Neutral Citation Number: [2021] EWHC 601 (QB)

Case No: QB-2020-003829

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 March 2021

Before :

MR JUSTICE JOHNSON

- -

Between :

LADY COLIN CAMPBELL

Claimant

- and -

MGN LIMITED

Defendant

- -
- -

William McCormick QC (instructed by Keystone Law) for the Claimant
Christina Michalos QC (instructed by Reach PLC) for the Defendant

Hearing date: 9 March 2021

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Approved Judgment

Mr Justice Johnson:

1. This is a trial of preliminary issues as to the meaning of an extract from a newspaper article. The article was published in the Daily Mirror, and online, by the Defendant on 19 November 2019. The two versions of the published article are not identical but there is no material difference between them. The article's headline was "A glimpse into the sordid world of entitled elite." It made reference to an interview given by His Royal Highness, The Duke of York about his relationship with a man, Epstein, described in the article as "a convicted sex offender". The full article (in its online form) is set out as an appendix to this judgment. It included the following words ("the words"):

> "Then, remarkably, Lady Colin Campbell left us all open-mouthed on Monday when she appeared on Breakfast TV to defend Epstein's right to rape children.
>
> 'He was procuring 14-year-old prostitutes,' she said. 'They were not minors, they were prostitutes, there is a difference.'"

2. The Claimant contends that the words mean: "the Claimant had appeared on national television for the specific purpose of defending Jeffrey Epstein's right to rape children and had done so." She contends that this was defamatory of her, both at common law and under s1 Defamation Act 2013.

3. The Defendant denies the claim. It contends that the words mean: "On Monday 18th November 2019 on Breakfast Television, the Claimant appeared to defend Jeffrey Epstein's right to rape children when she drew a remarkable and untenable distinction between procuring 14 year old prostitutes and procuring minors for sexual intercourse." It seeks to justify this meaning as being "true in substance and in fact."

4. On 16 February 2021 Nicklin J directed a trial of the preliminary issues of (a) the natural meaning of the words, and (b) the extent to which the meaning comprises a statement of fact and/or opinion.

The legal framework

5. Meaning: The legal principles to be applied when determining meaning are summarised in *Koutsogiannis v Random House Group Ltd* [2019] EWHC 48 (QB) [2020] 4 WLR 25 *per* Nicklin J at [11]-[12]. The Court's task is "to determine the single natural and ordinary meaning of the words". This is "the meaning that the hypothetical reasonable reader would understand the words bear." In making that determination the Court should apply the approach identified in *Koutsogiannis* at [12]. There is no dispute between the parties that (so far as is relevant to this hearing) that approach accurately reflects the law.

6. Fact/opinion: Again, the legal principles are well-established. They are summarised by Nicklin J in *Koutsogiannis* at [16]-[18]. Again, there is no dispute between the parties as to the accuracy of that summary. The ultimate question is the impact on the hypothetical reasonable reader (*Koutsogiannis* at [16(iii)]), in other words whether the hypothetical reasonable reader would understand the passage in question, read in context, as conveying fact or opinion.

7. Determining whether words express an opinion, or an asserted fact, is part and parcel of determining the words' meaning. Both questions depend on how the words would strike the hypothetical reasonable reader. It would be artificial to determine the two issues in any specific order, because then the resolution of one issue might impact on (or "stifle") the resolution of the other – see *Barron and others v Collins* [2015] EWHC 1125 (QB) *per* Warby J at [20]-[21]. That is not how a reader naturally approaches the words: the meaning of the words, and whether they convey fact or opinion, is assimilated holistically. I have therefore sought to answer the fact/opinion question at the same time as the resolution of the meaning question.

Extraneous evidence

8. In advance of the hearing, I read (in this order) the order of Nicklin J, the print version of the article, the online version of the article, the extracts from the statements of case which addressed the issue of meaning and the skeleton arguments. In reading the Defendant's skeleton argument I omitted what appeared to be an extract from a transcript of the programme ("the programme") from which the quotations in the article were said to be taken. Other material had been included in the bundle, including a link to the programme. I did not read this material and I did not view the programme. That is because (1) my preliminary view was that this additional material is not relevant to any issue in the hearing, (2) I was aware from the skeleton arguments that there is a dispute between the parties as to its admissibility, and (3) it seemed to me to be better not to read the material until after I had heard argument on the question of admissibility.

9. As to (3), a court will often read disputed material "de bene esse", that is to read it on a provisional basis without having first ruled that it is admissible, before then reaching a view as to whether it is admissible: if it is admissible then the material will be taken into account, if it is not then it will be left out of account. This approach can, in some contexts, be pragmatic, save time and cost and be helpful to the resolution of the question of admissibility. Here, however, it seemed to me that reading the material might make it more difficult to determine the meaning of the words in the way that is required by the authorities. Instead of reading the words in a way that is as close as possible an approximation to the hypothetical reasonable reader, I would then be reading them as someone who had viewed the programme with which the words are concerned. Unless it were established that the material is properly admissible, that would risk distorting, rather than assisting, the process of determining the correct meaning of the words.

10. Ms Michalos QC relied on the judgment of Tugendhat J in *McAlpine v Bercow* [2013] EWHC 1342 (QB) at [51]-[54]:

> "51. There may be an issue between the parties whether the circumstances of a publication amount to extrinsic facts, which have to be proved as such to support an innuendo, or whether they are general knowledge, which can be relied on in support of its natural and ordinary meaning. Either way, the court must find that the facts are known to the reader.
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> …
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> 54. In cases where the extrinsic fact is obscure a claimant will have to adduce evidence from witnesses or documents to prove that the readers of the words complained of knew the extrinsic

> facts. But in other cases a claimant may rely on an inference prove that some readers had the necessary knowledge of the extrinsic facts."

11. Ms Michalos' argument was that the interview given by the Duke of York was very well known, that the Claimant's appearance on television to discuss the interview was a matter of general knowledge, that what the Claimant said had become highly controversial and had been the subject of wide reporting, and that there must be a substantial overlap between the population that saw the Claimant on the programme and the population that read the article. She submitted that the Claimant's appearance on the programme was so well known that the content of the programme amounted to general knowledge which informs the natural and ordinary meaning of the words. Alternatively, the content of the programme is relevant to a possible innuendo meaning. Although this was not currently pleaded, if the Court rejected the Defendant's contention as to the natural and ordinary meaning of the words then it would be likely that the Defendant would apply to amend.

12. I do not accept that the additional material is admissible in this trial. There is no pleaded case that the detailed content of the programme was a matter of general knowledge at the time of publication of the article, or that the Defendant relies on any sort of innuendo meaning. There is no evidence that the detailed content of the programme was a matter of general knowledge at the time of publication of the article. The Defendant has not sought to adduce evidence as to the intersection between the populations that (1) viewed the programme, and (2) read the article. Instead, the Defendant's pleaded case is that the words bore the natural and ordinary meaning for which it contends. Naturally enough, therefore, Nicklin J directed the trial of a preliminary issue as to "the natural and ordinary meaning of the words" rather than any innuendo meaning. The additional material is not relevant to that issue (see *Koutsogiannis* at [12(x)]). I have not therefore considered it.

Argument

13. Both parties accepted that there is a potential ambiguity in the wording "appeared on Breakfast TV to defend." The ambiguity arises because "to defend" could, in this context, either be an infinitive of purposive or an infinitive governed by the verb "appeared". Both parties agreed that it is necessary to resolve the ambiguity.

14. Recognising that the Defendant's pleaded formulation (see paragraph 3 above) preserved the ambiguity, Ms Michalos QC offered an alternative: "During the course of an appearance on Breakfast Television on Monday 18th November 2019, the Claimant seemed to defend Jeffery Epstein's right to rape children when she drew a remarkable and untenable distinction between procuring 14-year-old prostitutes and procuring minors for sexual intercourse."

15. Mr McCormick QC contends that the hypothetical reasonable reader would, before encountering the words, appreciate the heading, the headline, and the preceding content of the article. The heading (in the print version, but absent from the online version) is "Darren Lewis. Honest and opinionated." That gives rise to an expectation that there will be "a clear slant, not nuanced debate" and that it will be something to be "read and absorbed swiftly" without "semantic analysis". The headline ("A glimpse into the sordid world of entitled elite") is hard-hitting and gives rise to the expectation that

"certain persons are in the line of fire". The earlier part of the article contains pointed attacks on the Duke of York and three senior conservative politicians who are, in context, presented as an "entitled elite" who live in a "sordid world." The words start with "Then remarkably", indicating that what is to follow is at least as bad. There is no nuance or debate about what the Claimant did – it is presented as fact. A reasonable reader would take the article as meaning that the Claimant had asserted as a fact that sex with a 14-year-old prostitute could not be rape, presumably on the basis of a false trope that a prostitute cannot be raped. The Claimant's pleaded meaning (see paragraph 2 above) accurately reflects the words of the article, albeit removing the potential ambiguity.

16. Ms Michalos QC contends that there is nothing in the words to support the Claimant's contended meaning that the Claimant had appeared on the television programme "for the specific purpose of" defending Epstein's right to rape children. This meaning wrongly involves the selection of "one bad meaning" when "other non-defamatory meanings are available." In order to resolve the ambiguity, it is necessary to read what immediately follows, namely a reference to the distinction that it was asserted the Claimant drew, followed with "Is there?". This indicates that the Claimant was seeming to defend a right to rape children by suggesting that there was a distinction, and that the author of the article was questioning the validity of the suggested distinction. Taken in context, the words do not convey the meaning that the Claimant appeared on the programme for the purpose of defending Epstein and instead they convey the meaning that she appeared on the programme and, in what she said, she seemed to defend Epstein. Alternatively, even if the opening sentence of the words bears the meaning pleaded by the Claimant, the remainder of the text makes it clear that the Claimant was seeking to draw a distinction, and that distinction seemed to proffer a defence of Epstein's conduct. This was an expression of opinion, as was the observation that the Claimant's distinction left viewers "open-mouthed."

17. Ms Michalos relied on *John v Guardian News and Media Ltd* [2008] EWHC 3066 (QB) *per* Tugendhat J at [16]-[17]:

> "If the judge errs in holding words to be capable of a meaning pleaded by a claimant, then [this may impose on the defendant] a very onerous burden… which interferes with the right to freedom of expression… [T]he Strasbourg cases show that a claimant can make an action more difficult to defend by characterising an impugned statement as fact rather than as a value judgment… There is a real risk of a violation of Art 10 if a claimant strains to attribute to words complained of a high factual meaning, which cannot be defended as true…"

18. Thus, if the fact/opinion assessment is wrongly made then that might give rise to a breach of the right to freedom of expression under article 10 of the European Convention on Human Rights. The point, therefore, is that it is necessary to take care in making the assessment because it may have significant consequences. I accept the submission so far as it goes, but it does not assist in pointing to the correct resolution of the preliminary issues. That must be done by applying the principles I have identified.

Discussion and decision

19. I formed a preliminary impression as to the meaning of the words in advance of the hearing, and in advance of reading the parties' statements of case and skeleton arguments.

20. That initial impression was that the words:

    (1) assert as fact: "Lady Colin Campbell appeared on a breakfast television programme. She did so to defend the rape of children by Epstein. Her defence was that the children had been 14-year-old prostitutes rather than minors."

    (2) express the opinion: "This is a shocking thing to say. Her comments are an exemplar of the sordid world of the entitled elite."

21. I have reviewed that provisional view in the light of the helpful arguments advanced by the parties.

22. The fact of the ambiguity (and therefore the fact that it is possible to construe the words in a non or less defamatory way) does not mean that the words must be construed in the manner which is most favourable to either party's litigation interests – see *Rufus v Elliott* [2015] EWCA Civ 121 [2015] EMLR 17 *per* Sharp LJ at [37]: "The touchstone remains what would the ordinary reasonable reader consider the words to mean. Simply because it is theoretically possible to come up with a meaning which is not defamatory, the court is not impelled to select that meaning."

23. I agree with both parties that the article would be read at speed. I do not think that the hypothetical reasonable reader would be likely to notice the ambiguity. The words "appeared on Breakfast TV" would be read as identifying what the Claimant did, and the words "to defend Epstein's right to rape children" would be read as the Claimant's purpose in doing that. That is the most natural meaning of the words, particularly when they are read quickly and without pedantic attention to the detail or a search for a possible alternative meaning. That meaning emerges largely because of the order in which the words are written ("appeared to defend Epstein's right to rape children…" might naturally convey a different meaning). It also emerges from the context in which the words appear: a hard-hitting opinion piece which is intended to provide a "glimpse into the sordid world of entitled elite" (as opposed to, for example, a nuanced review of what the Claimant had said and how it was to be construed). The reader would not be avid for scandal, but the context promises the delivery of scandal. That promise informs the meaning.

24. The Defendant's pleaded meaning (see paragraph 3 above) simply preserves the ambiguity. The Defendant's alternative formulation (see paragraph 14 above) changes the verb "appeared" to the noun "an appearance", which is placed immediately before "on Breakfast Television". In isolation, that would tend to resolve the ambiguity in the way that I consider is the most natural reading of the words. However, the Defendant's formulation then introduces an additional word "seemed", before "to defend." That would resolve the ambiguity in the opposite direction, but only by introducing additional language which does not reflect the most natural reading of the words.

25. My initial impression of the natural meaning of the words therefore resolves the ambiguity in a way that more closely aligns with the approach taken by the Claimant – the "to" denotes the Claimant's reason for appearing on the programme. However, I consider that the Claimant's "for the specific purpose of" introduces a shade of meaning that is absent from the more simple "to".

26. Conversely, the Claimant's "and did so" (ie that the words conveyed the meaning that the Claimant did in fact defend Epstein's right to rape children) is an over-simplification. The words do not naturally convey the meaning that the Claimant asserted that Epstein had a (general) right to rape children. Rather, they explain the distinction that it is said the Claimant sought to draw. That distinction, and hence the meaning of the words, is not adequately captured by the two words "did so". On this aspect, therefore, I consider that the natural meaning of the words is a little closer to that contended for by the Defendant.

27. I agree that the article (both in its online form and, more obviously from the layout, in the print form) is clearly an "opinion piece". It does, indeed, express an opinion. However, that opinion is based on asserted fact. Its status as an opinion piece does not in itself mean that everything within the article is an expression of opinion as opposed to an assertion of fact. Insofar as the words conveyed what the Claimant did and said, and what her purpose was, I consider that they are naturally read as statements of asserted fact. The opinion that is expressed derives from "left us all open-mouthed" and the context of the words as a whole which provide a "rogues' gallery" of high-profile individuals whose actions are said to provide a "glimpse into the sordid world of entitled elite".

28. The Claimant does not make any complaint about this expression of opinion. She accepts that if she did, and said, that which is attributed to her then that would amount to fair comment. Her complaint is that the statements of fact in the article were defamatory and unjust. That may be so, but the Court's task is to determine the single natural and ordinary meaning of the words. The consequences of that ruling, in terms of the future shape of the action and the issues that will subsequently fall for decision are matters for later.

29. The statements of case, skeleton arguments and oral argument have been of great assistance in testing my provisional impression and reaching a final conclusion as the meaning of the words. In the event, however, my final conclusion is the same as the initial impression that I formed as to the natural meaning of the words to the hypothetical reasonable reader.

Next steps

30. Consequent on this decision, there will need to be amendments to the statements of case. The Claimant will need to re-amend her Particulars of Claim to bring her pleaded meaning into line with that found by the Court. The Defendant will then need to consider its Defence. The Court does not usually grant permission for amendments that have not been seen. Subject to the parties' submissions, it appears to me that the Defendant should provide a draft of its proposed amended defence to the Claimant. If the amendments are agreed, then an Amended Defence can be filed under CPR 17.1(2)(a) and then a Reply will need to be served. To the extent that any amendments

to the Defence are contentious, then the Defendant will need to make an application to amend.

Outcome

31. The words:

(1) assert as fact: "Lady Colin Campbell appeared on a breakfast television programme. She did so to defend the rape of children by Epstein. Her defence was that the children had been 14-year-old prostitutes rather than minors."

(2) express the opinion: "This is a shocking thing to say. Her comments are an exemplar of the sordid world of the entitled elite."

Appendix: The online version of the article

"**Darren Lewis: A glimpse into the sordid world of entitled elite**

As it gets so cold that even Prince Andrew and Boris Johnson have to keep their trousers on, spare a thought for both men.

No, really. Last week ended with the Prime Minister at a Taunton Primary School not knowing the words to the nursery song The Wheels On The Bus.

This week Prince Andrew actually believes his interview – described as "a masterclass in repetitional suicide" – was a great success.

Dumb and Dumber are a snapshot of the entitled elite so detached from reality it is breathtaking.

Tory MP Michael Gove's remarks – that food bank users have only themselves to blame – have come back to haunt him. Earlier this month his colleague Jacob Rees-Mogg dismissed those who perished in the Grenfell Tower disaster as lacking the common sense to ignore advice from the Fire Brigade.

Johnson, meanwhile, remains under pressure as US businesswoman Jennifer Arcuri – snubbed since giving the PM those "technology lessons" – appears ready to elaborate on what could constitute a conflict of interest.

As for the Duke of York, his belief that his wafer-thin, rehearsed defence for his nocturnal activities would satisfy anybody tells you everything about the delusion and entitlement he is now drowning in.

As the BBC's Emily Maitlis dismantled him on camera, Andrew denied claims from Virginia Giuffre that she was forced to have sex with him when she was 17. He didn't regret his association with Epstein – a convicted sex offender said to have abused three or four girls as young as 14 a day. Andrew described him simply as having behaved "in a manner unbecoming".

A string of related claims made by the Prince in his defence were ripped to shreds either on social media within hours or subsequently in the press.

Then, remarkably, Lady Colin Campbell left us all open-mouthed on Monday when she appeared on Breakfast TV to defend Epstein's right to rape children.

"He was procuring 14-year-old prostitutes," she said. "They were not minors, they were prostitutes, there is a difference."

Is there?

Were he the man in the street, the Bollinger-swilling classes would be calling for Andrew to be banged up. Instead they are wondering out loud why he didn't just keep schtum.

They inhabit a different, far more sordid world to the rest of us.

Yet they'd have us believe Harry and Meghan spending Christmas away from the Queen is the problem."