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Case No: CA-2022-002241

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST
THE HONOURABLE MR JUSTICE NICKLIN
[2022] EWHC 2718 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2023

Before :

LORD JUSTICE DINGEMANS
LORD JUSTICE BIRSS
and
LORD JUSTICE WARBY

Between :

(1) Dyson Technology Limited	<u>Appellants/</u>
(2) Dyson Limited	<u>Claimants</u>
- and -	
(1) Channel Four Television Corporation	<u>Respondents/</u>
(2) Independent Television News Limited	<u>Defendants</u>

Hugh Tomlinson KC and Ian Helme (instructed by **Schillings International LLP**) for the **Appellants**

Adam Wolanski KC and Gervase de Wilde (instructed by **Simons Muirhead Burton LLP**) for the **Respondents**

Hearing date: 27 June 2023

Approved Judgment

This judgment was handed down remotely at 2 o'clock on 25 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Dingemans and Lord Justice Warby:

Introduction

1. This appeal raises an issue about the identification of the person who is the subject of an alleged libel or slander, and what legal tests the court should apply to decide whether an alleged libel or slander has referred to a person, so that they have the right to sue. The issue is described in the textbooks as being one of “identification” or “reference” to the claimant, see Gately on Libel and Slander, Thirteenth Edition, at Chapter 8 and Duncan and Neill on Defamation, Fifth Edition, at Chapter 7.
2. The appeal is from the judgment of Mr Justice Nicklin (“the judge”) dated 31 October 2022. The judge decided as a preliminary issue that the appellants were not entitled to sue unless they could plead a case that there were extrinsic facts linking them to the allegations in a broadcast which were known to viewers. The formal order against which the appeal is brought is that “based solely on intrinsic evidence in the broadcast, the broadcast does not refer to the second and third claimants”. The judge also struck out paragraph 7A of the Re-Amended Particulars of Claim. The appeal is brought with the permission of Lord Justice Warby.

The broadcast

3. Sir James Dyson, who is not party to this appeal, and the appellants Dyson Technology Limited and Dyson Limited, two British Dyson companies, sued Channel Four Television Corporation (“Channel Four”) and Independent Television News Limited (“ITN”) for libel arising from a report broadcast on *Channel Four News* on 10 February 2022 (“the broadcast”).
4. The broadcast concerned what were said to be claims of appalling abuse and exploitation in the factories in Malaysia run by a company called ATA, where Dyson’s cordless vacuums and other appliances were made, and the way in which Dyson had dealt with the matter.
5. The broadcast referred to “Dyson, genius at cleaning carpets” and asked “has this iconic British brand lost credibility?”. It recorded that “we speak to ex-employees of ATA, who suffered abuse, inhuman work conditions, and in one case, even torture, while they were helping to make Dyson products on wages of £9 per day ...” and asked “how could work conditions have got so bad, and why wasn’t it picked up?”. The broadcast stated “it is one of Britain’s most iconic companies but tonight Dyson is facing claims of appalling abuse and exploitation in the factories in Malaysia where its cordless vacuums and other appliances are made”, and referred to Dyson being “a flagship company in Britain”.
6. There was footage showing a Dyson demonstration store, with the name Dyson showing on the outside of the shop with Sir James Dyson, the founder of the Dyson group, saying “we are in a Dyson demo store where you can try out our technology”. There was a short interview with Oliver Holland, a partner at Leigh Day solicitors, saying “Dyson depicts itself as a very responsible company and ethical, so they should have known what was happening”. It also featured an interview with Michelle Shi, described as “Global Manufacturing and Procurement Director at Dyson in Singapore”.

7. A transcript of the full broadcast is annexed to the judgment below, so we have not set it out in this judgment.

The High Court proceedings

8. The Particulars of Claim began by giving brief details of the three claimants as follows:

“1. The First Claimant is the founder and Chairman of Dyson, the multinational technology enterprise established in 1991 (“Dyson”). His name is synonymous with the Dyson brand and group of companies.

2. The Second Claimant is the UK-based company within the Dyson group that holds Dyson’s intellectual property, technology and brand rights. The Second Claimant employs a number of Dyson’s executive team and retains advisors to protect the reputation of Dyson. The Third Claimant is Dyson’s UK trading company.”

9. A request for further information was made about the case that the broadcast referred to Dyson Technology Limited and Dyson Limited.

10. This was answered by saying “The information requested is not reasonably necessary to enable the Defendants to prepare their own case or to understand that case they have to meet. The Claimants’ pleaded case is clear and the Defendants are not entitled [to] any further information. The Claimants do not plead a reference innuendo. The Claimants rely upon the content of the words complained of which it will be contended would be understood by an ordinary reasonable viewer of the Broadcast to refer to the Second and Third Claimants as prominent Dyson companies.”

11. It was pleaded that the natural and ordinary meaning of the Broadcast was:

“(1) the Claimants were complicit in the systemic abuse and exploitation of workers at ATA, one of their suppliers located in Malaysia;

(2) the Claimants were also complicit in the persecution and torture of a worker who blew the whistle on the working practices at ATA; and

(3) the Claimants claim to act in a responsible and ethical way but when serious abuses of workers were brought to their attention these abuses were not properly investigated but were ignored and tolerated for a prolonged period of time while the Claimants tried to cover them up and shut down public criticism.”

12. The parties agreed that there should be a trial of two preliminary issues: the natural and ordinary meaning of the broadcast; and whether that meaning was defamatory at common law. The parties jointly applied to the court for an order to that effect.

13. Exchanges between the court and the parties about the scope of these issues led the judge to conclude and to direct, by an order dated 13 June 2022, that four preliminary issues should be tried. These were the two issues set out in paragraph 12 above and two further issues, namely: “whether the publication complained of ... in its natural and ordinary meaning referred to the Second and Third Claimants”; and whether the publication complained of was or included statements of fact or opinion.
14. In the order dated 13 June 2022 permission to amend the Particulars of Claim by consent was given. The amendment was as follows:

“7A. The Claimants’ primary case is that reasonable viewers would understand the Broadcast to refer to each of the Claimants without special knowledge of extrinsic facts.

7B. In relation to the Second and Third Claimants, if and insofar as necessary, in the alternative, the Broadcast was understood by a substantial number of viewers of the Broadcast to refer to them.

Particulars of Reference

7B.1 The Second and Third Claimants are the most prominent UK companies within the Dyson group. They are the only companies within the Dyson group that interact with UK consumers.

7B.2 The Second Claimant employs a number of Dyson’s executive team and retains advisors to protect the reputation of Dyson.

7B.3 The Third Claimant is Dyson’s trading company and makes sales of Dyson products to businesses and consumers in England & Wales.

7B.4 On the official Dyson website, the Third Claimant is identified as the company that users of the website make purchases from in the United Kingdom and the Second Claimant is identified as the company that, together with the Third Claimant, operates the Dyson website, apps and connected products.

7B.5 The above facts and matters were known to substantial numbers of viewers of the Broadcast.”

15. In accordance with standard practice the judge also directed the defendant to serve a statement of its case on the preliminary issues, without pleading a full defence. It might be noted that service of a defence would remove the option of an offer of amends under section 2 of the Defamation Act 1996.
16. In that statement Channel Four and ITN denied that the Broadcast referred to Dyson Technology Limited and Dyson Limited. They were not named and there was no

information in the Broadcast that would lead a reasonable viewer to understand the Broadcast to refer to either of them. Channel Four and ITN added:

“In the event that viewers turned their mind to the question of which corporate entity was being referred to (which is not admitted), given the repeated references to Dyson’s activities in South East Asia and the use of a Singapore-based Michelle Shi as corporate spokesperson, they would understand that entity to be Singapore based entity. Neither the Second nor the Third Claimant is based in Singapore.”

17. As to the meaning of the broadcast, if it did refer to the corporate claimants, Channel Four and ITN maintained that it contained an expression of opinion to the effect that the claimants were “responsible for” the abuse and exploitation of workers at ATA, and for the persecution by ATA of a worker who blew the whistle on working practices at ATA, and that they had therefore not lived up to their advertised standards of ethics and corporate social responsibility. Alternatively, if the broadcast contained a statement of fact then this was to the effect that “there were reasonable grounds to suspect that” the above was the case.

The judgment

18. The hearing of the preliminary issues before the judge took place on 6 October 2022 and the judge gave a written judgment on 31 October 2022. At the trial of preliminary issues it was common ground that the relevant broadcast referred to Sir James Dyson, but the judge held that it conveyed no defamatory meaning about him. Sir James Dyson’s personal claim was dismissed. Permission to appeal was refused and that claim is not an issue before this Court.
19. In his judgment the judge introduced the parties and turned to the broadcast. The judge set out the opening words of the broadcast to set out the topic and broad nature of the report. In the first and second lines of the middle paragraph of that extract was the question “has this iconic British brand lost credibility”. This was the only reference to those parts of the broadcast which had referred to Dyson being a company in Britain.
20. The judge set out the claim and its procedural history referring to the draft amended Particulars of Claim. The judge recorded that the original Particulars of Claim did not contain any particulars of reference and stated that it was an essential ingredient of a claim for defamation that the publication must refer to the claimant. He continued:

“7. In some cases, the claimant will rely solely on the intrinsic evidence contained in the publication to establish reference. Alternatively, a claimant can identify, and rely upon, extrinsic evidence of facts and matters known to some or all readers/viewers of the publication which, a claimant contends, would lead them reasonably to identify the claimant as the person the subject of the allegedly defamatory allegation(s). This is conventionally referred to as a ‘reference innuendo’.”

21. The judge then related the way in which the preliminary issue had arisen and then summarised the Particulars of Claim and the defendants' case.
22. The judge set out the legal principles in paragraphs 17 to 36 of the judgment. In paragraph 21 the judge stated "the identifying material may be contained in the words complained of themselves (intrinsic identification) or may be established by proof of specific facts that would cause the reader (with knowledge of those facts) to understand the words to refer to the claimant (extrinsic identification or 'reference innuendo)". The judge also referred to a "potential intermediate category" in paragraph 23, which included class libels, where the publication identified the target but did not name the claimant. In the course of his review the judge referred to a number of authorities including *Knupffer v London Express* [1944] AC 116 ("*Knupffer*"); *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 ("*Morgan v Odhams Press*") and an Australian case *Palace Films Party Limited v Fairfax Media Publications Limited* [2012] NSWSC 1136 ("*Palace Films*"). In paragraph 28 of his judgment the judge identified that *Knupffer* was a reference innuendo case and stated "where the publication complained of clearly identifies – but does not name – the target of the defamatory allegation (whether by description of activity ... photograph or birth name) it is an intrinsic reference case."
23. The judge then summarised the respective submissions of the parties from paragraphs 37 to 48 before setting out his decision from paragraph 49. The judge stated that "the decision on reference is likely to be highly fact specific and, apart from the most straightforward cases, is likely to require at least some consideration of the factual position". The judge stated that the touchstone of reference was whether the person or company would be identified as the subject of the allegations, namely the target.
24. The judge summarised in paragraph 52 the key messages that the hypothetical ordinary viewer would understand the broadcast to convey. These were that: the allegations centre on ATA, a Malaysian company that manufactures Dyson-brand vacuum cleaners and filters; Dyson is an internationally recognised brand, trading globally, but the experience of the ATA workforce stands in contrast to the image that Dyson likes to promote; "the key target is the Dyson company that has the agreement with, and therefore oversight of, ATA"; potentially there was a further Dyson company targeted in the broadcast, which was that company which carried out Dyson's PR operation; the interview with Ms Shi, and the repeated use of the word "we" showed that Ms Shi was speaking on behalf of whichever company had the commercial relationship with ATA.
25. In paragraph 53 the judge held that the allegations in the broadcast were not and would not reasonably be understood to be directed at the entire Dyson group. The judge held that the ordinary viewer would identify two candidates as the subject of the broadcast so far as concerns Dyson: the corporate entity that was trading with ATA and whichever company was responsible for the PR operation. The judge held that depending on the ultimate factual situation one Dyson company could have a claim based on some form of the first two pleaded meanings and a further company could have a claim based on the third. The judge recorded that if the second and third claimants were not the companies that are the subject of the allegations in the broadcast, then they would fail to establish reference and would have no claim. The judge noted that he was not in a position to resolve factual matters at that time. The judge held that on the first issue which he had to decide "whether, without

consideration of extrinsic evidence, the broadcast refers to the second and third claimants”, it did not. On that basis, he held, the rest of the preliminary issues fell away and did not call for decision.

26. In paragraph 57 of the judgment the judge considered that the case had demonstrated that caution should be exercised before the court directed reference to be heard as a preliminary issue.

The grounds of appeal

27. Dyson Technology Limited and Dyson Limited rely on two grounds of appeal. These are: (1) the judge applied the wrong test to the question of whether the words complained of referred to the Second and Third Claimants. The judge had proceeded on the basis that the case fell into a previously unrecognised “intermediate category” of cases which depended on whether these were the “target” of the allegations; and (2) in any event, the judge was wrong as to who were the subjects of the broadcast. The judge’s conclusion resulted from an over-elaborate analysis of the broadcast and was also inconsistent with what the broadcast itself said.
28. Mr Tomlinson KC, on behalf of Dyson Technology Limited and Dyson Limited, submitted that the judge wrongly considered that the test for establishing reference set out in *Knupffer* and approved in subsequent cases applied only to cases of reference innuendo, which the judge had referred to as “extrinsic reference”. It was submitted that it was a test of general application and that the judge should have addressed the question of whether the words were such as reasonably in the circumstances would lead persons acquainted with the claimants to believe they were the companies which were the subject of the broadcast.
29. Mr Tomlinson submitted that the judge performed an analysis of the Broadcast which was at odds with how it would have been understood by a reasonable viewer, watching it once. His analysis was over-elaborate, legalistic and technical.
30. Mr Wolanski KC on behalf of Channel Four and ITN agreed that the test is as stated in *Knupffer* but contended that the judge applied that test, and did not err in law. A three-part test applies which looks at the meaning of the words, the hypothetical reader’s acquaintance with the claimant, and circumstances such as the nature of the claimant and the accusation. Where a claimant is an unnamed company in a corporate group, the principles applicable to class libels are highly relevant and it would be rare for such claimants to succeed on intrinsic reference. It was submitted that acquaintance with the claimant is relevant both in intrinsic and extrinsic reference cases, and the judge did not deny this. However, courts should be alive to the risk that claimants such as those here might unfairly succeed on intrinsic reference by assertion, instead of pleading and proving the same facts as part of extrinsic reference.
31. As to the second ground of appeal Mr Wolanski submitted that the conclusions of the judge on the likely subjects of the broadcast were findings of fact that cannot lightly be set aside. They were in any event sound conclusions.
32. We are very grateful to Mr Tomlinson and Mr Helme and Mr Wolanski and Mr de Wilde, and their respective legal teams, for their helpful submissions.

Relevant principles of law

33. The purpose of the law of defamation is to enable a person to obtain a remedy if their reputation has been unjustifiably diminished by a statement published to one or more other people. It requires the proper interpretation of the relevant statement. It is well known that the law treats a given statement as having a single meaning, to be identified by a standard of the hypothetical reasonable reader or viewer. No person should be able to complain of a statement as a libel or slander if a reasonable reader or viewer would not understand the statement to bear any defamatory meaning. It is for similar reasons that a claim should not succeed if a reasonable reader or viewer would not understand the statement to bear any defamatory meaning about the claimant. A cause of action requires the broadcast to be “of and concerning” the claimant, see *Hulton v Jones* [1910] AC 20 at 23. If a claim could be maintained without satisfying these conditions, it would be an unacceptable interference with free speech. If the reasonable reader or viewer would understand the statement in a defamatory meaning and would take it to be about the claimant, an action should lie. These are common law threshold requirements for bringing a claim. We are not, in this appeal, concerned with the additional statutory requirement imposed by section 1 of the Defamation Act 2013 because that formed no part of the preliminary issue.
34. In general terms a claimant may be proved to be the person identified or referred to in a statement in two main ways. The first way is if the claimant is named or identified in the statement or where the words used are such as would reasonably lead persons acquainted with the claimant to believe that he was the person referred to, using the test derived from *Knupffer* and other authorities (the judge called this an “intrinsic reference”).
35. The second way is where a claimant is identified or referred to by particular facts known to individuals. This has been called in the textbooks “reference innuendo” (and which the judge called “extrinsic reference”). It is common ground that those particular facts need to be pleaded in the Particulars of Claim and the issue of identification or reference decided on the facts found to be proved. This second way of identification or reference was not the subject of the preliminary issue ordered by the judge in this case, because it might have led to the calling of evidence. The case of Dyson Technology Limited and Dyson Limited on this way of identification or reference is covered by paragraph 7B of the amended Particulars of Claim set out in paragraph 14 above.
36. Consistently with the approach taken to the preliminary issue, we are concerned only with the first way of showing identification of or reference to the claimant. In that respect for the purposes of identifying the natural and ordinary meaning of a statement the standard of reasonableness is given effect by interpreting it through the eyes and ears of a hypothetical reasonable reader or viewer. The qualities of this person are well-established. They were set out by Lord Kerr in *Stocker v Stocker* [2019] UKSC 17; [2020] AC 593 at paragraphs 35 to 38 and by Nicklin J in *Koutsogiannis v Random House Group Limited* [2019] EHC 48 (QB); [2020] 4 WLR 25 at paragraphs 11 and 12. It is also established that any court interfering with findings made by a judge on meaning, and we would say identification or reference to the claimants, should exercise “disciplined restraint”, and an appellate Court should not interfere just because it would prefer a different meaning or conclusion to that

made by a judge within the reasonably available range, compare *Stocker v Stocker* at paragraph 59.

37. As the judge rightly said, the same standards apply when deciding whether the statement complained of is made “of and concerning” the claimant or, put another way, whether it refers to, or identifies, or is about the claimant. The court must place itself in the position of the hypothetical reasonable reader or viewer. In the present context, however, the authorities make clear that the court’s approach to the issue of identification or reference is different in one respect, which is critical to the outcome of the present appeal. In deciding the natural and ordinary meaning of a statement the court looks only at the statement itself and no other evidence is admissible. For the purpose, however, of determining identification or reference in the second way the hypothetical reasonable viewer or reader is taken to be “acquainted with” the claimant (underlining added). In other words, the court imputes to the hypothetical viewer some degree of knowledge about the claimant which need not be found within the statement of which complaint is made.
38. Cases of reference innuendo apart, the test has been set out and applied in numerous authorities, including the decision of the House of Lords in *Knupffer* where it was said “where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to” (underlining added). That is the test adopted by Abbott CJ in his directions to the jury in *Bourke v Warren* (1826) 2 Car & P 307, 309-310, approved in *Hulton v Jones*, adopted in the often-cited decision of Isaac J in *David Syme v Canavan* (1918) 25 CLR 234, 238, and set out once again in the most recent House of Lords decision on the point, *Morgan v Odhams Press*, at pages 1242E and 1253G.
39. In *Morgan v Odhams Press* the Court of Appeal had suggested that for there to be identification of or reference to the claimant, there needed to be a “key or pointer” in the text. This test ignored both the part of the test of “persons acquainted” with the claimant, and the second way in which persons might be identified, namely reference innuendo.
40. The case of *Palace Films* featured significantly in the judgment below. It is clear that the case was rightly decided because the reasonable reader, acquainted with the claimant company, would not have considered that the words complained of were about that company. The reader would have known that the company did not trade and therefore could not be responsible for the film distribution activity that had allegedly been carried on in an improper way. There was a dispute in the submissions before us about whether the judge in *Palace Films* had intended to say that identification or reference could only be satisfied if a full corporate name was used. If that were what was being said in the judgment in *Palace Films*, any such approach would be inconsistent with the test set out in *Knupffer* which applies in this jurisdiction.
41. It follows from the above that by its very nature the legal test for identification or reference involves a departure from the pure approach to identifying the “natural and ordinary” meaning of the words themselves. The test for reference does not depend exclusively on the content and intrinsic qualities of the statement complained of. To describe the process as one of assessing whether a statement refers to a person in its

“natural and ordinary meaning” or as involving “intrinsic” reference is therefore apt to mislead or confuse. The bright line which the judge introduced between “intrinsic” and “extrinsic” reference is not to be found in previous authorities in this jurisdiction, in part because what the judge called “intrinsic” reference includes the reader or viewer who is acquainted with the claimant, and that acquaintance is very likely to include some facts extrinsic to the statement. In *Knupffer* Lord Atkin considered that the judgments in the Court of Appeal had over-elaborated the law of libel applicable to the law of identification or reference, see page 121, and although we understand why the judge was attempting to modernise the terminology in this area of the law, we consider that the labels “intrinsic” and “extrinsic” are unhelpful because they cut across the well-established test for identification of or reference to the claimant by a person acquainted with the claimant.

42. A determination of whether, in the absence of a reference innuendo, the requirement of identification of or reference to the claimant has been met is both objective and abstract. The court is not engaged in an investigation of what actual viewers subjectively knew about the claimant or who they took the statement to be about. In some cases, the requirement of identification or reference will be plainly and obviously met without any need for a hypothetical reasonable person acquainted with the claimant. This may be because the statement uses a full name which identifies the claimant and only the claimant. This case provides an illustration of this point. The first claimant was Sir James Dyson. His identification as a subject of the broadcast was conceded.
43. Names are not however the only unique identifiers that may put the matter beyond sensible doubt. A person may be uniquely identified by reference to an office or role they hold. The example often used is the Prime Minister. Other obvious examples of unique identifiers are the Archbishop, the headteacher of a named school, or the man who serves in the shop on the corner of A road and B street. There may be other ways, such as by way of photographs, in which a statement can designate its subject unequivocally. Equally, a name is not invariably a unique identifier of an individual or an organisation. Even if a full name is used, some are very common indeed, for example David Smith in the UK. Other names are common to several, or tens or hundreds of individuals. A statement may use only a first name, or only a family name, or a name that is common to more than one company. This case provides an illustration of the last category. There is, as Lord Justice Birss put it in the course of argument, a spectrum of possible factual situations. In cases of this kind it may not be obvious whether the test of identification or reference is satisfied. The court may have to resolve the question. As is common ground before us, the right way to do that is to consider the nature and content of the statement complained of and the attributes of the claimant which would be known to the hypothetical acquaintance. If the Claimant has also pleaded a reference innuendo that will need to be determined.
44. Where there is room for doubt or dispute about whether the claimant has been identified or referred to without reliance on the reader or viewer acquainted with the claimant, it becomes necessary to consider what attributes of the claimant the hypothetical viewer, acquainted with the claimant, would be deemed to know. The onus must of course lie on the claimant to identify those attributes. The starting point must be to plead the case. This is normally done by way of the introductory averments in the Particulars of Claim, as it was here. We were also told that in this case

although there is no formal defence admitting the facts, the introductory statements in paragraphs 1 and 2 of the Particulars of Claim (set out in paragraph 8 above) were common ground.

45. If the defendant disputes the pleaded case on that issue or considers it to be inaccurate, incomplete, insufficient or excessive, that issue can be raised and litigated, but we doubt this will often be necessary. We know of no case in which the court has been required to resolve a factual dispute about what a person acquainted with the claimant would know. That was not required in this case. As indicated, by the time the matter came before the judge there was no dispute as to the truth of the basic facts asserted by the claimants which it was common ground the hypothetical viewer acquainted with Dyson Technology Limited and Dyson Limited would know. The only issue was whether they were enough to support the case on reference.
46. Having said that, it is important to emphasise that if ever there is a need for an evidential inquiry in a case which is not a reference innuendo, it will be a factual inquiry into the attributes of the claimant known to the reasonable reader or viewer acquainted with the claimant, and not what any person actually knew or thought. We record, however, that evidence that persons did understand the article to identify or refer to the claimant may be relevant and potentially important on the issue of serious harm. The effect of section 1 of the Defamation Act 2013 is that a claim will fail altogether in the absence of proof on the balance of probabilities that the publication complained of caused or was likely to cause serious harm to the reputation of the claimant, and, in the case of a trading company, serious financial loss.
47. It is not necessary to reach any general conclusion about the amount of detail which the hypothetical acquaintance would know about the claimant. No doubt the answer will depend on the context. The authorities suggest that, in the case of a company, the person acquainted with the claimant would know when it was incorporated and the general nature of its business activities: see *Elite Model Management Corporation v BBC* unreported, 25 May 2001 at paragraph 19 and *Undre v London Borough of Harrow* [2016] EWHC 931 (QB); [2017] EMLR 3 at paragraphs 28, 30 and 31. It seems likely that in the case of an individual, their age and other outwardly obvious characteristics would be known. We would be inclined to agree with Mr Tomlinson KC that the hypothetical reader or viewer is not to be considered omniscient, or to know full details about the claimant. At any rate, the issues in the present appeal can be resolved as they were below on the agreed basis that a person acquainted with these corporate claimants would at least know the facts alleged by them in paragraphs 1 and 2 of the Particulars of Claim.
48. That said we can see there could be advantages of pleading a case of identification in the alternative, setting out in a reference innuendo those facts which a claimant contends would be known to a reasonable reader acquainted with the claimant and would cause the reasonable reader to identify the claimant as the subject of the relevant article or broadcast. This reduces the distinction between the first and second ways in which a person can be identified as the subject of a libel even further.

The appellants were identified

49. In the light of the matters set out above, we conclude that the judge fell into legal error in his approach to the issue of identification or reference. His approach was that

identification had to come from within the broadcast itself or from some extrinsic fact pleaded by way of “innuendo”. This much emerges from the reasons given by the judge for his order directing the hearing of the preliminary issues, from paragraph 7 of his judgment (set out in paragraph 20 above) and from his discussion of *Palace Films*. It seems to us that on a fair and reasonable interpretation of his paragraphs 27 and 28 the judge was wrongly distinguishing *Knupffer* on the basis that the test set out in that case was applicable only where the case on identification was one of what he called extrinsic evidence or reference innuendo. Applying the reasoning in *Palace Films* which we have discussed above, the judge concluded that in the absence of a name – meaning a full and precise corporate name which functioned as a unique identifier – the claimants could not show that they were the subjects of the allegations in the broadcast for the purpose of what the judge termed intrinsic reference. The judge at no stage undertook the exercise to which we have referred, namely reviewing the publication complained of in the light of the knowledge of the claimant companies which a hypothetical viewer acquainted with those companies would possess.

50. We do not consider that the judge was helped by the procedure which was adopted in this case, namely to have a preliminary issue about whether the publication complained of in its natural and ordinary meaning referred to the second and third claimants. Nor do we consider that the judge was helped by the use of the term “intrinsic” because the test in *Knupffer* expressly contemplates the use of facts known to hypothetical readers acquainted with the claimants. As it is the judge’s approach led to difficulty in determining whether the judge applied the test set out in *Knupffer* when it was common ground that he should have done. Mr Wolanski argued that the judge did apply that test. For the reasons set out above we agree with Mr Tomlinson that the judge did not do this.
51. Further the judge left out of account the features of the broadcast on which Dyson Technology Limited and Dyson Limited – in our judgment correctly - placed heavy reliance, namely the focus of the broadcast on Britain and the repeated references to Dyson being “this iconic British brand”, “one of Britain’s most iconic British companies” and “a flagship British company” together with the filming of the “Dyson” store. It was common ground before us that the reasonable viewer acquainted with Dyson Technology Limited and Dyson Limited would have known that Dyson Limited was “Dyson’s UK trading name” and so must have operated the shops that sold the products produced by ATA and that Dyson Technology Limited employed members of Dyson’s executive team and retained advisers to protect the reputation of Dyson.
52. The judge also erred, in our opinion, in treating this as a case of “intrinsic reference” in which “the publication complained of clearly identifies – but does not name – the target of the defamatory allegation” (see paragraph 28 of his judgment). What the judge seems to have meant by this was that the publication pointed in general terms to (and thus “identified”) a company or companies in the Dyson group that was or were responsible for certain kinds of disreputable act or omission. He reasoned that in order to show that they were the companies in question the claimants would have to plead and prove a case of extrinsic reference or innuendo, showing that as a matter of fact they (alone or with others) undertook or were responsible for oversight of the contractual relationship with ATA and had responsibility for PR and the response to the allegations. There are several problems with this approach. The first is that this

approach pays no attention to the words used in the broadcast of “iconic British company”. The second is that fails to take account of the fact that a hypothetical viewer acquainted with Dyson Technology Limited and Dyson Limited would know the matters set out in paragraph 2 of the Particulars of Claim. Thirdly, as it seems to us, the judge’s analysis was unduly refined. The broadcast gave the ordinary viewer acquainted with the claimants no good reason to think that the corporate failings described in the programme were the responsibility of some Dyson group company other than the “British” company to which frequent reference was made.

53. For these reasons, we conclude that the issue of identification or reference must be revisited. In most cases the issues of meaning and reference are intimately connected. It is not easy to address them separately and, as appears below, it is desirable to avoid having to do so if that can be done, but we are where we are. But putting the matter as broadly as possible at this stage, it seems to us that the broadcast had at least the theme that Dyson was a leading British company which sold products manufactured by ATA in Malaysia whose employees suffered abuse and inhuman working conditions and Dyson should have known what was happening and stopped it. It is also arguable that the broadcast suggested that Dyson tried to cover the matter up and shut down criticism.
54. We find ourselves unable to agree with the judge’s conclusion that the broadcast implicitly suggested to viewers that the responsible Dyson entity was a company or companies directly responsible for the supply contract with ATA. That seems to us much too narrow an interpretation, depending (as we see it) on: (a) an unduly refined analysis, of a kind that would not be undertaken by the reasonable viewer of the broadcast with the personal qualities identified in the authorities; and (b) inferences as to the corporate structure or organisation of the Dyson enterprise which lack a sound foundation in the broadcast. In any event, this approach asks and answers the wrong question which is, applying the authorities, whether the hypothetical reasonable viewer acquainted with the Dyson Technology Limited and Dyson Limited would conclude that they were responsible for the behaviour of the “one of Britain’s most iconic British companies” on which the broadcast focused its attention. The question can be put another way: would the informed viewer think this Channel Four News broadcast was telling them about the behaviour of these claimants?
55. We do not think it right to place any great weight on the mere fact that Ms Shi spoke from Singapore. That tells the reasonable reader very little, if anything, about the corporate structure. Indeed, in our view, the content of Ms Shi’s contribution tends rather to reinforce the portrayal of the British Dyson “company” as responsible for the worldwide operations. She was described (no doubt correctly) as Dyson’s “global manufacturing and procurement director”. The references to “we” on which Mr Wolanski placed heavy reliance seem to be points against the judge’s interpretation, given the references to Dyson being a British company. Although the judge had referred to the question whether “this iconic British brand [has] lost credibility” in the summary of the broadcast, the judge did not revisit this wording to explain his conclusions in the light of this focus of the broadcast.
56. In all of these circumstances we conclude that a hypothetical reasonable viewer, acquainted with Dyson Technology Limited and Dyson Limited and therefore knowing the matters set out in paragraph 2 of the Particulars of Claim, would identify Dyson Technology Limited and Dyson Limited as being referred to in the broadcast.

The undesirability of preliminary issues on identification or reference

57. We should state that given that there are two main ways of showing that the broadcast identified or referred to the claimants, and given that there is a spectrum of possible factual situations which lead the viewer to identify a person as the subject of broadcast, we do not consider that it is desirable to have a preliminary issue on the issue of identification or reference which deals only with the first way of identifying or referring to the claimants. This is because there was always a risk (as happened in this case) that the determination of the preliminary issue would not determine a party's case on the issue of identification or reference, so there will have been no saving of time or costs. We also understand why the judge did not determine the second way of identifying or referring to the claimants (namely reference innuendo) because it would have involved the calling of evidence, but even the first way of identifying a claimant does mean that some factual matters (namely those known to the hypothetical reasonable viewer acquainted with the claimants) will be in play. Finally, if the judge finds that there is no reference, the issues of meaning will remain at large.
58. Experience shows that identifying the meaning of an article or broadcast at an early stage of the proceedings ensures that cases which should be compromised are compromised and if there is no compromise, that all parties know where they stand. The same is not shown for preliminary issues about identification or reference.
59. All of this indicates that the judge's view expressed in paragraph 57 of the judgment about the need for caution before ordering a preliminary issue on the issue of identification or reference is sound. A preliminary issue on the issue of reference may easily turn into the treacherous short cut contemplated in *Tilling v Whiteman* [1980] AC 1 at 25.

Conclusion

60. For the detailed reasons set out above we allow the appeal and set aside the order that "based solely on intrinsic evidence in the broadcast, the broadcast does not refer to the second and third claimants" and conclude that a hypothetical reasonable viewer, acquainted with Dyson Technology Limited and Dyson Limited and therefore knowing the matters set out in paragraph 2 of the Particulars of Claim, would identify Dyson Technology Limited and Dyson Limited as being referred to in the broadcast.

Lord Justice Birss:

61. I agree.
62. I will add only this. One problem here was that the outcome of the preliminary issue ended up depending on the difference between reference innuendo – which was outside the preliminary issue – and the approach of the hypothetical reasonable person acquainted with the claimant (as in *Knupffer*) – which was within its scope. These are clearly distinct concepts and the difference will be straightforward in many cases. Nevertheless, as my Lords have explained above, within the wide range of factual situations which can arise will be cases in which both approaches involve identifying facts known to the relevant person. The result was that a procedural step tried to draw

a sharp line between situations which are not as different from one another as they might at first have appeared. That I think led to part of the difficulty in this case.