

Neutral Citation Number: [2014] EWHC 1063 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2014

Before :

THE HONOURABLE MR JUSTICE DINGEMANS

Between :

	DEANA UPPAL	<u>Claimant</u>
	- and -	
	(1) ENDEMOL UK LIMITED (2) CHANNEL 5 BROADCASTING LIMITED (3) CONOR MCINTYRE	<u>Defendants</u>

Dr Christopher Hayes and Bruce Drummond (instructed by **Rubic Lois King solicitors**) for
the **Claimant**

Manuel Barca QC (instructed by **Charles Russell LLP**) for the **Defendants**

Hearing dates: 7 April 2014

Judgment **Mr Justice Dingemans** :

Introduction

1. This is a claim made by Deana Uppal (“Ms Uppal”), a model, actress and former Miss India UK. Ms Uppal was a housemate in the 2012 series of “Big Brother”. The claim is made against Endemol UK Limited, the producer of Big Brother, (“Endemol”), Channel 5 Broadcasting Limited, the broadcaster of Big Brother, (“Channel 5”) and Conor McIntyre, a fellow housemate of Ms Uppal on Big Brother (“Mr McIntyre”). The status of the

proceedings against Mr McIntyre was not clear from the information provided to me.

2. Contestants, who become housemates, live together in the Big Brother house where they compete to win a prize of £100,000. The contestants are constantly watched by television cameras. Sometimes they are taken into the diary room to speak to Big Brother. The contestants win by being the last person left after all the other housemates have been evicted from the Big Brother House. The series takes place over a number of weeks.
3. The claim arises in respect of two broadcasts of events from the Big Brother House. The first broadcast was on 25th June 2012 and the second broadcast was on 19th July 2012. There are claims for damages, including aggravated damages, for libel and for breach of a duty of care owed by Endemol and Channel 5 to Ms Uppal as a housemate, and for breach of contract against Endemol.
4. It is in these circumstances that Endemol and Channel 5 bring an application seeking: (a) a ruling that the words complained of in this action are incapable of bearing the meaning pleaded in paragraphs 8, 9, 10, 12 or 13 of the Particulars of Claim; (b) that the words are not capable of being defamatory of Ms Uppal; and (c) that Endemol and Channel 5 be granted summary judgment against Ms Uppal on the defamation claim.
5. Endemol and Channel 5 also seek an order that Ms Uppal provide further information about her claim for breach of a duty of care and breach of contract. That application is agreed, but there is a dispute about the costs of that application.

The broadcast on 25 June 2012

6. The broadcast shows a number of persons sitting around the dining table in the kitchen. Ms Uppal was washing up. One of the housemates, Caroline, called over to Ms Uppal and the following exchange took place with Mr McIntyre (shown on the transcript as Conor):

Caroline: Deana your leg hair is on the kitchen table.

Deana: What are you saying, that I used my epilator on the kitchen table?

Caroline: You can see it.

Deana: Oh shut up [Pause] I think it's your pubes.

Arron: How inappropriate.

Caroline: So inappropriate.

Conor: [Rapping] It's your epilator, stick it up your arse, we don't give a fuck because I'm going to fucking smash your face you little piece of shit.

Ashleigh: Maybe you should play fun games with her tonight.

Conor: With who? I'll give her a fun game, I'll stick this [showing the hair brush] up her fucking minge, the stupid bastard, I'll give her a fucking epilator [thrusting the hair brush towards his groin]. I'm gonna play loads of pranks on her because she's a fucking piece of shit, I don't give a fuck if I get pulled into the Diary Room, so it could be ...

Ashleigh: Yeah, but what if she gets you back with water?

Conor: What?

Ashleigh: What if, say you got her with water like Arron?

Conor: And she threw it over me, I'd punch her in the face just knock her out, just get up from that you piece of shit ... [making a punching sound].

7. Shortly afterwards, Mr McIntyre was shown going to the diary room to speak to Big Brother (shown in the transcript as BB). He was reminded that he had agreed to the rules of the Big Brother House about unacceptable language and behaviour, and reminded of what he had said, and the following exchange took place:

BB: Do you understand how unacceptable this kind of language is when aimed at another housemate?

Conor: Yeh it was just anger.

BB: Big Brother suggests you find other ways to express your anger. Conor, do you understand how serious?

Conor: Yep, yep one hundred per cent.

8. It might be noted that, notwithstanding the exchange set out above, Mr McIntyre did not look particularly contrite. Out of fairness to Mr McIntyre I should record that I have not heard evidence from him, nor did I hear any submissions made on his behalf. The whole exchange took place over about 4 minutes of viewing time.

The broadcast on 19 July 2012

9. On 19th July 2012 two housemates Scott and Ashleigh were shown talking, while other housemates, including Mr McIntyre (shown on the transcript as Conor) were listening. The following exchange took place:

Ashleigh: I was watching her eating her cereal and I was actually cringing so much inside, like, she was getting the milk and the fucking and she was picking it up with her hands, not a spoon.

Scott: What? What was she picking up with her hands? [laughing]

Ashleigh: The milk and cereal.

Scott: You know what, they used to do that in my Dad's take away.

Conor: What?

Scott: My Dad owned an Indian take away and they used to do the thing with their hands, maybe it's the culture.

Ashleigh: I don't know ...

Voiceover: Coming up: [The camera then showed the diary room with Scott in the chair] Big Brother has no option other than to issue you with a formal warning. If you use this type of language again then Big Brother may have to consider removing you from the Big Brother House.

Scott: Oops I'm sorry.

10. There was then a commercial break, and a very short piece showing Miss Uppal speaking to another housemate about other housemates' sense of humour. It was then shown and announced that Scott had been called to the diary room. Scott was reminded by Big Brother about the rules regarding unacceptable language and behaviour and a transcript of his remarks was read out. The following exchange took place:

BB: Big Brother believes that your use of language in this conversation could be seen as stereotyping and therefore potentially offensive do you understand?

Scott: Yes definitely. Oops I'm sorry.

BB: Big Brother has no option other than to issue you with a formal warning. If you use this type of language again then Big Brother may have to consider removing you from the Big Brother House. Do you understand Scott?

Scott: Now I hear it back it sounds really bad. Oh that's really horrible cos I didn't actually want to, I actually do like Deana and I didn't want to be horrible about her like that. I feel just disappointed in myself, getting carried away and talking about someone especially like that, yeh I'm really sorry about that.

11. It was common ground that Scott did appear genuinely sorry for what he had said.

Other materials

12. The Claimant adduced a considerable amount of evidence showing media and public reaction to the broadcasts. It is common ground that this evidence is not admissible on an application to determine meaning, and I have therefore not taken this material into account.

13. The Claimant also adduced rulings by Ofcom which investigated complaints into, among other matters, the broadcasts which are the subject of this action. It is again common ground that the question which was asked by Ofcom, namely whether the broadcast was highly offensive and in breach of the relevant code, was not the issue before me.

The pleaded meanings

14. In the Particulars of Claim it was pleaded that the meanings of the words broadcast on 25th June 2012 were “*that the Claimant had below average intelligence*”; “*alternatively that the Claimant is in some way socially or intellectually inferior*”. A further pleaded meaning, said to arise from the way in which the hair brush was used, was “*that the Claimant was sexually promiscuous*”.

15. It was pleaded that the meanings of the words broadcast on 19th July 2012 were “*that the Claimant was in some way socially or intellectually inferior to the other housemates because she was of Indian origin or descent*”.

Relevant legal principles

16. This is an application about whether the words are capable of bearing a defamatory meaning. It is not the hearing of a preliminary issue for a determination as to the actual meanings of the words. The actual meaning of the words is a matter for trial, or the hearing of any preliminary issue as to actual meaning. There was much common ground in the submissions from Dr Hayes and Mr Drummond on behalf of Ms Uppal and Mr Barca QC on behalf of Endemol and Channel 5, and I am grateful to all counsel for their assistance.

17. The principles to be applied on applications of this nature were summarised by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at paragraph 14:

"The legal principles relevant to meaning ... may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation ...' (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense.'"

18. It has been said that the reasonable reader is “*now perceived by the courts, both domestic and international, as having stronger stomachs and more discriminating judgment than was traditionally recognised*”, see *Lukowiak v Unidat Editorial (No.1)* [2001] EMLR 46 at paragraph 47. Mr Barca submits that the same ought to be expected of a reasonable viewer, and I accept that submission. There was some discussion by both Mr Barca and Dr Hayes about the characteristics of the reasonable viewer representative of those watching Big Brother. It does not seem to me to be possible to say more than the hypothetical reasonable viewer would have the characteristics of the reasonable reader set out in *Jeynes v News Magazines*.

19. There are a number of well-known definitions of the legal meaning of the word “*defamatory*”. Sir Thomas Bingham MR in *Skuse v Granada Television Limited* [1996] EMLR 278 at 286 said:

“A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.”

20. It follows that it is not enough that the words should damage the Claimant in the eyes of a section of the public only, see *Modi v Clarke* [2011] EWCA Civ 937.

21. It is not in dispute that to be counted as defamatory an allegation must pass a certain threshold of seriousness: *Thornton v Telegraph Media* [2010] EWHC; 1414 (QB); [2011] 1 WLR 1985 at paragraph 16. As Lord Atkin expressed it in *Sim v Stretch* [1936] TLR 669 at 672; [1936] 2 All ER 1237 at 1242:

“That juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character and are treated as actionable wrongs.”

22. It is common ground that insults or abuse are not actionable unless they contain defamatory imputations, see *Gatley on Libel and Slander*, Twelfth Edition, at paragraph 3.37. In *Berkoff v Burchill* [1996] 4 All ER 1008 the Court of Appeal accepted that words which might be understood to mean that a person was not just unattractive, but in fact repulsive, might hold a person up to contempt, scorn or ridicule, or cause him to be excluded from society. There was no real dispute about the applicable legal tests between all the members of the Court of Appeal, but a dispute about their application to the article in question. Millett LJ, who dissented in the result, noted, at page 1020 a-b that “*it is one thing to ridicule a man; it is another to expose him to ridicule*”.

The broadcasts were not capable of bearing the meanings alleged or any other meaning defamatory of the Claimant

23. In my judgment neither of the broadcasts was capable of bearing the meanings alleged by Ms Uppal, or any other meanings defamatory of Ms Uppal.
24. As to the broadcast on 25th June 2012 the words were not capable of meaning that Ms Uppal had below average intelligence or was socially or intellectually inferior. The words did not reflect on Ms Uppal's social or intellectual status. The use of the words, and in particular the use of the words "piece of shit" to describe Ms Uppal, was vile abuse.
25. The broadcast was not capable of meaning that Ms Uppal was sexually promiscuous. All that could be discerned from the broadcast was Mr McIntyre's rap about what he wanted to do to Ms Uppal. Even, assuming in the Claimant's favour, that a reasonable viewer might consider that Mr McIntyre intended to do what he had rapped about, no reasonable viewer could have thought that Ms Uppal would have been a willing participant in any such activity. Dr Hayes suggested that the Claimant might make an amendment to plead that there were sometimes sexual relationships between contestants on Big Brother, and that this might assist in determining the meaning of the rap by way of innuendo. In my judgment the proposed amendment could not meet the fundamental objection to the pleaded meaning. This objection is that there is nothing to suggest that Ms Uppal would be a willing participant in any of the suggested activity.
26. In my judgment the words were not capable of bearing any meaning defamatory of Ms Uppal. As noted above, the use of the words "piece of shit" to describe Ms Uppal was vile abuse by Mr McIntyre. Mr McIntyre's rap may have been Mr McIntyre ridiculing Ms Uppal, but the rap was not capable of exposing Ms Uppal to ridicule. Further the broadcast had to be seen with any "*bane and antidote*", which included Big Brother's condemnation of Mr McIntyre's remarks. Any reasonable viewer would have understood that the person whose reputation might have been adversely affected by this was the person who made up the rap, and not Ms Uppal.
27. As to the broadcast on 19th July 2012 the words were not capable of meaning that the Claimant was socially or intellectually inferior to the other housemates because of her Indian origin or descent. This was, as was pointed out by Big Brother in the diary room to Scott immediately after the incident, offensive racial stereotyping. This was a reflection on Scott, and it is fair to Scott to record that he did seem genuinely sorry afterwards when given a final warning by Big Brother, but it was not a reflection on Ms Uppal. The words were not capable of bearing any other meaning defamatory of the Claimant.
28. For these short reasons I have decided that the words are not capable of bearing the meanings

alleged on behalf of Ms Uppal, or any other meanings defamatory of Ms Uppal.

29. It is common ground that, in these circumstances, Endemol and Channel 5 are entitled to summary judgment on the defamation claim against Ms Uppal, and I therefore dismiss Ms Uppal's claim for defamation.

The request for further information

30. Endemol and Channel 5 have made a request for further information in relation to the claim for breach of duty of care and breach of contract. Although promises have been made to answer the request, no answer has yet been provided. It is common ground that the answer should be provided. I will order that the Further Information be provided by 4 pm on 22 April 2014, which is 14 days from the hearing.

31. There was an argument about whether the Claimant or Defendants should pay the costs of this application. In my judgment the Claimant should pay the costs. Although it is right to say, as was said on behalf of the Claimant, that she had never objected to providing the answer, the short point is that she has not yet answered the Request. This is despite the fact that a request for extra time was made and agreed, further requests for a response were made after the new deadline expired, and at the date of the hearing, the answer had still not been provided. It was said that the Claimant wanted to wait for the result of the Defendants' meaning application before answering the request. However the request for information related to separate causes of action, and did not justify delay. For these reasons I order the Claimant to pay the First and Second Defendants' costs of the application for Further Information. I will assess the costs after hearing submissions on the amount of costs.

Conclusion

32. For the reasons given above I have determined that the words are not capable of having the meanings attributed to them in the Particulars of Claim, or any other meanings defamatory of the Claimant. I grant the First and Second Defendants summary judgment on the defamation claim and dismiss the defamation claim.

33. I direct that the Claimant do provide the Further Information by 4 pm on 22 April 2014 in relation to the breach of duty of care and breach of contract claims, and pay the costs of that application.

34. Unless the parties can resolve the matters by agreement, I will hear submissions on the outstanding issues of costs, and on the assessment of the costs of the application for

Further Information.