

Statements in open court--making amends

27/05/2015

IP & IT analysis: What does the decision in *Murray v Associated Newspapers Ltd* tell us about the offer to amends procedure? Julian Santos, barrister at 5RB, considers the issues raised by the decision and how a statement in open court is often a valuable endpoint to litigation.

Original news

Murray v Associated Newspapers Ltd [2015] EWCA Civ 488, [2015] All ER (D) 151 (May)

The Court of Appeal, Civil Division, dismissed an appeal by the defendant Associated Newspapers against an order giving the claimant author permission to read a unilateral statement in open court following her acceptance of an offer of amends, under the Defamation Act 1996, s 2 (DeA 1996).

What is the factual background of this case?

The claimant, better known as the author JK Rowling, sued the defendant in libel in relation to an article published both on its website and in the *Daily Mail*. The article was entitled 'How JK Rowling's sob story about her past as a single mother has left the churchgoers who cared for her upset and bewildered' and purported to be based on the claimant's account of her experiences as a single mother in Edinburgh in the 1990s. Her account had appeared on the 'Gingerbread' internet website. The defendant's defamatory article had alleged that the claimant had given a knowingly false account of her experiences and falsely and inexcusably accused her fellow churchgoers of behaving in a bigoted, unchristian manner towards her. The parties reached a settlement through the offer of amends procedure, and the claimant then applied for permission to read a unilateral statement in open court in terms approved by the court. The defendant appealed against Tugendhat J's approval of the claimant's proposed statement.

What is the law around offer of amends and making a statement in open court?

The offer of amends procedure was introduced by DeA 1996, ss 2-4. An offer of amends can be made before or after service of proceedings, but must be made before service of a defence. An offer can be qualified or unqualified. Where the offer is unqualified, the offeror accepts that the article bears the meaning attributed to it by the claimant (or potential claimant), and that it was defamatory. The offer must be to make a suitable correction and a sufficient apology published in a reasonable and practicable manner, and to pay such compensation and such costs as may be agreed or determined. If the offer is not accepted it is a complete defence (in the case of a qualified offer it is a defence in respect of the meaning put forward in the offer) unless a claimant can show that the offeror acted in bad faith. If the parties cannot agree on the appropriate level of compensation it is determined by a judge. An early apology and offer of the amends can attract a discount in damages of up to 50% (see eg *Cairns v Modi*; *KC v MGN Ltd* [2012] EWCA Civ 1382, [2012] All ER (D) 01 (Nov)).

A claimant can apply to the court for permission to read a statement in open court in accordance with the Civil Procedure Rules 1998, SI 1998/3132, Pt 53, PD 6.3 and it was established in *Winslet v Associated Newspapers Ltd* [2009] EWHC 2735 (QB), [2009] All ER (D) 22 (Nov) that such an application can be made where the offer of amends regime is engaged.

On what grounds did the defendant appeal against the claimant making a unilateral statement in open court?

The defendant contended that Tugendhat J had been wrong to approve the proposed statement because it went outside the claimant's case in two material respects:

- o mischaracterising the meaning of the words complained of (the meaning objection), and
- o including matters relevant to aggravation of damages which went beyond the allegations in the particulars of

claim (the aggravated damages objection)

However, shortly after permission to appeal was granted, the claimant opted not to oppose the appeal in relation to the aggravated damages objection. The meaning objection was restricted to the claimant's proposed inclusion of a denial that her Gingerbread article was 'dishonest' in her unilateral statement. The defendant argued that the use of this word, which had not appeared in the pleadings, added an impermissible 'moral colour' to the meaning that the defendant had conceded in its unqualified offer of amends. This was therefore unfair to the defendant and the judge was wrong to permit the inclusion of that word.

On what grounds did the Court of Appeal dismiss the defendant's appeal?

Sharp LJ, giving the leading judgment, stated that a statement in court must be fair and proportionate and not misrepresent a party's case or the nature of any settlement that has been reached. However, the court would be unlikely to intervene in a unilateral statement in the absence of any substantial unfairness to the objecting party and 'nit-picks' were to be discouraged. Further, a party making a statement in open court is exercising their right to freedom of expression and the court should not be too ready to intervene in those circumstances. Sharp LJ held that the pleaded meaning was clearly and unambiguously set out in the statement and the sentence containing the word 'dishonest' was no more than an expression in ordinary and less formal language of the correctly identified pleaded meaning. It was impossible to see how the claimant could have given a 'knowingly false' account of her experiences and 'falsely and inexcusably accused' her fellow churchgoers without being dishonest. As for the aggravated damages objection, even though it was not being contested by the claimant, Sharp LJ noted that a situation might arise where matters occur or are discovered after the case is pleaded which are relevant to damages and which it would be legitimate for a claimant to refer to. Too rigid an approach by reference to pleadings might be counterproductive and encourage a claimant to plead too much, which would not be conducive to settlement. What it is fair and reasonable for a claimant to say must depend on the facts.

What can lawyers learn from this ruling?

As the Court of Appeal noted, the offer of amends procedure is a very powerful tool for defendants to use. A statement in open court is often a valuable endpoint to litigation brought to achieve vindication, since it provides the means for more publicity to be given to a settlement than might otherwise occur. It is clear that the court wanted to discourage collateral disputes or nit-picking in relation to these useful procedures, which are designed to facilitate settlement. The court clearly expects parties to approach these procedures constructively and to resolve issues sensibly. Lawyers will therefore do well to avoid being drawn into costly disputes over minor differences where there is no 'substantial unfairness' to the objecting party. However, as the judgment makes clear, the objecting party does have the option of making submissions to the judge in response to the application.

Interviewed by Barbara Bergin.

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