



Neutral Citation Number: [2023] EWHC 3535 (KB)

Case No: QB-2022-002486

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

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 12th October 2023

Before:

THE HONOURABLE MR JUSTICE NICKLIN

Between :

(1) DMITRI ZHURBA
(2) ANDREY MALYSHEV

Claimants

- and -

**PERSON(S) UNKNOWN BEING THE PERSON
OR PERSON RESPONSIBLE FOR
THE PUBLICATION OF A WEBPAGE
REFERRING TO THE CLAIMANTS ON THE
WEBSITE WWW.TALK-FINANCE.CO.UK**

Defendants

IAN HELME (instructed by Withers LLP) for the Claimants
The Defendants did not attend and were not represented

APPROVED JUDGMENT

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MR JUSTICE NICKLIN:

1. This is a claim for libel and breach of data protection commenced by a Claim Form dated 2 August 2022. It concerns the publication of an article headline “*Dimitri Zhurba and Andre Malachev defraud US investors for millions*” on a website www.talk-finance.co.uk. The Claimants sought remedies including damages and an injunction.
2. For the purposes of the defamation claim, the natural and ordinary meaning pleaded in the Particulars of Claim was that:

“... the Claimants have perpetuated a multimillion dollar fraud by selling properties to third parties and then, having received money for the purchase of the properties, retained that money whilst dishonestly procuring their wives to claim that the properties were in fact stolen so that the transactions were declared invalid.”
3. The claim has been brought against persons unknown. Proceedings against unknown individuals are difficult to pursue in most cases for several procedural reasons (principally the need to serve the Claim Form upon the Defendants to establish the jurisdiction of the Court over them), and there will also be a question of what value any remedies obtained against persons unknown will prove to have.
4. In this case the Claimants obtained an order, dated 22 November 2022, for alternative service of the Claim Form on three email addresses associated with the website. Permission was also granted to serve the Claim Form out of the jurisdiction. The Defendants could have applied to set aside those orders, but they have not done so as yet.
5. There is further difficulty in defamation litigation against persons unknown as the claimant may not be able to show where the defendant is domiciled. If a defendant is domiciled out of the jurisdiction, s.9 Defamation Act 2013 will be engaged. Permission to serve the Claim Form out of the jurisdiction would only be granted if the claimant could overcome the s.9 hurdle.
6. There is some evidence that the Defendants are aware of the Claimant’s claim. On 8 December 2022, an email was received by the Claimant’s solicitors: “*Hi. We’ve deleted the requested [article]*”. The following day the Claimants’ solicitors wrote asking for confirmation that the article had been permanently deleted. On 9 December 2022, a response was received: “*If by any chance the claim will not be withdrawn, we will reverse this decision.*” Despite that threat, the article has not been republished on the original website.
7. However, on 30 December 2022, the original article (or one in substantially similar terms) was then published on a different and separate website. The Claimants have not been able to establish any link between the Defendants to these proceedings and this new publication.
8. The Defendants did not file an Acknowledgement of Service or a Defence. As a result, on 28 February 2023, Master Gibbon granted the Claimants default judgment.

He directed a disposal hearing to be fixed to determine the remedies that the Claimants should be granted consequent upon the default judgment.

9. On 16 June 2023, a pre-trial review was held before me. The hearing was directed so that the Court could better understand the relief the Claimants were seeking. Directions were given at that hearing for the Claimants to file evidence and for the provision of a draft order identifying the relief that they sought at the disposal hearing. Each Claimant has duly filed a witness statement and provided a draft order. In summary, they seek damages limited to £10,000 each and a final injunction prohibiting the Defendants from republishing the same or any similar allegation as made in the original article. Although the Claimants had sought originally other remedies in their Claim Form, including orders under s.13 Defamation Act 2013, which if granted would have affected third parties, none of those other remedies has been pursued.
10. One of the issues that had troubled me, prior to the PTR, was the extent to which the Claimants were seeking to obtain default judgment against persons unknown and then potentially attempting to use that as the basis to seek remedies against other third parties who are not defendants to the proceedings. There are potentially significant issues to be resolved as to the circumstances in which the court might grant such an order. It appears to me that, at the very least, any third parties who would be affected by the grant of an order under s.13 Defamation Act 2013 would need to be given notice of the relevant application. The court would also have to consider any jurisdiction issues that arose if it appeared that the persons controlling the relevant website were domiciled outside the jurisdiction. Nevertheless, given the stance now taken by the Claimants in this claim, those are matters for another occasion. The Court will want to consider these issues very carefully should they arise in subsequent cases. There have been very few occasions on which s.13 has been considered by the Court since the enactment of the Defamation Act 2013. In terms of orders that have the potential to affect the rights of freedom of expression of third parties, there are obvious issues to be considered.

Proceeding in the Defendants' absence

11. I am satisfied that it was justified today to proceed in the defendants' absence – see *Sloutsker -v- Romanova* [2015] EMLR 27 [25]-[26] and *Brett Wilson LLP -v- Persons Unknown* [2015] 4 WLR 69 [14]-[15]. Beyond the limited responses received from the Defendants that I have set out above, they have not engaged with the proceedings despite being apparently aware of them. This behaviour is entirely consistent with the Defendants hiding behind the anonymity of a website to make serious allegations but an unwillingness to come forward and defend their position when called upon to do so.
12. At the PTR, I directed that the order fixing this hearing, and the evidence filed by the Claimants in support of their application for the remedies they seek today, should be served on the Defendants. That has been done and the Defendants have not responded or engaged. Any legitimate interest the Defendants have is protected by their ability to apply, even now or at any subsequent point, to set aside the judgment in default that was granted against them under CPR 13.

The proper approach of the court to granting relief following a judgment

13. CPR 12.12(1) provides that:

“Where a claimant makes an application for a default judgment, the judgment shall be such judgment as appears to the court the claimant is entitled to on his statement of case.”

Accordingly, the general rule is that where a judgment has been entered in default the court will proceed to determine the remedies that the claimant should be granted on the basis of his/her unchallenged pleaded case. Where the defendant has not disputed the claimant’s case, there is no need to adduce evidence or for the court to make express findings of fact. Indeed, it would usually be disproportionate, unnecessary and often inappropriate and contrary to the overriding objective to use court resources to do so. The claimant can under the CPR legitimately be granted remedies therefore on the assumption that his or her case is correct. The court may depart from this general rule, but only if it is clear that the claim is for some reason impossible, or fundamentally flawed, or that any other required legal threshold has not been met: *Sloutsker* [84]-[86].

14. It is not therefore necessary for the court to spend time making any findings of fact against the defendant in relation to liability after an assessment of evidence. I have in this case read the witness statements of both claimants. These of course have not been filed on the issue of liability. That has been resolved against the defendants by the default judgment. These witness statements contain the claimants’ evidence relevant to the remedies they seek.

15. I am satisfied, having reviewed carefully the Particulars of Claim, that the Claimants’ pleaded claims do not demonstrate any reason why I should depart from the usual rule that the Court proceeds on the basis of the pleaded case. The article complained of is obviously defamatory of the Claimants. The natural and ordinary meaning that has been pleaded is not artificial or one that has no real prospect of success.

16. In terms of remedies sought, the data protection claim adds nothing in substance. In terms of the underlying basis of the claims I need to go no further than this in light of the default judgment.

Remedies

17. I turn therefore to the remedies. The first remedy sought by the claimants is damages. There are two overarching principles. First, damages in civil proceedings are awarded to compensate the claimant for the damage to his/her reputation. They are not punishment. Punishment is the realm of the criminal law. Second, awards of damages in the tort of defamation are also designed to reflect and compensate elements of hurt, upset and distress, and there can be a substantial overlap between these various elements. I must ensure there is no double counting of these elements.

18. The Claimants in this case have sensibly sought a single award of damages reflecting the totality of the damage, harm and distress that each has suffered as a result of the publication of the article complained of. Substantially because they include similar elements of upset and distress, the data protection claim does not add significantly to that task and makes sensible the award of a single sum.

19. In damages for libel cases, the principle is to restore the claimant to the position he or she would have been in had the libels not been published. Compensation is required for the injury done to each claimant's reputation and to compensate for the feelings of distress that have been caused by the original publication. The general principles are set out in *Barron -v- Vines* [2016] EWHC 1226 [20]-[21] in which Warby J drew upon the judgment of Sir Thomas Bingham MR in *John -v- MGN Limited* [1997] QB 586:

[20] The general principles were reviewed and re-stated by the Court of Appeal in *John -v- MGN Ltd*. A jury had awarded Elton John compensatory damages of £75,000 and exemplary damages of £275,000 for libel in an article that suggested he had bulimia. The awards were held to be excessive and reduced to £25,000 and £50,000 respectively. Sir Thomas Bingham MR summarised the key principles at pages 607 – 608 in the following words:

‘The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must [1] compensate him for the damage to his reputation; [2] vindicate his good name; and [3] take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is [a] the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. [b] The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. [c] A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that [d] compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way. Although the plaintiff has been referred to as "he" all this of course applies to women just as much as men.’

[21] I have added the numbering in this passage, which identifies the three distinct functions performed by an award of damages for libel. I have added the lettering also to identify, for ease of

reference, the factors listed by Sir Thomas Bingham. Some additional points may be made which are relevant in this case:

- (1) The initial measure of damages is the amount that would restore the claimant to the position he would have enjoyed had he not been defamed: *Steel and Morris -v- United Kingdom* (2004) 41 EHRR [37], [45].
- (2) The existence and scale of any harm to reputation may be established by evidence or inferred. Often, the process is one of inference, but evidence that tends to show that as a matter of fact a person was shunned, avoided, or taunted will be relevant. So may evidence that a person was treated as well or better by others after the libel than before it.
- (3) The impact of a libel on a person's reputation can be affected by:
 - a) Their role in society. The libel of Esther Rantzen was more damaging because she was a prominent child protection campaigner.
 - b) The extent to which the publisher(s) of the defamatory imputation are authoritative and credible. The person making the allegations may be someone apparently well-placed to know the facts, or they may appear to be an unreliable source.
 - c) The identities of the publishees. Publication of a libel to family, friends or work colleagues may be more harmful and hurtful than if it is circulated amongst strangers. On the other hand, those close to a claimant may have knowledge or viewpoints that make them less likely to believe what is alleged.
 - d) The propensity of defamatory statements to percolate through underground channels and contaminate hidden springs, a problem made worse by the internet and social networking sites, particularly for claimants in the public eye: *C -v- MGN Ltd* (reported with *Cairns -v- Modi* [2013] 1 WLR 1051) [27].
- (4) It is often said that damages may be aggravated if the defendant acts maliciously. The harm for which compensation would be due in that event is injury to feelings.
- (5) A person who has been libelled is compensated only for injury to the reputation they actually had at the time of publication. If it is shown that the person already had a bad reputation in the relevant sector of their life, that will reduce the harm, and therefore moderate any damages. But it is not permissible to seek, in mitigation of damages, to prove specific acts of misconduct by the claimant, or rumours or

reports to the effect that he has done the things alleged in the libel complained of: *Scott v Sampson* (1882) QBD 491, on which I will expand a little. Attempts to achieve this may aggravate damages, in line with factor (d) in Sir Thomas Bingham's list.

- (6) Factors other than bad reputation that may moderate or mitigate damages, on which I will also elaborate below, include the following:
 - a) "Directly relevant background context" within the meaning of *Burstein -v- Times Newspapers Ltd* [2001] 1 WLR 579 and subsequent authorities. This may qualify the rules at (3) above.
 - b) Publications by others to the same effect as the libel complained of if (but only if) the claimants have sued over these in another defamation claim, or if it is necessary to consider them in order to isolate the damage caused by the publication complained of.
 - c) An offer of amends pursuant to the Defamation Act 1996.
 - d) A reasoned judgment, though the impact of this will vary according to the facts and nature of the case.
 - (7) In arriving at a figure it is proper to have regard to (a) Jury awards approved by the Court of Appeal: *Rantzen* 694, *John*, 612; (b) the scale of damages awarded in personal injury actions: *John*, 615; (c) previous awards by a judge sitting without a jury: see *John* 608.
 - (8) Any award needs to be no more than is justified by the legitimate aim of protecting reputation, necessary in a democratic society in pursuit of that aim, and proportionate to that need: *Rantzen -v- Mirror Group Newspapers (1986) Ltd* [1994] QB 670. This limit is nowadays statutory, via the Human Rights Act 1998.
20. Those are the principles by which the court fixes the level of damages and, had the case proceeded to a full assessment of damages, each of those elements would have had to be considered before a total sum was awarded. Given that both Claimants have limited their claims for damages to £10,000, I can deal with this issue quite shortly.
21. As to the seriousness of the allegations, in my judgment the allegation is one of some seriousness. It reflects upon the honesty of both claimants and the conduct alleged would probably have amounted to a criminal offence. As to the extent of publication, the evidence that is available to the court is that, as at 22 November 2022, the website had received fewer than 5,000 direct visits. However, the methodology used to produce this figure is unknown. It is necessarily a degree of speculation about the total publication that the Claimants have pointed in their evidence to the fact that for at least a time whilst it was being published the article appeared prominently in search

engine results where the claimants' names had been entered. From this, in my judgment, it is correct to draw the inference that it is likely that the web page would have only become so prominent in such search results if there had been some significant traffic online to the relevant web page. It is not a matter of significant importance in this case. It is not the case that it could be seriously contended on the basis of the pleaded case that there was no serious harm to reputation, and the Court can draw sensible inferences about the extent of publication.

22. A degree more analysis might have been required if the court were fixing a sum not limited to £10,000, but as I have said the exercise is simplified in this case by the Claimants capping of their damages award to £10,000. I am satisfied that the extent of publication that has been demonstrated on the evidence is sufficient to justify at least an award of £10,000.
23. Based upon the seriousness of the allegation and what I believe to be the extent of the publication, the Claimants at trial would probably have been successful in obtaining damages in excess of £10,000 each. As I have said, they have capped their claim to £10,000 and that is the sum that I will award each of them.
24. The final remedy that the Claimants seek (ignoring for these purposes costs) is an injunction. The terms of the injunction sought are in a conventional form. They seek to restrain further publication by the defendants of any allegation giving rise to substantially the same as the meaning complained of in the original Particulars of Claim. Although it is true, as I have noted above, that the article was withdrawn from publication on the original website in December last year, the Claimants can point to the fact that there was at least a threat made shortly thereafter that that decision to remove the article might be reversed. It hasn't been, but in my judgment the Claimants are entitled to a remedy to prohibit the defendants in these proceedings from any further publication.
25. As I say, the safeguard of any legitimate interests of these defendants lies in the fact that they always have the ability to apply to set aside the judgment in default that was against them if they can meet the necessary requirements for such an order setting aside judgment to be made.
26. So, for those reasons, I will make the order that has been circulated to the Claimants' team earlier today, and that will then bring this matter to a close, subject to any application the Defendants may make to set aside the orders made by the Court.

(This Judgment has been approved by the Judge.)

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