Case No: HC 03 C01725

Neutral Citation Number: [2003] EWHC 1205 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd May 2003

Before :

THE VICE-CHANCELLOR

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Between :

(1) BLOOMSBURY PUBLISHING GROUP LIMITED	**Claimants**
(2) J. K. ROWLING	
- and -	
(1) NEWS GROUP NEWSPAPERS LTD	**Defendants**
(2) PERSON OR PERSONS UNKNOWN	
(3) DONALD PARFITT	
(4) GARY COX	
(5) E. J. BARNES	
(6) PARK	

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Mr. David Kitchin QC and Mr. Adrian Speck (instructed by **Messrs Schillings**) for the Claimants
Mr. Bruce Carr (instructed by **The Treasury Solicitor**) as Advocate to the Court

Hearing date : Wednesday, 21st May 2003

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....
The Vice-Chancellor

The Vice-Chancellor :

1. The second claimant, J.K.Rowling, is the well known writer of the Harry Potter books. The fifth book is eagerly awaited and is to be published by the first claimants, Bloomsbury Publishing Group Ltd, on 21st June 2003. In April 2003 Bloomsbury made arrangements for the book to be printed by Clays Ltd of Bungay, Suffolk under conditions of exceptional security.

2. Those arrangements have not been wholly successful. The evidence clearly establishes that at least three copies of the book have been taken away from the printers without authority and offered to the press at varying prices. Thus, on 5th May 2002 a man telephoned the Daily Mail. He indicated that he had a copy of the new book and asked how much they would pay him for it. On 6th May 2003 Mr Webb found two somewhat damp copies in the grass on the Common at Bungay. It is unclear how they got there. They have now been returned to the claimants via the first defendant, the Sun Newspaper. Later on the same day The Sun received two separate telephone calls from a man. In the first he offered to sell to them three chapters of the book for £25,000. In the second, he offered to sell four chapters for £20,000. On 7th May 2003 the Daily Mirror was offered the first three chapters for an unspecified price. On 13th May 2003 another copy of the book was found in the grass on the Common at Bungay.

3. These events prompted a number of legal steps. On 7th May 2003 Laddie J made an order against "the person or persons who have offered the publishers of the Sun, the Daily Mail, and the Daily Mirror newspapers a copy of the book 'Harry Potter and the order of the Phoenix' by JKRowling" requiring them to deliver up all copies of the book, any notes recording any part of it or any information derived from it and restraining them from disclosing to any person all or any part of the book or any information derived from it. In his judgment he explained the unusual nature of the order against defendants so described and recognised the need in due course to address the issue in more detail. That order was continued by Laddie J on 9th May and by Rimer J on 14th May. On 21st May I continued it again until today in order to put this judgment into writing.

4. The application against the first defendant has been disposed of on the basis of certain undertakings. The third to sixth defendants were arrested on 7th May and charged with theft of copies of the book or receiving them knowing them to have been stolen. They were joined as defendants by name on 14th May and submitted to the orders I made against them on 21st May. Thus the only outstanding issue is whether the orders against the second defendant first made by Laddie J on 7th May should be continued until 21st June notwithstanding that he, she and/or they are not described by name. In the light of the argument the claimants seek to amend the description of that defendant or those defendants so as to read:

> "the person or persons who have offered the publishers of the Sun, the Daily Mail, and the Daily Mirror newspapers a copy of the book 'Harry Potter and the order of the Phoenix' by JKRowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants."

5. The problem with regard to an order against persons so described was revealed by the decision of the Court of Appeal in **Friern Barnet UDC v Adams** [1927] 2 Ch. 25. In that case the plaintiff sought to recover the cost of certain streetworks from the relevant frontagers. They did not know their names and issued a writ against "the owners of" certain land clearly identified by name. It was pointed out that only owners of that land at the date of the completion of the works could be liable. In order to cover that point the plaintiff sought to amend the description by adding "at the time of the completion of the works". The judge refused leave to amend and his decision was upheld by the Court of Appeal. At page 30 Lord Hanworth MR said:

> "A writ cannot be issued in the terms proposed referring to the parties sought to be summoned in this vague way. I think that that is clear from the rules and the official forms. Tracing the matter a little further back the original official form of writ in use was established by the Act of 2 Will. 4,

> c.39. That act recited that "whereas the process for the commencement of personal actions is by reason of its great variety and multiplicity very inconvenient in practice," and proceeded to enact that the process in all such actions should be according to the form contained in the Schedule to the Act annexed marked No. 1, and which process should be called a writ of summons. In the form of the writ in the Schedule the writ is directed to C. D. of, etc., in the County of…….
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> That form was followed in the Judicature Act, 1873, and it is to be found now in the forms directed to be used in Order 11., r. 3, which directs that "the writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in one of the Forms Nos. 1, 2, 3, and 4 in Appendix A Part 1, with such variations as circumstances may require," and the appendix shows that the writ must be directed to a particular defendant of a specified address. In my opinion, this writ does not comply with the form of writ which has the basis of statutory authority."

6. Similarly Atkin LJ, at page 31, said:

> "It appears to me that the procedure established by the Judicature Act necessarily implies even if it does not expressly state – and I think it does so state – that it is necessary to an action that the defendants should be named. In some cases they may be described by the office which they hold, but apart from that, they must be named; and it seems to me to be contrary to the rules to issue a writ against defendants who you do not know by describing them merely as owners of certain property. It is not right to describe the defendants in the vague way adopted in this writ."

7. Lawrence LJ, at page 32, added:

> "This is a writ in personam, and in my opinion, the writ, in not naming the defendants, but merely describing them as the owners of adjoining property, is bad. The plaintiffs do not know, and the writ does not state, whether any one of the defendants is a lunatic, or an infant, or is residing abroad, or is under any kind of disability, in each of which cases some special directions or some special procedure might be required.
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> There is no authority or precedent for such a writ, and counsel was unable to tell us of any case where a writ of this sort has been allowed."

Thus the objections were twofold. First, the prescribed form required names and addresses. Second the description was too vague.

8. A similar problem arose in In **Re Wykeham Terrace** [1971] 1 Ch. 204. In that case squatters had broken into and were in occupation of vacant premises. The plaintiff owner did not know their names. He applied for an order for possession by means of an ex parte originating summons to which there was no defendant. Service was effected by putting it through the letter box. Stamp J refused to make an order for possession on such an application. He concluded that there were two insuperable objections. The first was:

> "It is axiomatic that a person claiming an order of this court against another, except where a statute provides otherwise – and I shall have to consider whether the order and rules made under statute do provide otherwise – cannot obtain that relief except in proceedings to which that other person is a party and after that other person – the person against whom the relief is sought – has had the opportunity of appearing before this court

> and putting forward his answer to the claim. The accusatorial process by which the person against whom relief is sought is summoned to appear to answer the plaintiff's claim is the process by which justice has been done in England and Wales between man and man over the centuries."

9. The second was dealt with by Stamp J in these terms:

> "The second objection, and it is in my judgment a fatal objection, to the procedure which the applicants invoke is that an order made upon an ex parte application in ex parte proceedings will bind nobody. It is a truism that an order or judgment of this court binds only those who are parties to or attending the proceedings in which the order or judgment is given or made. This principle is blurred where the action is an action for the recovery of land by reason of the process by which the judgment is executed. The sheriff acting pursuant to a writ of possession will be bound to turn out those he finds upon the land whether they are bound by the judgment or not. But judgment and the execution of the judgment are two different things, and much of the argument which has been addressed to me in this case, I think, ignores that distinction. It is no doubt correct that if I were to grant the relief which the applicants seek upon this present application and order that the persons in occupation do deliver possession of the premises and that the applicants be at liberty forthwith to issue a writ of possession the trespassers would be turned out and in that sense the order would be binding upon them. But as a matter of law an order that the plaintiffs do recover possession of the premises binds only the parties to the proceedings: which these trespassers are not.

Thus the objections in this case were different to those in **Friern**, namely, there was no defendant and the order, as sought, would have no effect.

10. In **McPhail v Persons Unknown** [1973] 3 AER 393 the Court of Appeal was faced with a similar problem to that confronting Stamp J. Lord Denning MR doubted the correctness of the decision of Stamp J (p.398) but, as the rules had been altered, did not say why. Similar problems have arisen in the case of 'touts' and others selling pirate copies of copyright goods. In such cases if one of them is identified by name the court has been prepared to make an order against that defendant on his own behalf and as representing all other persons engaged in the activity of which complaint is made. In **EMI v Kudhail** [1985] FSR 36 the Court of Appeal concluded that the common link afforded by that activity and the common interest in wishing to remain anonymous is sufficient to justify the order.

11. Accordingly even before the introduction of the Civil Procedure Rules the position in England was anomalous. A claimant could obtain an injunction against all infringers by description so long as he could identify one of them by name, but, by contrast, if he could not name one of them then he could not get an injunction against any of them.

12. Other common law countries took a different line. Thus in **Jackson v Bubela** [1972] 5 WWR 80 the British Columbia Court of Appeal allowed an amendment to correct the name of the defendant from 'John Doe' to the real name of the driver involved in the relevant accident. It was held to be a misnomer not the substitution of one party for another. Bull J.A, at page 82, said:

> "However, I have reached the conclusion that the Local Judge was wrong in holding that a substitution for, or addition of, a party was involved and erred in not holding that the application was merely to correct a misnomer of an existing party to the action. The words "John Doe" to my mind are not restricted in connotation to a "fictitious" person or one not in existence. Traditionally the words were used in that limited sense in early ejectment suits, but for generations they have come to be accepted, used and

> understood, both in legal and common parlance, as indicating a real person existing and identifiable but whose name is not known or available to the person referring to him. That is the situation here. The appellant was not purporting to sue a fiction to maintain or acquire some property right as was done in ancient times. On the contrary, she was suing a living man whom she alleged was at a particular defined time and place operating a described motor vehicle in such a negligent manner as to cause her injuries then and there. Her litigating finger was pointed at that driver and no one else, but she did not know his name. For the purposes of suit (and it was necessary to act quickly because of the imminent expiry of the limitation period) she gave that identifiable and identified man a name, using one that would clearly connotate to all that it did not purport to be his real name. And, further, in the endorsement it was clearly stated that the real name of the defendant driver was not "John Doe" but was unknown except to the other defendant, the female respondent.
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> Under these circumstances, I can see no elements of an addition of, or substitution for, a defendant. No new entity or person was involved. It was merely an application to change the name of a party from a patently incorrect one to his proper one."

Thus the description 'John Doe' sufficiently identified the driver of the vehicle at the relevant time and place even though it was obviously not his name. The use of that description was both permitted and sufficiently certain. Such a description was also approved by the Court of Appeal in England in the case of **Levy v Levy** (unreported 9th November 1979), see per Donaldson LJ in **Barnett v French** [1981] 1 WLR 848, 853.

13. **Jackson** was followed by the British Columbia Supreme Court in **Golden Eagle v International Organisation of Masters** [1974] 5 WWR 49. In that case the plaintiff sued " persons unknown to the plaintiffs picketing in the vicinity of...carrying signs directed against the plaintiffs' vessel...". Four persons entered appearances in the name 'John Doe' and applied to have the proceedings struck out. The judge refused to strike out the action so as to frustrate a genuine claim on the ground that the plaintiff could not name the defendant. After referring to **Friern**, **Re Wykeham Terrace** and **Jackson v Bubela,** at page 52, the judge said:

> "The Court of Appeal of this province has endorsed the practice of the use of "John Doe" to describe a defendant who is a real person but whose name is not known. In the case of *Jackson v Bubela,* [1972] 5 W.W.R. 80, 20 D.L.R. (3d) 500 (B.C. C.A.), the Court of Appeal permitted the plaintiff to amend his writ of summons to substitute for the name "John Doe" the proper name of the driver of the motor vehicle. The discussion in that case indicates very clearly that in this jurisdiction a plaintiff is not to be frustrated in his claim by a procedural requirement that the defendant be named where the circumstances are such that the name is not known or ascertainable.
>
> A well-established practice of the court ought not to be changed without a convincing reason. None has been shown to me and moreover, by implication, the practice has the approval of the Court of Appeal."

There is no indication in the reports of either **Jackson** or **Golden Eagle** that the decisions turned on provisions peculiar to the law of British Columbia.

14. **Friern** and **Re Wykeham Terrace** have not been followed in New Zealand either. In **Tony Blain Pty Ltd v Splain** [1994] FSR 497 the second defendant was sued as "all persons who sell unlicensed...merchandise at or about the...stadium on 26th March 1993 who are served with this statement of claim". Anderson J granted the ex parte order sought. At page 499 he said:

> "It is an ancient maxim of the law that where there is a right there is a remedy: *Ubi jus ibi remedium*. In circumstances where it is plain that persons are infringing proprietary interests which the law recognises, or deceiving the public by way of trade in a manner which may indirectly affect the commercial interests of others, the law should, if it reasonably can, provide a remedy.
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> What is proposed in this case is that certain solicitors named in the application who by virtue of their status are officers of this court, should be authorised to accost bootleggers at the concert venues and require them to provide their current addresses, evidence of identity, and to surrender up to the named solicitors all merchandise including T-shirts, head-bands, badges or programmes in their possession or control. Persons required to respond to these oral interrogatories, which conceptually is what they are, will be such persons as are served with the orders for injunction also sought in this proceedings.
>
> The second and third defendants are identified as persons who sell unlicensed merchandise at the relevant concert venues. It is expedient to refer to them in this judgment as "John Doe" and "Jane Doe". The fact that persons cannot be identified at this stage of the proceeding is no bar to relief against persons who may be identified at a relevant time. It is not the name but the identity and identification of infringing persons which is relevant. The identify may not be immediately established but persons infringing will be identified by their act of infringement. Jane Doe and John Doe will be known by their works."

15. I should also refer to the relevant provisions of the Civil Procedure Rules. Rule 1.1(1) proclaims that

> "These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly."

What that involves is amplified in Rule 1.1(2). Rule 1.2 requires the court to give effect to the overriding objective when it exercises any power given by the Rules. Such powers include the general powers of management set out in Rule 3.1 which include the power (3.1(2)(m)) to

> "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective".

Rule 3.10 confers on the court a general power of dispensation where there has been a procedural error and provides that such error does not invalidate any step taken in the proceedings unless the court so orders.

16. Proceedings are started when the court issues a claim form at the request of the claimant, Rule 7.2(1). The form to be used is specified in Rule 4(1). Rule 4(2) authorises a variation in that form "if required by the circumstances of a particular case". 7PD.4.1(1) provides that the claim form must be headed with the title of the proceedings and indicates that the title "should state...the full name of each party..". The claim form must be served on the defendant within four months or such extended time as the court may allow, Rule 7.5.

17. Counsel for the claimants has properly been concerned throughout each stage of these proceedings with whether the court had the power to make orders of the type he sought against a defendant described otherwise than by name. He emphasises that the evidence clearly indicates that at least four copies of the book have been taken from the printers, at least one of which is still at large. He points out that, given the elaborate security surrounding the printing it must have been obvious to any one who took or received a copy that such copy and its contents were secret until publication on 21st June 2003. He suggests that an order in the form sought cannot cause confusion because anyone to whom

it is shown will know immediately whether or not it is descriptive of and therefore directed to him or her.

18. Thus there are two questions:

a) am I entitled to make the order sought? and if so
b) should I do so?

The answer to the first question depends on whether and if so to what extent I am bound by the ratio decidendi of either **Friern** or **Wykeham Terrace**. I will consider them in turn.

19. **Friern** was decided on two grounds, first that the prescribed form of writ required the defendant to be named, second that the description used was too vague. Both points were decided against the background of the regime prescribed by the Rules of the Supreme Court. The regime introduced by the Civil Procedure Rules is quite different. There is no requirement that a defendant must be named, merely a direction that he "should" be. The failure to give the name of the defendant cannot now invalidate the proceedings both because they are started by the issue of the claim form at the request of the claimant and because, unless the court thinks otherwise, Rule 3.10 so provides. The over-riding objective and the obligations cast on the court are inconsistent with an undue reliance on form over substance. The proper application of Rule 3.10 is incompatible with a conclusion that the joinder of a defendant by description rather than by name is for that reason alone impermissible. For these reasons I conclude that the decision of the Court of Appeal in **Friern** is not applicable to proceedings brought under the Civil Procedure Rules.

20. The decision of Stamp J in **Wykeham Terrace** is not binding on me in any event, though I would follow it unless it was distinguishable or I was satisfied that it was wrongly decided. I consider that it is distinguishable as being, like **Friern,** inapplicable to cases under the Civil Procedure Rules. But it is also distinguishable on other grounds. First the objection in that case was that there was no defendant. In this case there is; the question is whether he or she has been properly described. Second, the objection in that case that the order sought would not bind any one to do or abstain from doing anything. That is not so in this case. A person falling within the description of the defendant could be liable for contempt of court if he acted inconsistently with it. Any other person who knowing of the order assists in its breach or nullifies the purpose of a trial may also be liable for contempt. **Acrow (Automation) Ltd v Rex Chainbelt Inc** [1971] 3 AER 1175 and **A-G v Times Newspapers Ltd** [1992] 1 AC 191.

21. These conclusions are consistent with the decisions of the Court of Appeal in **Biguzzi v Rank Leisure** [1999] 1 WLR 1926 and **Stewart v Engel** [2000] 1 WLR 2268. Accordingly I conclude that the claimants are entitled to join as defendants and I am entitled, if I see fit, to make the order sought against persons described as quoted in paragraph 4. Mr Carr, as advocate to the court, for whose assistance I am most grateful, suggested that there might be a distinction to be drawn between cases such as **Jackson** and **Levy,** in which the description clearly referred to an identified person, **Golden Eagle** in which the defendants were identified in part by service of the statement of claim and **Tony Blain** in which the defendant was also identified in part by service of the order and this case where the description may cover no one or, by contrast, more than one person. I accept that those distinctions may be drawn but I do not consider that they should lead to a different result. The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me to matter that the description may apply to no one or to more than one person nor that there is no further element of subsequent identification whether by service or otherwise.

22. I can see no injustice to anyone if I make an order in the form sought but considerable potential for injustice to the claimants if I do not. For these reasons I will make the order.