Neutral Citation Number: [2021] EWHC 1888 (QB)

Case No: QB-2020-002028

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2021

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

REBEKAH VARDY	**Claimant**
- and -	
COLEEN ROONEY	**Defendant**

- -
- -

Hugh Tomlinson QC and Sara Mansoori (instructed by **Kingsley Napley LLP**) for the **Claimant**
David Sherborne and Ben Hamer (instructed by **Brabners LLP**) for the **Defendant**

Hearing date: 18 June 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE STEYN DBE

Mrs Justice Steyn :

A. Introduction

1. This judgment is given after the hearing of a pre-trial application in this libel claim, by which the claimant seeks to strike out or obtain summary judgment on some of the allegations in the defendant's Amended Defence. Both the claimant and the defendant are well-known media and television personalities who are married to former England footballers.

2. The claim is brought in respect of a post published by the defendant on Instagram, Twitter and Facebook on 9 October 2019 ("the Post"). The meaning of the words complained of in the Post, as determined by Warby J following a trial of a preliminary issue as to meaning ([2020] EWHC 3156 (QB)), is:

> "Over a period of years the Claimant had regularly and frequently abused her status as a trusted follower of the Defendant's personal Instagram account by secretly informing The Sun newspaper of the Defendant's private posts and stories, thereby making public without the Defendant's permission a great deal of information about the Defendant, her friends and family which she did not want made public."

3. In summary, the claimant applies:

   i) For §§15(34) to (46) and 16(9) of the Amended Defence:

      a) to be struck out pursuant to CPR r.3.4(2); and/or

      b) excluded from consideration in these proceedings pursuant to CPR r.3.2(1)(k) and/or (m); and

   ii) For the claimant to be given summary judgment in respect of the issue as to the claimant's responsibility for the leak of information leading to the publication of the "TV Decisions" Articles pleaded at §§15(20) to (24) of the Amended Defence.

4. The application as originally filed did not refer to §§15(34) or 16(9). An application to amend was filed on 8 June 2021 and I granted the application at the outset of the hearing.

5. The defendant indicated, in the witness statement of Mr Paul Lunt, that she is "prepared to accept that the Court will not be required to further consider the matters pleaded at paragraphs 15(45) and 15(46) of the Amended Defence which will no longer be pursued". As those paragraphs are withdrawn, it is common ground that I do not need to consider them. In respect of §16(9), which I address further below, both parties acknowledged at the hearing that the position could and should be clarified by amendment.

B. The procedural history

6. The claim was issued, and Particulars of Claim were served, on 12 June 2020. On 17 September 2020, Nicklin J ordered that meaning be determined as a preliminary issue. Time for service of the Defence was extended until 28 days after the determination of the preliminary issue. However, the Defendant chose to serve her Defence on 2 October 2020, prior to the meaning trial.

7. The trial of the preliminary issue as to meaning took place on 19 November 2020 before Warby J. By an order made the following day, he made a declaration as to the meaning of the words complained of in the terms I have set out in §2 above. In accordance with directions made by Warby J, Amended Particulars of Claim were served on 23 November 2020, an Amended Defence was served on 30 November 2020, and the Claimant's Reply was served on 8 December 2020.

8. The proceedings were then stayed until 8 February 2021 while a mediation took place. That was unsuccessful.

9. On 16 March 2021, a costs and case management conference ("the CCMC") took place before Master Eastman. For the purposes of the CCMC, the parties filed costs budgets on 22 February 2021. Master Eastman directed the claimant to issue any application for strike out and/or summary judgment and/or to limit the evidence by 30 March 2021. He made directions for the filing and service of Revised Costs Budgets on Precedent H forms following the determination of the claimant's application, which was duly issued on 30 March 2021.

C. The procedural rules and principles

10. The overriding objective is to deal with cases justly and at proportionate cost. This includes (CPR r.1.1(2)), so far as is practicable:

> "(c) dealing with the case in ways which are proportionate—
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> …
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".

11. The claimant's application is made pursuant to the following rules:

    i) First, CPR r.3.4(2), which gives the court power to strike out a statement of case, or part of one:

> "…if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

ii) Secondly, CPR r.3.1(2)(k) and/or (m) which provides:

> "Except where these Rules provide otherwise, the court may –
>
> (k) exclude an issue from consideration; …
>
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective…"

iii) Thirdly, CPR r.24.2, which provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
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> …
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at trial."

12. Practice Direction 3A (Striking Out a Statement of Case) – supplements CPR r.3.4. It provides:

> "1.1 Rule 1.4(2)(c) includes as an example of active case management the summary disposal of issues which do not need full investigation at trial.
>
> 1.2 The rules give the court two distinct powers which may be used to achieve this. Rule 3.4 enables the court to strike out the whole or part of a statement of case which discloses no reasonable grounds for bringing or defending a claim (rule 3.4(2)(a)), or which is an abuse of the process of the court or otherwise likely to obstruct the just disposal of the proceedings (rule 3.4(2)(b)). Rule 24.2 enables the court to give summary judgment against a claimant or defendant where that party has no real prospect of succeeding on his claim or defence. Both those powers may be exercised on an application by a party or on the court's own initiative.

…

1.6 A defence may fall within rule 3.4(2)(a) where:

(1) it consists of a bare denial or otherwise sets out no coherent statement of facts, or

(2) the facts it sets out, while coherent, would not even if true amount in law to a defence to the claim.

1.7 A party may believe he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks appropriate.

1.8 The examples set out above are intended only as illustrations."

13. Practice Direction 53B (Media and Communication Claims) provides so far as material:

"2.1 Statements of case should be confined to the information necessary to inform the other party of the nature of the case they have to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim

…

Defamation

…

4.3 Where a defendant relies on the defence under section 2 of the Defamation Act 2013 that the imputation conveyed by the statement complained of is substantially true, they must—

(1) specify the imputation they contend is substantially true; and

(2) give details of the matters on which they rely in support of that contention.

…

4.5 Where a defendant alleges that the statement complained of was, or formed part of, a statement on a matter of public interest under section 4 of the Defamation Act 2013, they must—

(1) specify the matter of public interest relied upon; and

> (2) give details of all matters relied on in support of any case that they reasonably believed that publishing the statement was in the public interest."

14. In *Duchess of Sussex v Associated Newspapers Limited* [2020] EWHC 1058 (Ch), [2020] EMLR 21 (*"Sussex (1)"*), Warby J addressed the core principles to be applied when considering an application to strike out under CPR r.3.4(2). In that case, he was addressing an application to strike out parts of the particulars of claim brought by a defendant, whereas I am here concerned with an application by the claimant to strike out parts of a defence. Making adjustments to reflect the differing context, the core principles are these:

    i) A defence must be concise. It should be confined to the material facts necessary to inform the claimant of the nature of the case she has to meet. In a defamation claim, (a) where the defence of truth is relied on, that includes pleading a clear and succinct summary of the material facts relied on in support of the plea of truth (that is, capable of proving the sting of the defamatory meaning); and (b) where the public interest defence is relied on, that includes pleading a clear and succinct summary of the matters relied on to prove that the defendant reasonably believed that publishing the statement was in the public interest. (See PD53B and *Tchenguiz v Grant Thornton LLP* [2015] EWHC 405 (Comm), Leggatt J at [1].)

    ii) "An application under CPR r.3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should "grasp the nettle"…, but it should not strike out under this sub-rule unless it is "certain" that the statement of case, or the part under attack discloses no reasonable grounds of claim... Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment." (*Sussex (1)* at [33(2)], citations omitted.)

    iii) "Rule 3.4(2)(b) is broad in scope, and evidence is in principle admissible. The wording of the rule makes clear that the governing principle is that a statement of case must not be "likely to obstruct the just disposal of the proceedings". The rule is to be interpreted and applied in the light of the overriding objective of dealing with a case "justly and at proportionate cost". …" (*Sussex (1)* at [33(3)].)

    iv) ""Abuse of process" is a sub-set of category (b). An abuse of process is a significant or substantial misuse of the process. It may take a variety of forms. Typical examples are proceedings which are vexatious, or attempts to re-litigate issues decided before, or claims which are "not worth the candle" (*Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946). But the categories are not closed." (*Sussex (1)* at [33(4)].)

    v) "Rule 3.4(2)(c) gives the court "an unqualified discretion to strike out a claim or defence where a party has failed to comply with a rule, practice direction or court order": Civil Procedure n.3.4.4. In many cases there may be alternatives … but the right approach to serious procedural default may be to strike out the

> entire claim or, by analogy, an entire section of it …" (Sussex (1) at [33(5)], citations omitted.)

15. Applying these principles, Warby J struck out certain parts of the particulars of claim on the grounds that the allegations pleaded (namely, allegations of dishonesty in the context of a misuse of private information claim) were irrelevant and likely to obstruct the just disposal of the proceedings, by calling for an investigation which could have no bearing on the decision as to liability. He observed that:

> "34. In the context of r.3.4(2)(b), and more generally, it is necessary to bear in mind the Court's duty actively to manage cases to achieve the overriding objective of deciding them justly and at proportionate cost; as the Court of Appeal recognised over 30 years ago, "public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for the fair determination of the dispute between the parties": *Polly Peck v Trelford* [1986] Q.B. 1000, 1021 (O'Connor LJ). An aspect of the public policy referred to here is reflected in CPR r.1.1(2)(e): the overriding objective includes allotting a case "an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".
>
> …
>
> 51. …The overriding objective of deciding cases justly and at proportionate cost requires the Court to monitor and control the scale of the resources it devotes to each individual claim. Irrelevant matter should, as a rule have no place in Particulars of Claim. There may be cases where the court would allow the inclusion of some minor matters that are, on a strict view, immaterial. But where the irrelevant pleading makes serious allegations of wrongdoing which are partly implicit, unclear, lacking in the essential particulars, and likely to cause a significant increase in cost and complexity the case for striking out is all the clearer."

16. In *Duchess of Sussex v Associated Newspapers Limited* [2021] EWHC 273 (Ch), [2021] 4 WLR 35 (*"Sussex (2)"*), Warby J addressed the well established principles that govern the court's exercise of the power to give summary judgment pursuant to CPR r.24.2 at [12]-[13]:

> "12. … In this context there is no assumption that what is asserted in the Defence is true; evidence to the contrary is admissible, and is commonly adduced by the applicant and by the respondent. But it is possible to seek summary judgment on the footing that the claim is plainly meritorious and the defence contentions, even if true, could not amount to an answer to the claim.
>
> 13. Both parties have referred me to Lewison J's classic exposition of the right approach to summary judgment

in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (approved by the Court of Appeal in *AC Ward & Son Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301). The passage was about applications by defendants, but applies equally to applications such as the present, made by a claimant. Making adjustments to reflect that context, and omitting internal citations, the seven key principles are these:

> "(i) The court must consider whether the [defendant] has a 'realistic' as opposed to a 'fanciful' prospect of success; (ii) A 'realistic' [defence] is one that carries some degree of conviction. This means a claim that is more than merely arguable … (iii) In reaching its conclusion the court must not conduct a 'mini-trial' … (iv) This does not mean that the court must take at face value and without analysis everything that a [defendant] says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents … (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial … (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case … (vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of … successfully defending the claim against him … Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go

> to trial because something may turn up which would have a bearing on the question of construction: …"

D. The application to strike out

17. The application notice relies on subparagraphs (a), (b) and (c) of r.3.4(2) on the basis that striking out §§15(34)-(46) and 16(9) of the Amended Defence is required:

> "1.1 … in order to keep the proceedings strictly to the issues necessary for the fair determination of the dispute between the parties and to achieve the overriding objective of dealing with the case justly and at proportionate cost The various matters relied upon in paragraphs 14(34), 15(35) to 15(46) and 16(9) are either irrelevant to (or, at best, of collateral relevance to) the issue of 'truth' and resolution of them will inevitably involve very [considerable] additional expenditure of costs and Court time; and/or
>
> 1.2 the particulars disclose no reasonable grounds for defending the claim and/or they fail to comply with a rule or practice direction (in particular, paragraphs 2.1 and 4.5(2) of Practice Direction 53B). They consist of unsupported assertion and speculation and/or do not logically support the case of truth advanced by the Defendant and/or are not properly pleaded and would involve the Court in time consuming and irrelevant exploration of matters not necessary for the fair determination of the action."

18. As I have said, the defendant has agreed to withdraw §§15(45) and (46), so it is unnecessary for me to consider those subparagraphs.

19. The defendant has pleaded that the meaning of the words complained of in the Post is true. The particulars of truth are set out across 32 pages in subparagraphs (1) to (47) of §15 of the Amended Defence. The core particulars allege, in short, that the defendant (having become concerned that stories on her "Private Instagram Account" were leaking to *The Sun* newspaper) posted three invented stories, namely, the "Gender Selection Post", the "TV Decisions Post" and the "Flood Basement Post" (which the defendant has referred to cumulatively as "the Sting Operation Posts"). The defendant's pleaded case is that she limited access to these stories to the claimant's account and each story then found its way to The Sun, being published in what the defendant refers to as "the Sting Operation Articles".

20. The defendant contends (Amended Defence §15(32)(a)):

> "The Claimant was the person responsible for the provision of these stories to The Sun, whether providing them directly herself or indirectly through individuals whose activities were approved or condoned of [sic] by the Claimant and who had access to her Instagram account, such as Caroline Watt (her PR agent who had also been responsible for operating this account, for example, when the Claimant was in the jungle filming the television

> programme, *I'm a Celebrity*, at the end of 2017) and/or through Mr Hayward and their company, Front Row Partnership ("FRP")."

21. A further central element of defendant's particulars of truth is at §15(32)(c) and §15(33), where the defendant has pleaded that the claimant provided other private information derived from six posts on the defendant's Private Instagram Account to The Sun which resulted in the publication of "the Marriage Article", "the Pyjamas Article", "the Car Article" and "the Soho House Article".

22. Save to the extent that the claimant seeks summary judgment in respect of §§15(20) to (24) of the Amended Defence, which relate to the TV Decisions Post, the claimant does not seek to strike out or obtain summary judgment in respect of these core particulars of truth. These are matters to be determined at trial.

23. However, the claimant contends that §§15(34) to (44) are irrelevant or of such peripheral relevance that they should be struck out on case management grounds. The claimant has provided a list of 52 issues arising from the disputed paragraphs and contends that the determination of these issues will have little or no impact on the court's determination of the central issue in the case. In response to the defendant's submission that she is entitled to rely on the disputed paragraphs in mitigation of damages and in support of her *Burstein* plea, the claimant submits that an unacceptable plea of truth cannot be saved on the basis that the matters may be relevant to damages. They would have to be properly pleaded in that context and, as Warby J observed in *Sussex (1)* at [52], "*the Court needs to keep a watchful eye on the proportionality of litigating matters which go solely to damages*".

24. The claimant submits, and the defendant acknowledges, that §§15(34) to (44) plead matters which are relied on as propensity or similar fact evidence. The claimant accepts that if these paragraphs concerned other instances where she is alleged to have leaked private information about others, they would have some probative value as similar fact evidence, but she submits these paragraphs contain almost no allegations of that kind.

25. It is common ground that in determining whether similar fact evidence ought to be admitted:

    i) The first stage of the inquiry is whether, assuming it to be true, the evidence is probative – in the sense that it makes the matter which requires to be proved (or disproved) more or less probable - of some matter which requires proof. If it is probative, then it is legally admissible. If it is not, it is inadmissible.

    ii) The second stage of the inquiry requires the court to make a case management decision as to whether evidence which is legally admissible should be admitted or excluded. This assessment depends primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole. Considerations which the court should have in mind include the need for proportionality and expedition, and to avoid unbalancing the trial by focusing attention, time and resources on collateral issues. Whether matters are peripheral should be determined objectively.

(See *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 and *Mitchell v News Group Newspapers Ltd* [2014] EWHC 3590 (QB) at [52]-[58].)

26. The claimant has adduced evidence in support of her contention that acceding to the strike out application would result in a saving in the claimant's costs estimated at about £201,765. The claimant estimates that without the paragraphs she seeks to strike out, the trial will take about 5 days, whereas trial of the issues raised by those paragraphs would occupy the court for an additional 3-4 days. The claimant contends that the additional time and costs entailed in determining these collateral issues would be disproportionate. She acknowledges that a number of these issues may properly be the subject of cross-examination, but submits that background material and evidence should not be pleaded (with the consequence, if it is pleaded, that it is the subject of disclosure).

27. The defendant submits that insofar as the claimant's application is based on case management considerations, it is made too early. In any event, the defendant contends that the claimant has overstated the extent to which the length of the trial and the costs will be increased by issues arising from §§15(34) to (44) of the Amended Defence. In terms of the additional time that these issues will take, the defendant points out that at the time of filing her Directions Questionnaire the claimant suggested the trial would last five days and the claimant's costs budget for the CCMC assumed a seven day trial. It is only in the context of this application that the claimant has contended that if she succeeds on her application the time estimate will be five days whereas if the application fails it will be nine days. The defendant submits the alternative costs budgets served by the claimant to demonstrate the cost impact of acceding to or rejecting the claimant's application have been prepared and served for forensic purposes, and so should be viewed with caution. In assessing proportionality, the defendant submits it is important to note that the claimant has made a claim for unlimited damages.

28. The defendant acknowledges that the paragraphs the claimant seeks to strike out are relied on as similar fact evidence. The defendant submits that these paragraphs all address intertwining strands of her case that the claimant was responsible for the leak of Posts from the defendant's Private Instagram Account.

§15(34): "The Claimant's close relationship with journalists at The Sun"

29. At §32(d) the defendant has pleaded:

> "As part of this, the Claimant has developed and maintained exceptionally close relationships with a number of journalists over the years, especially at *The Sun*, to whom she provides private information for the purposes of self-promotion or in return for financial reward or positive coverage (as referred to in sub-paragraph (34) below).

30. There is no application to strike out §32(d), but the claimant seeks to strike out §15(34) in which the defendant has provided five pages of particulars, in subparagraphs (a) to (g), in support of the contention that the claimant has had an "*exceptionally close relationship*" with *The Sun* or journalists who work for *The Sun*, and "*she has used this for the purposes of promoting or financially exploiting her public profile*", which in

turn is relied on in support of the contention that the claimant was the source of articles about the defendant in *The Sun*.

31. I have concluded that the claimant's application to strike out §15(34) succeeds to the extent that the following subparagraphs should be struck out:

    i) §15(34)(c)(ii), from "Amongst her other publicity seeking behaviour" to the end of subparagraph (ii);

    ii) §15(34)(c)(iv);

    iii) §15(34)(e); and

    iv) §15(34)(g).

32. In §15(34)(c)(ii), the defendant has pleaded alleged publicity seeking behaviour on the part of the claimant during a football match on 16 June 2016, in the form of insisting on sitting in a seat by the defendant (to guarantee her appearance in the media) rather than her allocated seat. For the purposes of the strike out application, I assume the allegation is true. The allegation is not probative of the plea of truth. The fact that a person seeks media coverage of their own attendance at a football match does not make it more probable that they would disclose private information about another person to the press.

33. I accept that an exceptionally close relationship between the claimant and the newspaper or journalists to whom the defendant's Posts are alleged to have been disclosed is probative of the plea of truth, albeit on its own it would not take the defendant far. It is one of the building blocks on which the defendant's inferential case is built. It can, at least, be said to be less likely that a person with no such relationship would regularly disclose private information about others to that newspaper or those journalists and, perhaps, less likely that the disclosure would, on its own, result in a published article. However, the behaviour described in the part of §15(34)(c)(ii) which I consider should be struck out, although it is included within a section alleging an exceptionally close relationship between the claimant and The Sun or journalists working for The Sun, does not support that allegation.

34. As this part of the pleading is irrelevant, and it would be a waste of time and resources for it to be the subject of disclosure, evidence and determination, it falls to be struck out pursuant to CPR r.3.4(2)(a) on the ground that it discloses no reasonable grounds for defending the claim and r.3.4(2)(b) on the ground that its continuing inclusion in the statement of case is likely to obstruct the just disposal of the proceedings.

35. Paragraph 15(34)(c)(iv) pleads a newspaper report on 23 June 2016 that the claimant was asked by the then England football captain, and other senior players, "*to keep a lower profile in the media*". At its highest, this is an implicit allegation that the claimant engaged in seeking publicity for herself. As I have said in relation to §15(34)(c)(ii), that is not probative of the truth of the words complained of. For the reasons I have given in relation to that subparagraph, this part of the pleading also falls to be struck out under CPR r.3.4(2)(a) and (b).

36. In paragraph 15(34)(e), the defendant relies on the fact that when *The Sun on Sunday* became the subject of a complaint to the Independent Press Standards Organisation about an article it published on 19 November 2017, based on an interview with the claimant, in which she made allegations of abuse by her second husband, the claimant provided *The Sun on Sunday* with an affidavit. The facts pleaded over a page and a half are relied on in support of the contention as to the closeness of the relationship between the claimant and *The Sun*.

37. In my judgment, the circumstances in which the claimant gave an affidavit to IPSO are so far removed from the central allegations that they cannot be considered probative. In any event, insofar as this part of the pleading may be said to provide an illustration of the claimant's relationship with *The Sun/The Sun on Sunday*, it is of such limited and peripheral relevance that I consider it should be struck out on case management grounds. If it remains in the pleading, the court would have to consider the context of the claimant's involvement in the regulatory complaint and whether it supports the defendant's contention that she has an "exceptionally close relationship" with *The Sun*. In my judgment, bearing in mind the overriding objective is to deal with cases justly and at proportionate cost, addressing §15(34)(e) would unnecessarily distract the parties and the court from the real issues that require to be determined. Accordingly, it falls to be struck out under CPR r.3.4(2)(a) and (b).

38. Paragraph 15(34)(g) alleges that, in the context of these proceedings, there were leaks to *The Sun* regarding failed without prejudice discussions which led to an article in the online and print editions of *The Sun* on 9 and 10 May 2020. The defendant alleges these leaks were made by the claimant or with her approval or condonement.

39. While this is an allegation of leaking confidential information to *The Sun*, the nature of it is very different to what was alleged in the Post. Notably, the defendant has pleaded it in support of the contention that there is a close relationship between the claimant and *The Sun*, rather than as an instance of the claimant disclosing another person's private information. Assuming it to be true, in my view, it casts very little, if any, light on whether the meaning of the Post is true.

40. The claimant contends that if the court were to engage in determining this issue, it would involve consideration of several hundred media articles concerning this case and a much greater number of requests and enquiries from the media to the claimant's advisers, as well as disclosure from the defendant. The defendant submits that her case is confined to leaking to *The Sun* and so disclosure would be limited.

41. In my judgment, the scale of the issue is unlikely to be as great as the claimant contends (not least given the likelihood that many press articles about this litigation will not contain confidential information), but nor is it nearly as limited as the defendant suggests. If the court were to engage in considering the provenance of articles in *The Sun* in which confidential information regarding this litigation have been published, it would necessarily have to consider other articles which are alleged to contain confidential information regarding this litigation. In my judgment, spending time focusing on press coverage of this litigation, an issue which is, at most, of peripheral relevance, would be an unnecessary distraction from the central issues. The time and resources required to address it would be disproportionate to the value of determining the issue. Accordingly, it falls to be struck out under CPR r.3.4(2)(b) as it would be likely to obstruct the just disposal of the proceedings.

42. I reject the claimant's submission that the remainder of §15(34) should be struck out. As I have said, an exceptionally close relationship between the claimant and the newspaper or journalists to whom the Posts are alleged to have been provided is one of the building blocks on which the defendant's inferential case is built. It is pleaded in §15(32) which the claimant does not seek to strike out.

43. In support of this alleged relationship, subparagraphs (a) and (b) plead articles published by *The Sun* and by Simon Boyle (the journalist who wrote the Flooded Basement Articles) about the claimant, based on information provided to them by her, subparagraph (c)(i), (ii) and (iii) (save the extent addressed above) pleads articles written by the claimant for *The Sun* in June 2016, and subparagraph (d) pleads that *The Sun* described the claimant as "a Sun columnist" on two occasions in June 2016.

44. The claimant contends that these subparagraphs give rise to the following issues:

> "1. Did the Claimant provide The Sun with many 'exclusive' articles over the years to (i) Andy Halls; and (ii) other journalists at The Sun?
>
> 2. Did the Claimant have an 'especially close relationship' with Simon Boyle?
>
> 3. In relation to each of the articles published in The Mirror on 1, 7, 8, 9, 16 and 21 May 2016:
>
> (a) Were they as a result of contact between the Claimant or FRP and Mr Boyle?
>
> (b) Were they as a result of contact between Caroline Watt or Danny Hayward and Mr Boyle?
>
> (c) Did the Claimant benefit financially as a result of her images photographs being published in each or any of the articles?
>
> (d) Do the answers to (a) to (c) above mean that the Claimant had an exceptionally close relationship with Simon Boyle?
>
> 4. Was the Claimant the author of 'a number of articles' for The Sun, directly or indirectly? If so, which articles and what is the context of each article relied upon?
>
> 5. What was the context for the Claimant's contribution to the three diary pieces during the 2016 UEFA European Football Championship?"

45. In my view, save to the extent that I have struck out parts of §15(34)(c), the claimant has overstated the time and resources required to address §15(34)(a)-(d). The existence and content of published articles is easily established. The context in which they were published, and whether they demonstrate the alleged close relationship, will add some time and cost, but it must be borne in mind that whether the claimant had a close relationship with *The Sun* or journalists at *The Sun* is an issue raised in paragraphs that

are not sought to be struck out. I am not persuaded that §15(34)(a)-(d) (save the extent already stated) should be struck out under CPR 3.4(2)(a), (b) or (c).

46. Paragraph 15(34)(f) alleges:

> "For several years, the Claimant has been heavily engaged on social media with various Sun journalists, directly communicating and interacting with them, in particular Simon Boyle, Dan Wootton, Hannah Hopes, Andy Halls, Amy Brookbanks and Beth Neil."

47. In my judgment, the claimant's engagement on social media with these journalists is relevant in considering the defendant's case that she had an exceptionally close relationship with them, which I have accepted is one of the building blocks on which the defendant seeks to build her defence of truth. I am not persuaded that it should be struck out on case management grounds. In my view, the appropriate stage at which to ensure that disproportionate time and resources are not expended addressing §15(34)(f) is when considering the scope of disclosure. In particular, bearing in mind that this is not a central part of the plea of truth, it would be appropriate to limit the time period that is the subject of disclosure and limit the search to the named journalists.

§15(35): "Positive promotion of the Claimant from The Sun in return"

48. In §15(32) the defendant has pleaded that the claimant's purpose in providing private information was to promote herself and/or to financially exploit her public profile (b) and:

> "(e) As a result of her providing such information about the Defendant, the Claimant has received positive coverage in return in The Sun (and Sun on Sunday), as is clearly demonstrated in sub-paragraph (35) below."

49. The claimant does not seek to strike out §15(32), but she applies to strike out §15(35) in which the defendant has particularised the alleged benefit to the claimant in respect of various of the alleged leaked information. The claimant acknowledges that this is an issue that can be explored at trial, but submits these are background matters that ought not to appear on the face of the pleading. She contends that it is of limited relevance and should be struck out on case management grounds.

50. Having regard to the way in which the claimant puts her application, it is clear that this paragraph does not fall to be struck out pursuant to CPR 3.4(2)(a) or (c). The question is whether, if it remains in the pleading, it would be likely to obstruct the just disposal of proceedings and so should be struck out on case management grounds, applying CPR r.3.4(2)(b). I am not persuaded that it would. It is probative, going as it does to the claimant's alleged purpose or motive in disclosing private information about the defendant, and forms one of the building blocks of the defendant's inferential case. The issues to which it gives rise, as to how and when the articles which are alleged to have been the benefit for leaking, are relatively confined and addressing them is not, in my judgment, disproportionate. Accordingly, I refuse to strike out §15(35).

§15(36) to (37): "The Claimant's campaign of self-promotion"

51. At §15(32)(b) of the Amended Defence the defendant has pleaded the claimant's "established history and habitual practice of providing private information to journalists or the press, especially *The Sun and The Sun on Sunday* newspapers, either directly or via an intermediary such as FRP, for the purposes of promoting herself and/or financially exploiting her public profile". At 15(32)(f) the Amended Defence states:

> "Again, this is consistent with the Claimant's campaign of self-promotion which has carried on throughout her relationship with the high-profile footballer, Jamie Vardy, and in particular led to the founding of FRP, the talent management and public relations agency which she was involved in setting up with Ms Watt and Mr Hayward and which specialises in working directly with celebrities and their agents to achieve maximum press coverage and paying them from the sales generated by their pictures (as referred to in sub-paragraphs (36) to (37) below).

52. As I have said, the claimant does not seek to strike out §15(32), but she contends that §15(36) and (37) should be struck out. Paragraph 15(36) is a short paragraph which repeats the bare allegations - already made in essentially the same terms in §15(32) - that the claimant (a) has an established history of self-promotion and (b) a habitual practice of providing private information to journalists and the press. Paragraph 15(37) sets out "facts and matters" relied on in 15 subparagraphs (a) to (o).

53. The fact that a person has a history of self-promotion is not logically probative of whether she disclosed private information *about another* to the press. Nor is it logically probative of that matter if the person has a habitual practice of providing private information *about herself* to the press. There is a clear and obvious distinction between choosing to put information about oneself into the public domain, and disclosing private information about another person without their permission and in breach of trust.

54. Although §15(36) refers to the provision of private information without specifying that the allegation is that the claimant has provided information *about herself,* it appears in the section headed "*The Claimant's campaign of self-promotion*" and (save for two arguable exceptions in §15(37)(g) and (h)) none of the facts relied on in §15(37) concern allegations of disclosure of private information about others.

55. The first arguable exception, in §15(37)(g), alleges that during the Football World Cup in 2018, the claimant orchestrated a photograph of herself and eight other partners of footballers from the England team outside a restaurant in St Petersburg. It is alleged that the claimant suggested a group photograph, and insisted that it be taken outside without letting the others know that she had arranged for a paparazzo to be outside to photograph them. This comes close to an allegation of disclosing others' private information to the press, in that it may be alleged that there was an expectation that the place where the group met would be kept private. But that is not how it is currently pleaded. It appears to be an allegation of self-promotion. If it were to be alleged that the claimant was breaching a confidence by disclosing their location, rather than merely engaging in self-promotion, that would need to be explicitly pleaded.

56. Paragraph 15(37)(h) includes the pleading that at an awards ceremony "the Claimant was accused by Sarah Harding of taking intrusive photographs of her without her consent". A breach of privacy, in the form of taking intrusive photographs, would be

potentially probative. However, the defendant does not allege that the claimant took intrusive photographs of Ms Harding. The fact that the claimant was *accused* of doing so is incapable of providing any support for the defendant's plea of truth.

57. In my judgment, insofar as the facts pleaded in §15(37) have any relevance, it is as background facts or evidence, not material facts necessary for the purpose of formulating the defence. Accordingly, I consider that §15(36) and (37) should be struck out pursuant to CPR 3.4(2)(a) and (b).

§15(38) to (44): "The Claimant is the 'Secret Wag'"

58. At §15(32)(g) the defendant has pleaded that the Claimant is the "Secret Wag", the name of a column that appeared in *The Sun* from September to October 2019, under which pseudonym it is alleged the claimant provided information about the private lives of other wives and girlfriends of high-profile footballers. In the Reply, the allegation is denied. No application has been made to strike out this allegation as it appears in §15(32).

59. The paragraphs the claimant applies to strike out, §15(38) to (44), appear under the heading "The Claimant is the 'Secret Wag'". In these subparagraphs, the defendant contends that the claimant was the columnist known as the "Secret Wag" or the primary source for that column, and this is relied on as part of her alleged "history and practice of publicly disclosing private information about other people she was friendly or associated with". Twelve articles which appeared in the Secret Wag column are identified. The basis on which the defendant infers the claimant is the Secret Wag is pleaded. And, in any event, it is pleaded that the claimant was the source of an article which bore the headline "Out of all the footballers' partners, Danielle Lloyd was the most desperate to be a wag" ("Article 8").

60. The claimant contends that these paragraphs give rise to the following issues:

> "49. Is the Claimant the 'Secret Wag' and the author of this column?
>
> 50. Has the Claimant contributed to the Secret Wag column by publicly disclosing confidential private information about other people with whom she was friendly or associated? (As to which see Issue 52 below)
>
> 51. In relation to each of the twelve articles relied upon in paragraph 15(41) of the Defence:
>
> (1) What information in the article is '[highly] private information'?
>
> (2) Was that private information 'leaked' to The Sun?
>
> (3) Was, or can it be inferred, that the Claimant was the source for that particular piece of private information?

> 52. Was the Claimant the source of Article 8 pleaded at paragraph 15(41)(i) concerning Danielle Lloyd. What was the reason for the removal and reposting of Article 8 by The Sun?"

61. The claimant contends that determination of these issues would involve substantial time (adding a day to the trial) and costs. The pleading does not give any details of any private information the twelve Secret Wag Articles are alleged to contain and so extensive analysis of each article would be required. It should be struck out on case management grounds. Whereas the defendant contends that this is a classic example of a pleading that is admissible as similar fact evidence and in support of a *Burstein* plea.

62. I am not persuaded that these paragraphs should be struck out. While these paragraphs do not go to the core issues, the allegation that the claimant had, or was the primary source for, a gossip column about professional footballers and their partners in *The Sun* is logically probative similar fact evidence. I accept the defendant's contention that I should be careful at this stage of proceedings in shutting out matters which may be arguable in the context of *Burstein*. The column was only published for one month, so the number of articles is quite limited (consisting of fewer than half the number of articles appended to the claimant's Reply), and the claimant's issues 49 and 50 are raised, in any event, in part of the pleading that the claimant does not seek to strike out. So I do not consider that allowing these paragraphs to remain in the pleading is likely to add disproportionately to the time and costs. However, I reserve the ability to cut out or limit this aspect of the case if that should prove necessary in the interests of dealing with the case justly and at proportionate cost.

§16(9): The public interest defence

63. In §16(9)(c) of the Amended Defence, under the heading "Particulars of public interest", the defendant has pleaded that "Paragraphs 14 to 15 above are repeated". The claimant objects that incorporating the whole of the truth defence is impermissible because the defendant is only entitled to rely on those matters which she knew about at the time of publication in support of her public interest defence. Some of the matters pleaded in §15 of the Amended Defence occurred after the Post was published and so cannot have been known to the defendant at that time.

64. In her application and skeleton argument, the claimant contended that the defendant had had an opportunity to amend (this defect having been drawn to the defendant's attention in a letter dated 3 March 2021), had not done so, and so the offending part of the pleading should be struck out. However, recognising that the application to strike out §16(9) was only made by amendment on 8 June 2021, and (unlike §15(34)) it was not addressed in Ms Harris's first witness statement (and consequently was not addressed in evidence by the defendant), during the hearing the claimant's position was that this defect could be remedied by amendment rather than by an order striking it out.

65. The defendant acknowledges that there are some matters pleaded within §15 which post-date the Post and so evidently were not known when it was published, such as the allegation regarding leaking of information in respect of this litigation. The defendant contends that striking out would be inappropriate as the defendant has not been given a proper opportunity to deal with it, in circumstances where it did not form part of the application as filed on 30 March 2021 or the evidence filed with that application.

Decision in respect of §16(9)

66. Incorporation of the whole of the truth defence is impermissible. In order to establish the defence under section 4 of the Defamation Act 2013, the defendant can only rely on facts and circumstances that existed at the time of publication, and any of those facts and circumstances of which the defendant was unaware at the time cannot be relied on in support of her contention that she reasonably believed that publishing the Post was in the public interest.

67. Nevertheless, the appropriate course is for the defendant to amend the pleading, rather than for the court to strike out any part of §16(9). That is so because the application to strike out this part of the pleading was raised late and (unlike §15(34)) the defendant was not given a proper opportunity to consider and address it in evidence. It is apparent from the approach the defendant has taken in respect of §15(45) and (46) that if it had been raised in the original application the defendant might have agreed to remedy the issue. I appreciate that the claimant raised her objection to §16(9) in a letter of 3 March 2021, but inevitably the focus was on the scope of the application once that had been filed.

E. The application to exclude issues from consideration

68. The alternative way in which the claimant put her application in respect of §§15(34)-15(44) and 16(9) was to seek to have the issues to which they give rise excluded from consideration in reliance on CPR r.3.1(2)(k) and/or m. I have addressed the arguments in respect of these paragraphs in the context of the strike out application and reliance on CPR r.3.1(2) does not lead to the conclusion that any matters that I have not struck out should be excluded from consideration under (k) and/or (m) as being that "consideration of these issues would be disproportionate to litigate and their inclusion in these proceedings is contrary to the overriding objective".

F. The summary judgment application

69. The claimant seeks:

> "summary judgment in respect of the issues as to the Claimant's responsibility for the leak of information leading to the publication of the "TV Decisions" Article pleaded at paragraphs 15(20) to (24) of the Amended Defence and paragraphs 33 to 37 of the Reply as the Claimant believes that the Defendant has no real prospect of succeeding on the issue and knows of no other compelling reason why the issue should be disposed of at trial."

70. Subparagraphs (20) to (23) plead the posting of the (fake) TV Decisions Post on 25 September 2019, its inaccessibility to other followers, and the publication on 29 and 29 September 2019 of the two TV Decisions Articles in The Sun. Paragraph 15(24) of the Amended Defence states:

> "The TV Decisions Articles quote an unidentified 'source', and are proximate to the TV Decisions Post, a post which was visible only to the Claimant's account. The TV Decisions Articles also use similar language and refer to similar matters as contained in

> the TV Decisions Post. In the premises, it can be inferred that the Claimant was the source of the information (whether directly or indirectly) that formed the basis of the TV Decisions Articles."

71. In short, the claimant contends that the defendant's case that the TV Decisions Post was the source of the TV Decisions Articles is not sustainable. She submits the determination of this issue requires an analysis of the Articles and the Post from which the Articles are said to be derived. It is apparent from the lack of similarity between them that this aspect of the defendant's case has no real prospect of success. Most notably, the TV Decisions Articles do not refer to the television programme "I'm a Celebrity Get Me Out of Here", although that programme was implicitly referred in the TV Decisions Post, whereas the TV Decisions Articles referred to "Strictly Come Dancing" and a fashion programme which were not referred to in the TV Decisions Post, and she submits the language used is not similar.

72. In response, the defendant has raised a point of principle as to whether the matter on which the claimant seeks summary judgment is an "issue" for the purposes of CPR r.24.2 on which summary judgment can be given. The defendant relies on *Anan Kasei Co v Neo Chemicals* [2021] EWHC 1035 (Ch) ("Anan Kasei") in support of the submission that it is not. In *Anan Kasei* Fancourt J held at [82]:

> "The "issue" to which rule 24.2 ("*the claimant has no real prospect of defending the claim or issue*") and PD 24 refers is a part of the claim, whether a severable part of the proceedings (e.g. a claim for damages caused by particular acts of infringement or non-payment of several debts) or a component of a single claim (e.g. the question of infringement, or the existence of a duty, breach of a duty, causation or loss). It is not any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage.

73. The defendant contends that the question whether a source of the TV Decisions Articles was the TV Decisions Post is a factual issue that is intertwined with the plea of truth in respect of the other Sting Operation Posts and Articles. It is not a part of the claim on which summary judgment can be given. In any event, she submits the timings and subject-matter of the TV Decisions Articles and TV Decisions Post give rise to a real prospect of success on the factual issue.

74. The claimant submits that I should not follow *Anan Kasei* on the meaning of the word "issue" in CPR 24.2. Mr Tomlinson relies on paragraph 79 of *Anan Kasei*, from which it appears that the respondent did not dispute that the issues raised could be the subject of a summary judgment application. On this basis, he suggests it does not appear the

judge heard argument on whether the summary judgment jurisdiction was wide enough to cover the issues raised in the application. Mr Tomlinson draws attention to the use of the word "issue" throughout the Civil Procedure Rules, and in particular in r.1.4(2)(c): "*Active case management includes … deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*". He submits that there is no indication in the CPR, or in the commentary in the White Book, that the word "issue" has a narrower meaning when it is used in r.24.2 than elsewhere in the CPR. In the alternative, if summary judgment cannot be given on §15(20) to (24), Mr Tomlinson submits that the issue in respect of the TV Decisions Post and Articles should be excluded from consideration pursuant to CPR r.3.1(2)(k).

Decision on the summary judgment application

75. In my judgment, Fancourt J's analysis of the scope of the summary judgment jurisdiction in *Anan Kasei* applies and I should follow it. *First*, although I am not technically bound by that decision, as Lord Neuberger observed in *Willers v Joyce (No.2)* [2016] UKSC 44 [2018] AC 843 at [9], puisne judges "*should generally follow a decision of co-ordinate jurisdiction unless there is a powerful reason for not doing so*". *Secondly*, I agree with Fancourt J that there is an important distinction between seeking summary judgment and the determination of a preliminary issue. As Fancourt J observed at [80]-[81]:

> "… A party is free to issue a summary judgment application, subject to compliance with the rules, and the court will determine it, whether it depends on an issue of law, fact or mixed fact and law. Whether a preliminary issue should be determined is a matter for the court to decide, and any party may apply for a direction in that regard. The court has various case management considerations and guidance from appellate courts to weigh when deciding whether the overriding objective is best served by directing the trial of a preliminary issue at that stage. The likelihood that resolution of such an issue may assist the parties to settle the claim or part of the claim is one of the relevant considerations, in modern case management.
>
> The justification for allowing the parties to bring forward a summary judgment application is the asserted strength of the case against the respondent and the fact that a final trial of at least part of the claim will be disposed of…"

76. If I were to make a preliminary determination of whether the TV Decisions Post was the source of the TV Decisions Articles, that decision would have no consequence other than reducing the number of issues to be determined at trial. In effect, the claimant is seeking the determination of a preliminary issue rather than summary judgment. Yet the issue which she seeks to have determined on a preliminary basis is not one which any court would have acceded to setting down as a preliminary issue. It is one of many factual issues to be resolved at trial in determining whether the truth defence is made out. It seems highly unlikely that resolution of this issue would assist the parties to settle the claim.

77. While there is some force in the claimant's submission that there are significant differences between the TV Decisions Articles and the Post from which they are alleged to derive, the question whether the claimant disclosed the TV Decisions Post to *The Sun* is one that can only properly be answered having regard to all the evidence at trial. It is not a wholly discrete issue that is incapable of being affected by the evidence as to whether there was a pattern of disclosure by the claimant of private information from the defendant's Posts.

78. Accordingly, I reject the claimant's application for summary judgment in respect of §15(20) to (24) of the Amended Defence. It follows from the reasons that I have given that I also reject the alternative application made during the hearing that these paragraphs should be excluded from consideration pursuant to CPR r.3.1(2)(k).

G. Conclusions

79. The claimant's application succeeds to the extent that the following paragraphs of the Amended Defence shall be struck out (and is otherwise dismissed): (1) §15(34)(c)(ii) (from "Amongst her other publicity seeking behaviour" to the end of subparagraph (ii)); (2) §15(34)(c)(iv); (3) §15(34)(e); (4) §15(34)(g); (5) §15(36); and §15(37).