Neutral Citation No. [2022] EWHC 438 (IPEC)

Case No: IL-2020-000089

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

Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: Thursday, 13 January 2022

Before:

MR JUSTICE FANCOURT

- -

Between:

GREENCASTLE MM LLP

Claimant

- and -

(1) ALEXANDER PAYNE
(2) MICHAEL TINDALL
(3) JAMES HASKELL

Defendants

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- -

JAMES ST VILLE and **BETH COLLETT** (instructed by **DLA Piper**) for the **Claimant**
SIMON MALYNICZ QC and **GEORGINA MESSENGER** (instructed by **Marks & Clerk Law LLP**) for the **Defendants**

- -

Approved Judgment

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MR JUSTICE FANCOURT:

1. At this pre-trial review, there are two applications that I need to determine, both issued by the Defendants in relation to the witness evidence filed on behalf of the Claimant.

2. The first application was issued on 7 January 2022, and it seeks an order that various identified passages of the first witness statement of Mr John Quinlan dated 12 November 2021 be struck out pursuant to paragraphs 5.1 and 5.2 of Practice Direction 57AC of the Civil Procedure Rules. This application was preceded by a letter from the Defendants' solicitors, Marks & Clerk Law LLP, dated 10 December 2021, pointing out alleged non-compliance with that practice direction in various respects, with specific non-complying paragraph numbers and sub-paragraphs of the witness statement identified. A response to that letter from the Claimant's solicitors, DLA, was not sent until 5 January 2022 and, when sent, really only amounted to disagreement and joinder of issue in all respects with Marks & Clerk's letter. Accordingly, the application was issued.

3. The second application notice was issued on 11 January 2022 and relates to a second witness statement of Mr Quinlan dated 10 January 2022. The further witness statement from Mr Quinlan was permitted by an order made as a result of late disclosure of various documents by the Defendants. This disclosure was given pursuant to an order of Bacon J on 10 November 2021 and further unredacted disclosure was given following a subsequent order of Meade J on 10 December 2021. The second application notice seeks an order that Mr Quinlan's second statement be struck out in its entirety.

4. Mr Quinlan is the only witness to be called on behalf of the Claimant at trial. He is the chief executive officer of the Claimant.

5. The Claimant company was incorporated in 2020 specifically to acquire the business of a company called JOE Media Ltd (referred to as "JOE"), which company was by then in administration. JOE's business included the rights to a well-known podcast on the subject of Rugby Union Football known as the "House of Rugby", which was owned by JOE but had been presented for the previous two years by the three Defendants. The three Defendants had no contracts with JOE, which paid them from time to time as it saw fit and, at the time of the administration, leaving substantial outstanding sums unpaid.

6. The issues in this claim, which were clarified in a discussion between the Court and Counsel this morning, are in substance and reality the following: first, whether the Defendants in fact did various acts which remain disputed and are alleged by the Claimant to amount to the tort of passing off; second, whether any of the acts admitted by the Defendants or alleged and disputed amount to misrepresentations about ownership of the media rights and other intellectual property associated with the House of Rugby podcasts; and third, whether any of the acts that did amount to misrepresentations caused the Claimant loss.

7. Mr Quinlan was only involved in the relevant events in his capacity as an officer of the company that purchased the assets of JOE. The Claimant attempted to persuade the Defendants in the summer of 2020 to continue the existing House of Rugby podcast series, but the Defendants were not attracted by the attitude of the Claimant or its parent company, or their standing, and they eventually decided to set up their own rugby

podcasts, which were then published under the name "The Good, the Bad and the Rugby".

8. Mr Quinlan's witness statement sets out: first, his business experience, which is not directly relevant to anything in issue in the trial, as he is not an expert witness and no expert evidence was permitted; second, the Claimant's acquisition of JOE, which is not relevant to any issue as it is now accepted that the Claimant did acquire the rights of JOE to the assets, intellectual property and the goodwill of the House of Rugby brand; third, a description of the House of Rugby show as it had been, and how the Claimant felt that they could exploit its potential with particular reference to its previous main sponsor, Guinness (that is to say, the company Diageo); fourth the particular events of May to October 2020, which includes substantial parts commenting on the position of Diageo and its attitude to House of Rugby, the impact of sponsorship, and a section commenting on what the Defendants were doing in terms of marketing their intended new podcasts; and fifthly, and relatively briefly at the end of the statement, some paragraphs describing the impact of what the Defendants did on the Claimant's ability to continue with the House of Rugby brand.

9. It is not possible to say that Mr Quinlan and Mr Richard Taylor (the partner at DLA who certified compliance of the witness statement with PD 57AC) were not aware of the Practice Direction, because the formal statement and certificate of compliance required by PD 57AC are there in the witness statement. However, I have real doubt whether either of them has read the Practice Direction or, if they have, whether they understood the effect and purpose of it. That is because the first witness statement of Mr Quinlan does, really, exactly what the Practice Direction was designed to prevent trial witness statements of fact from doing, that is to say referring to matters that were not within the knowledge of the witness (other than properly presented hearsay evidence), commenting on documents that have been disclosed (save to the very limited extent that the practice direction does permit it) and presenting argument in support of a party's case.

10. The relevant parts of the Practice Direction are:

> "2.1 The purpose of a trial witness statement is to set out in writing the evidence in chief that a witness of fact would give if they were allowed to give oral evidence at trial without having provided the statement.
>
> (Rule 32.2(1)(a) provides that in general any fact which needs to be proved at trial by the evidence of witnesses is to be proved by their oral evidence given in public, and rule 32.4(1) defines a witness statement as a signed statement containing the evidence the witness would be allowed to give orally.)
>
> 3.1 A trial witness statement must contain only –
>
> (1) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and
>
> (2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in

evidence in chief if they were called to give oral evidence at trial and rule 32.5(2) did not apply.

(Rule 32.5(2) provides that where a witness is called to give oral evidence at trial, their witness statement shall stand as their evidence in chief unless the court orders otherwise.)"

And in the Statement of Best Practice in relation to trial witness statements, in the Appendix to Practice Direction 57AC, which paragraph 3.4 of the Practice Direction requires to be followed, the following paragraphs are relevant:

"2.3 Factual witnesses give evidence at trials to provide the court with testimony as to matters of which they have personal knowledge, including their recollection of matters they witnessed personally, where such testimony is relevant to issues of fact to be determined at trial, and:

(1) a matter will have been witnessed personally by a witness only if it was experienced by one of their primary senses (sight, hearing, smell, touch or taste), or if it was a matter internal to their mind (for example, what they thought about something at some time in the past or why they took some past decision or action)…

3.4 A trial witness statement should refer to documents, if at all, only where necessary. It will generally not be necessary for a trial witness statement to refer to documents beyond providing a list to comply with paragraph 3.2 of Practice Direction 57AC, unless paragraph 3.7 below applies or the witness's evidence is required to:

(1) prove or disprove the content, date or authenticity of the document;

(2) explain that the witness understood a document, or particular words or phrases, in a certain way when sending, receiving or otherwise encountering a document in the past; or

(3) confirm that the witness saw or did not see the document at the relevant time; but in the case of (1) to (3) above if (and only if) such evidence is relevant. Particular caution should be exercised before or when showing a witness any document they did not create or see while the facts evidenced by or referred to in the document were fresh in their mind. Where a trial witness statement does refer to a document, it should not exhibit the document but should give a reference enabling it to be identified by the parties, unless it is a document being produced or disclosed by the witness that has not been disclosed in the proceedings.

3.6 Trial witness statements should not –

(1) quote at any length from any document to which reference is made,

(2) seek to argue the case, either generally or on particular points,

(3) take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument, or

> (4) include commentary on other evidence in the case (either documents or the evidence of other witnesses), that is to say set out matters of belief, opinion or argument about the meaning, effect, relevance or significance of that other evidence (save as set out at paragraph 3.4 above)."

11. The Defendants' solicitors' letter of 10 December 2021, to which I have referred, helpfully included a version of the statement with those passages that were objected to highlighted. The principal objections taken by the Defendants are, as to the variously identified paragraphs: first, that they contained content of which Mr Quinlan has no personal knowledge, including a good deal of speculation about what others did and thought and why they did it and, in particular, how the public might react to the Defendants' branding as compared with the House of Rugby branding; second, that they amount to commentary on documents that Mr Quinlan did not see at the time of the events in issue; and third, that they amount to Mr Quinlan arguing the Claimant's case, not presenting evidence of matters of disputed fact that are relevant to issues to be determined at the trial, which is what the Practice Direction states that a witness statement should confine itself to.

12. In my judgment, the Defendants' objections are broadly well-founded. In their argument, principally written and elaborated to some extent orally, Mr Malynicz QC on behalf of the Defendants pointed to particular passages that exemplify the objections, and they are in my judgment passages that demonstrate with a degree of clarity the nature of the objections taken.

13. As an example, paragraph 41 of the statement contains the following sentences:

> "It is a small industry, and I have heard from several sources within the industry that wish to remain confidential that this was being done by the Defendants. Any such touting being done by the Defendants will have poisoned the well from the perspective of potential sponsors for our House of Rugby show at that time such that any approach made by us for sponsorship from that potential sponsor would not have had a chance of succeeding. Indeed, the sponsor may simply not have bothered responding to our approaches, or if they were previously intending to approach us they would have changed their minds."

This paragraph, Mr Malynicz says, improperly relies on unattributed hearsay evidence but, more significantly, it is Mr Quinlan speculating on the thought processes of third parties and matters that are not within his knowledge, and then using the result of that speculation to give an opinion on what is really a final ultimate question for the court on the issue of misrepresentation.

14. As another example, paragraph 18.5 includes the following:

> "In order to obtain this sponsorship arrangement, JOE Media may have approached Diageo with a rough idea of who the presenters were going to be, but far more critically with the concept of the show. It would have been pitched as a show where a broad range of rugby-related topics are discussed amongst high-profile individuals in the public eye, with the opportunity to further commercialise the product (e.g., through merchandise or live shows). Identifying the target audience will have been key for Diageo, who will have wanted to attract casual rugby funs in addition to regular watchers of the sport."

The objection, of course, is that this amounts to mere speculation on the content of an approach by JOE Media of which Mr Quinlan has no knowledge. It all took place prior to the date on which he became involved, and his speculation then goes further as to what may have been in the mind of Diageo.

15. A different kind of example is paragraph 42, which states as follows:

> "My suspicions that such touting was being done have been validated by certain documents I have now seen from the Defendants' disclosure, though I have no doubt that many more representations will have been made by the Defendants to many more organisations where the Defendants held themselves out to those organisations as owning the House of Rugby brand. By way of example, I can see that..."

and there is then a commentary on three separate documents that have been disclosed, describing what those documents show. The objection, unsurprisingly, is that this amounts to expressing opinions and indeed conclusions that the court should reach and is no more than commentary on documents that have been produced by way of disclosure.

16. Finally, paragraph 49 contains the following:

> "It remains the case, therefore, that the Defendants' activities (for example, the 4 August post referred to above) will have confused a significant proportion of listeners into thinking that they were relaunching House of Rugby, and that the comments on the social media posts are a very small fraction of the overall consumer market. There is therefore a silent majority who would still be under the misunderstanding that the Defendants were relaunching House of Rugby, but who would not have taken the time to comment as such on social media."

The objection here is that Mr Quinlan is arguing the case and putting forward his own opinions on matters such as confusion, and speculating about what those members of the public would have concluded.

17. The arguments advanced on behalf of the Claimant by Mr St Ville are, in virtually all of the respects that he addressed, really the following arguments in substance. First, it is said that, on the authority of the *MAD Atelier* case (a decision of Sir Michael Burton), Mr Quinlan is entitled to give factual evidence about what his company would have done and what would have come to pass if the Defendants had not carried out the alleged infringing activities. Second, that Mr Quinlan is entitled to give evidence about what could or would have happened in the media industry as regards the way in which sponsors, agents and others conduct themselves and how they would act, given that the court otherwise does not have helpful evidence about industry practice. Third, that having seen the documents disclosed by the Defendants more recently, Mr Quinlan is entitled to give evidence about what impact the conduct of the Defendants and various third parties had on the Claimant's business. Fourth, that the evidence that Mr Quinlan is giving about what happened as a result of how the industry works and how it would have worked in the case of the Defendants and the Claimants in connection with rugby podcasts and sponsors is intended to be helpful to the court and should therefore be allowed to be given, because argument about its relevance and weight can be had at the trial. And fifth, it is more convenient in terms of case management to let the evidence

stand and argue about its significance later than to have satellite litigation about the content of the witness statements. He also said that there are criticisms to be made about the Defendants' own witness statements, although no application has been made in relation to them and no particulars were given by way of developing that argument.

18. I disagree with Mr St Ville's approach, save in relation to limited aspects of the arguments that he advanced. I accept that Mr Quinlan is entitled to say what the Claimant would have done differently itself, if the Defendants had not done the matters that are complained about. However, Mr Quinlan is not entitled to give an opinion about what third parties would have decided to do in their relationship with the Claimant or otherwise, had the Defendants not done so. That amounts to pure speculation.

19. The right course in such circumstances is for any party wishing to establish the approach of third parties, and how different it might otherwise have been, to call evidence from such a third party, as in fact the Claimant has sought to do with some hearsay statements in Mr Quinlan's witness statement and the Defendants seek to do with a live witness who was employed at the time by Diageo. Mr Quinlan cannot get around that by purporting to give evidence about, or based on his knowledge of, the media industry as a means to the same end. Mr Quinlan is not being called as an expert on the media industry. There is no pleaded case that there are special aspects of the media industry and the way it carries on business that are relevant to the issues in this case, and therefore there has been no application for expert evidence. Mr Quinlan cannot give opinion evidence about particular practices of the industry, or how particular players in the industry have generally behaved, or indeed on how customers perceive matters or how they may be confused by branding or marketing issues.

20. The disclosure of documents by the Defendants, whether belated or otherwise, does not entitle Mr Quinlan to prepare a commentary on what the documents appear to show, or to argue that certain conclusions follow from what the documents appear to show, as he has done.

21. Neither is Mr Quinlan is not entitled to argue the Claimant's case, as he does to a considerable extent in the first witness statement. It is not an answer that the court does not otherwise have any evidence about certain matters, or to say that Mr Quinlan is trying to be helpful to the court. The purpose of the witness statement of Mr Quinlan is clearly to assist the Claimant by advancing and indeed arguing its case.

22. It is not, in my judgment, convenient or appropriate to leave the dispute to sort itself out at trial. The whole purpose of Practice Direction 57AC is to avoid a situation where the witness statements are full of comment, opinion, argument and matters asserted that are not within the knowledge of the witness, which have to be disentangled at trial by protracted cross-examination. The purpose is to limit factual evidence to admissible and relevant evidence of facts within the witness's own knowledge (including correctly identified hearsay evidence) that a witness can properly give in relation to disputed issues of fact.

23. I therefore find that, with certain exceptions, the objections raised on behalf of the Defendants to the first witness statement of Mr Quinlan are established out. As to the exceptions, I consider that the passages objected to in paragraph 28, the first passage objected to in paragraph 34, the passage in paragraph 37, the first sentence objected to in paragraph 41, paragraph 45.1 as a whole, the first passage objected to in paragraph 46

and paragraph 59 (including 59.1 and 59.2) are unobjectionable and are properly included in the statement.

24. The witness statement as a whole is the clearest case of failure to comply with Practice Direction 57AC that I have seen since it direction came into force in April 2021. The impression it gives is that the chief executive officer of the Claimant was very upset about the conduct of the Defendants and is determined to have his say about what they did and why he considers that it was wrong. It is replete with comment and argument that goes well beyond the disputed facts that are known to Mr Quinlan personally.

25. In my judgment, there appears to be more objectionable content than that highlighted by the Defendants. The additional paragraphs that, provisionally, I consider are objectionable are the following: paragraphs 18.3, the first part of paragraph 18.4, paragraphs 32 and 33, other parts of paragraphs 34, 35, 37 and 38, all of paragraph 39 and paragraph 40, paragraph 45.4, the first part of 45.5, all of paragraph 48, and the first part of paragraph 49. It may be that the Defendants did not object to these because they were not particularly concerned about the evidence that was given there. Nevertheless, provisionally - and I emphasise provisionally, because I have not heard Mr St Ville address those additional paragraphs - it does seem to me that they equally are in breach of the Practice Direction.

26. As for the second witness statement of Mr Quinlan dated 10 January, there are substantial passages of this witness statement too that are not compliant with the Practice Direction. A certain amount of the material, though perhaps technically not in compliance, is relatively innocuous. This applies to paragraph 5 in particular, save for elements of paragraph 5.4 and 5.5 where there is speculation and evidence of opinion given by Mr Quinlan. These particular passages were identified in argument by Mr Malynicz, and I consider that his objections are justified.

27. There then follows a section from paragraph 6 to 9 which Mr St Ville says is admissible because it explains the background to the way certain media companies and agencies operate. In my judgment, the material in these paragraphs is only admissible to the extent that Mr Quinlan has first-hand knowledge of these matters, including matters concerning the attitude of the Claimant or JOE formerly (if Mr Quinlan has knowledge of this) and about the Claimant's own holding company of which Mr Quinlan may also be a director or otherwise have first-hand knowledge, but not evidence about other specific companies or the generality of companies or agencies of this type. Mr Quinlan is simply not in a position to give evidence about their attitudes or approach to business.

28. There then follows a lengthy section headed "Harm caused by communications with those businesses", and this section which goes up to paragraph 27, is in substance nothing more than commentary by Mr Quinlan on the various disclosed documents that he identifies, and argument advanced to support the Claimant's case. There are, however, a number of relatively small exceptions which include the passages in paragraphs 14, 16 and 17 to which reference has been made in argument, which relate to the Claimant's own engagement with Premiership Rugby and with other agencies. No objection could be made to those relatively short passages. The rest of that section, however, seems to me to infringe fundamentally the requirements of the Practice Direction.

29. There is then a section headed "Unknown communications" which purports to identify gaps in disclosure and advance arguments as to what conclusions are to be drawn from

that, and whether any other documents must exist. Those are clearly arguments and not evidence, and should not be there.

30. The final section is of a different character and is a reply to some of the evidence advanced on behalf of the Defendants. It seemed to me, when I first read it, that much of the content - though not necessarily all of it - was unobjectionable; and as the argument developed, Mr Malynicz dropped his objections to any of the content of this section. That content can therefore remain.

31. The question then, of course, is what should be done about the witness statements at this relatively late stage before the trial. The trial is due to start in the week commencing 7 February 2022. There is, rather surprisingly, a further round of witness evidence to come, as a result of the Orders recently made, and that falls to be exchanged by 19 January 2022. That is principally evidence in response to witness statements that have already been served.

32. The options for the court are the following. First, to withdraw permission for Mr Quinlan's two witness statements, in whole or in part, leaving the Claimant to apply for permission to adduce a further witness statement, which of course would have to be on the basis of an application for relief against sanctions. Second, to withdraw permission for the existing statements but order that the witness statement(s) be re-drafted in accordance with PD 57AC; third, to do surgery to the existing witness statements, by excising those passages that are objected to by the Defendants that I agree are non-compliant and, possibly, the further paragraphs that I have identified; fourth, to require Mr Quinlan's evidence to be given orally in chief at the trial; and the fifth option is to do nothing and let the matter go on to trial and make an adverse costs order.

33. I do not intend to take the first option, which seems to me to be disproportionately punitive to the Claimant, nor do I intend to take the last of the options since it is most unsatisfactory for a serious breach of the practice direction to be ignored and the problems left to be dealt with at trial.

34. The Defendants were content that I take the option to excise the offending passages of the first witness statement and, in the light of my ruling, to allow the parties the opportunity to seek to agree the admissible content of the second witness statement. However, it is not a matter entirely for the Defendants, and I am not persuaded that that approach is the best approach to take at this late stage. There are, as I have indicated, a number of other passages in the first witness statement which do seem to me to be objectionable. There is no certainty that the parties will be able to reach agreement. Cutting out only parts of the witness statement also has the disadvantage of leaving parts of the rest of the statement incoherent, as Mr St Ville has pointed out in argument.

35. If there is a sensible alternative to striking out the witness statements and directing that oral evidence be given in chief at trial, I would prefer to take that alternative, because Mr Quinlan is the only witness to be called by the Claimant and to require all its evidence to be given orally would create a potentially unfair imbalance between the two parties. There is time to take another sensible course. I therefore consider that the right approach in this case is to withdraw the existing permission for Mr Quinlan's witness statements, but to give permission for the Claimants to prepare a replacement, fully compliant statement by 19 January 2022, which is the same date on which the further outstanding evidence is due.

36. My reasons for reaching that conclusion, very shortly, are the following. First, this is an egregious case of serious non-compliance with the Practice Direction. Second, the Claimant is still entitled to put in further evidence in any event within the timescale that I have indicated, and so the process of preparing factual evidence has not yet been concluded. Third, there is adequate time for the exercise of preparing a replacement statement for the trial and a replacement compliant statement would be fairer and more appropriate for this case than requiring Mr Quinlan to give oral evidence in chief.. The work that will be involved is not that extensive. This is not an opportunity for the Claimant to seek to put in further unheralded evidence, save to the extent that it is permitted at this stage by the existing orders; and the exercise is therefore one of removing the objectionable paragraphs and putting the remaining content into a comprehensible form. Fourth, it would in my view be better for the Claimant to be given the opportunity to give careful thought to the additional passages that I have identified, rather than debate further now whether they should be excluded, as they have not been addressed in argument. The responsibility is however on the Claimant to ensure that any replacement statement is compliant with the Practice Direction. Fifth, attempting to perform surgery on the witness statements, paragraph by paragraph, would take further considerable time that is not available before trial and might well create problems of incoherence in the remaining parts of the statement and make its contents less compelling, which would potentially be unfair to the Claimant.

37. Further, I think that it is right in principle that the Claimant, rather than the court or the Defendants, should bear the burden and costs of identifying exactly what is the permissible content for the replacement witness statement in the light of the general indications that I have given. The Claimant can, of course, expect that the replacement statement, if served, will be scrutinised by the Defendants for compliance with the Practice Direction.

This judgment has been approved by Fancourt J.