, the extent of publication and the claimants' desire for vindication, I conclude, after balancing the prejudice caused by the operation of s.4A and the prejudice that any decision under s.32A would cause to the BBC, that it would not now be equitable to allow the claims brought by Ms Daedone and OneTaste to proceed.
60. I take, however, a different view in respect of Ms Cherwitz's claim. I accept the explanation for her own delay and while her ignorance of the law is of little weight, she – unlike her fellow applicants – was not aware of the original claim and did not make a deliberate decision in November 2021 not to join in proceedings. In my judgment, the balance of prejudice favours allowing Ms Cherwitz's claim to proceed.



## **OUTCOME**

61. I therefore direct that s.4A shall not apply to the claim brought by Ms Cherwitz and dismiss the BBC's own application to disallow the amendment of the claim form to plead her claim for libel. I dismiss the applications by Ms Daedone and OneTaste for a like direction under s.32A and allow the BBC's own application to disallow the amendments to plead their claims for libel.