Neutral Citation Number: [2023] EWHC 1825 (KB)

Case No: KB-2023-000774

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2023

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

(1) RICHARD (RAZIEL) DAVIDOFF **(2) HANNAH (HANNI) DAVIDOFF** **(3) TAMARA DAVIDOFF** **(4) DEBBY DAVIDOFF**	**Claimants**
- and –	
NICHOLAS HARGRAVE	**Defendant**

- -
- -

William Bennett KC (instructed by **Patron Law Ltd**) for the **Claimants**
Adam Speker KC and Samuel Rowe (instructed by **Payne Hicks Beach LLP**) for the **Defendant**

Hearing date: 4 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 21 July by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HEATHER WILLIAMS

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Introduction

1. The four claimants bring defamation proceedings in relation to: (a) the defendant's quote-tweet of 7 May 2022, in which he commented on a tweet from the Leasehold Knowledge Twitter account; and (b) the defendant's post that was published on 9 June 2022 below an article in *The Negotiator* from 11 May 2022 headlined "*Two estate agents apologise in court over online reviews about employer*". I will refer to the former as "the 7 May 2022 Tweet" and the latter as "the 11 May 2022 Post" as although the defendant's comment was made on 9 June 2022 this is the shorthand term that has been used by the parties.

2. The claim was issued on 2 February 2023. Particulars of Claim were served on 16 February 2023, having been amended before service. They were not prepared by Mr Bennett KC, who now appears for the claimants. I refer to the detail of this pleading (the "APC") from paragraph 10 below. In relation to the 7 May 2022 Tweet, the claimants alleged that the words complained of referred to each of them (paragraph 9, APC). In support of this proposition, they contended that the hyperlink to an article on the Leasehold Knowledge website that was contained in the Leasehold Knowledge tweet formed part of the publication (paragraph 10, APC). In the alternative, the claimants relied upon a reference innuendo (paragraph 11, APC). As regards the 11 May 2022 Post, the APC accepted that only the first claimant was expressly referred to, but a reference innuendo was relied upon in respect of the other claimants, as set out at paragraphs 8.1 and 8.2 of the pleading.

3. By application notice filed on 17 April 2023, the defendant applied to strike out paragraphs 8.1, 8.2 and 11 of the APC ("the Strike Out Application"). He also applied for a determination of the following preliminary issues: (a) whether the words complained of at paragraphs 4 and 7 of the APC referred to the claimants or each of them; (b) the natural and ordinary meaning(s) borne by the words complained of at paragraphs 4 and 7, APC; (c) whether the words complained of, in the meanings, found, are defamatory of each of the claimants at common law; and (d) whether the statements complained of are statements of fact or expressions of opinion ("the Preliminary Issues Application").

4. By order dated 20 April 2023, Nicklin J directed that the Preliminary Issues Application and the Strike Out Application be listed for a half day hearing ("the Nicklin Order"). These applications were duly listed before me on 4 July 2023. The Reasons accompanying the Nicklin Order included the following:

> "(B) The issue of reference is not straightforward, and needs careful consideration before directions for the issue to be resolved as a preliminary issue. Logically, the Strike Out Application needs to be dealt with first, because it affects the parameters of the Preliminary Issues Application. Separately and additionally, I understand the appeal from my decision in ***Dyson v Channel Four Television Corpn*** [2023] EMLR 5 is being heard by the Court of Appeal on 27 June 2023.

> (C) At the moment, I consider that the Preliminary Issues Application should be dealt with once the Strike Out Application has been determined, but they will be listed to be heard together."

5. In *Dyson v Channel Four Television Corpn* [2022] EWHC 2718 (KB), [2023] EMLR 5 ("*Dyson*"), the case referred to, Nicklin J had indicated that caution should be exercised before the court directed disputed issues of reference to be determined as a preliminary issue, given that an investigation of the evidence and findings of fact may be required, which may not be suitable for disposal at that stage. He observed that if reference was to be determined as a preliminary issue "the parameters must be spelled out very clearly and the cost/benefit analysis considered carefully" (paragraphs 57 and 58). The Judge had already indicated that it was inappropriate and unwise to embark upon determining the natural and ordinary meaning of the words used and whether they were defamatory at common law and fact or opinion before then, as without establishing reference the second and third claimants had no cause of action and their claim was hypothetical and unclear (paragraph 56).

6. Consideration of the skeleton arguments in advance of the 4 July 2023 hearing, indicated that the parties had proceeded on the basis that Nicklin J had listed a preliminary issues *trial* of the four issues identified at (a) – (d) of the defendant's application. This was erroneous. For the reasons he had identified, the Judge had listed the defendant's *application* for a trial of the preliminary issues to be considered by the court, envisaging that the Strike Out Application would be heard first.

7. In the circumstances, I raised the scope of the hearing with counsel at the outset. After giving them an opportunity to take instructions and to discuss the matter, it was agreed that the court would hear oral submissions on: (a) the Strike Out Application; and (b) a discrete point of law which I identify in the next paragraph. In the event, submissions on these matters lasted the remainder of the morning. I indicated that I would reserve judgment. I did not consider that there was value in hearing submissions on the Preliminary Issues Application before I had determined those matters, as there were too many hypothetical possibilities in play which counsel would need to address. I indicated that I would give counsel an opportunity to take stock and to make written submissions on consequential directions and the Preliminary Issues Application after seeing my judgment; and that after considering those submissions, I would decide whether a further hearing was required before the Preliminary Issues Application could be resolved.

8. The discrete point of law which the parties agreed I should resolve at this stage was formulated with counsel, as follows: "Are the parties permitted to adduce evidence regarding the defendant's followers in relation to the question of whether the hypothetical reasonable reader would click on the hyperlink in the 7 May 2022 Tweet" ("the Point of Law"). This has a potential bearing on the Preliminary Issues Application, in as much as if this was a point upon which evidence could be adduced (as the claimants submitted), the question of whether the hypothetical reasonable reader would click on the link to the article on the Leasehold Knowledge website, so that it was a part of the publication, would be a matter for factual evidence at trial and not one likely to be suitable for resolution at a preliminary stage in any event.

9. After referring to the pleadings, I will address, firstly, the Point of Law and then the Strike Out Application.

The parties' pleaded cases

The Amended Particulars of Claim

10. Paragraph 1 of the APC states that the claimants are family members who are engaged in the business of commercial and residential property sales, lettings and leasehold management through a group of companies collectively known as ABC Estates, which is "a family run business". The first and second claimant are husband and wife; and the third and fourth claimants are their adult daughters. The claimants live in Hendon, north west London "and are orthodox Jews active in the Jewish community based in and around the Edgware and Hendon areas of north London. ABC Estates has offices in Mayfair, Hendon and Edgware and conducts business across Greater London".

11. Paragraph 2 of the APC describes the defendant as the co-founder of a public affairs and government relations consultancy and a former special adviser to the Conservative Prime Ministers David Cameron and Theresa May. He operates the Twitter account @NIHargrave which the pleading says had around 4,500 followers at the material time. He is also said to be a contributor to the website www.leaseholdknowledge.com, which "writes articles about issues arising in leasehold properties and purports itself to be campaigning for leasehold reform".

12. Paragraph 3 of the APC sets out the background relied upon by the claimants. It is said that in 2019 – 2020 the claimants and ABC Estates were the subject of a large number of defamatory reviews posted on Google, which were written under fictitious names by people falsely claiming to be unhappy customers. The claimants established the identity of two of the posters as Messrs Doshi and Govan and issued proceedings for libel against them in March 2021. Messrs Doshi and Govan issued an application for strike out and/or summary judgment which was dismissed by Deputy Master Yoxall on 17 December 2021. The proceedings were later compromised and on 9 May 2021 there was a statement in open court in which each of these defendants accepted the allegations were false and apologised for the same.

13. Paragraphs 4 and 5 of the APC address the 7 May 2022 Tweet. It is said that at 8.21 am on 7 May 2022, the defendant published on Twitter a quote-tweet from @LKPleasehold, to which he had added his own commentary. The pleading continues (with an erroneous reference to "2021" rather than "2022"):

> "4. ....The May 2021 Tweet, in its entirety, was defamatory of the Claimants and stated as follows:
>
> **[Defendant's commentary]**
>
> '*Sad tale on whistleblowing from the leasehold world. Where a deeply unethical and dishonest firm have capitalised on the unsophisticated methods of those who spoke out. Funnily enough @PBottomleyMP and I haven't been treated in the same way*
>
> *Cc @melyork @anna_tims @LKPleasehold*
>
> **[original material (apparent directly below)]**

> '*Two former employees who criticised ABC Estates in fake Google reviews 'face £60,000 each in costs after libel claim, and must apologies in open court' @PBottomleyMP @michaelgove @team_greenhalgh https://leaseholdknowledge.com/two-former-employees-of-abc-estates-face-6000-each-in-costs-after-libel-claim-and-must-apologise-in-open-court/*'
>
> 5. The article contained at the hyperlink, having previously been published on www.leasholdknowledge.com by 'Admin 4' (and appended to these Particulars) contained a large photograph of the ABC Estates website, in which ABC Estates was described as an estate agency business in Edgware, Hendon and Mayfair and included, in its third paragraph, the following:
>
> '*Richard Davidoff, his wife Hanni and grown-up daughters Tamara and Debby, ABC Block Management Limited and ABC Hendon Limited claim Mr Doshi and Mr Govan had accused them of fraud, dishonesty and permitting staff to steal from tenants...*"
>
> (Emphasis in original)

14. Paragraph 10 of the APC alleged that the article contained in the hyperlink:

> "formed part of the publication complained of: the Defendant's words expressly relied upon the @LPKnowledge tweet and hyperlink and thereby directed readers to view it".

15. Paragraph 11 of the APC alleges in the alternative that:

> "the 7 May 2022 Tweet bore (and was understood to bear) the meaning at [9] above and referred (and was understood to refer) to the Claimants by innuendo. An unknown but significant proportion of readers would have read the article at the hyperlink, for the reasons given at [10] above."

16. The words complained of in relation to the 11 May 2022 Post are set out at paragraphs 6 – 7 of the APC as follows:

> "6. On 11 May 2022, an article was published in www.thenegotiator.co.uk (https://thenegotiator.co.uk/two-estate-agents-apologise-in-court-over-online-reviews-about-employer/), a copy of which is appended to these Particulars and which included the following:
>
> (At paragraph 1) '*Two estate agents in London have made a public apology in open court and face paying legal costs of £60,000 each after they posted critical reviews of their employer online using fake names*.'

> (At paragraph 2) '*Leaseholders' charity LKP reports that Dhir Doshi and Thomas Govan, both of whom worked for ABC Estates in North London, were tracked down digitally by their employer after accusing the company's management of fraud, dishonesty and permitting staff to steal from tenants all within 12 Google reviews posted using false names after they left the company.'*
>
> (At paragraph4) '*Richard Davidoff and three members of his family who run ABC Estates then initiated defamation and libel action against the duo, who failed in court last December to have it struck down*.'
>
> (At paragraph 6) '*Court papers unearthed by LKP...*'
>
> Where underlined, the words in the article provided a hyperlink to www.leaseholdknowledge.com
>
> 7. Beneath that article, the Defendant, operating the username, 'Nick Hargrave S, S' published...the following statement (the 11 May 2022 Post) which was defamatory of the Claimants:
>
> '*The boys referred to above were foolish in their methods and imprecise in their wording – and have unfortunately paid a heavy penalty.*
>
> *It is worth reading recent interventions in the House of Commons by Sir Peter on this subject*:
>
> https://www.theyworkforyou.com/debates/?id=2022-01-24c.816.0"
>
> (Emphasis in original)

17. Paragraph 8 of the APC contends that the words complained of in the 11 May 2022 Post referred to the first claimant in their natural and ordinary meaning, because the text named him. The pleading continues:

> "8. ...Further, the words complained of referred, and were understood to refer to the Second to Fourth Claimants.
>
> Particulars of Reference
>
> 8.1 The article in the Negotiator referred to 'three members' of the Davidoff family, in addition to the First Claimant, and to a publication of a report by Leasehold Knowledge (being the article at [5] above) and previous reports published on Leasehold Knowledge in December 2021. The December 2021 publication (which was, and continues to be, published at https://www.leaseholdknowledge.com/two-ex-employees-of-abc-estates-fail-to-stop-richard-davidoff-defamation-action-over-fake-google-reviews-and-face-36000-costs-so-far/) also

> refers to the First to Fourth Claimants by name and published a link to the Judgment of Deputy Master Yoxall which named each Claimant. Those reports are also available as the first Google search returns after entering the terms 'Davidoff libel' 'Davidoff apology' 'DavidoffDoshi' and DavidoffGovan'. It is to be inferred that a significant (but unquantifiable) proportion of readers either followed those hyperlinks or otherwise researched the Leasehold Knowledge report, and read the article naming the Second to Fourth Claimants.
>
> 8.2 Further or alternatively, each of the Second to Fourth Claimants was widely known to be related to Richard Davidoff, and in connection with ABC Estates by reason of the following;
>
> 8.2.1 Paragraph 1 above is repeated;
>
> 8.2.2 The Second to Fourth Claimants worked for ABC Estates, in a client-facing role; each attended the offices of ABC Estates, drove a car branded with ABC Estates name and corporate identity, which they used for personal as well as professional purposes;
>
> 8.2.3 The Second to Fourth Claimants were known as relatives of Richard Davidoff in the Jewish community in which they live and work. Many members of that community are also current or former clients, service users or competitors of ABC Estates;
>
> 8.2.4 The Second Claimant was identified in a number of Google Reviews of ABC Estates (including one published by a poster giving the name 'Nick Hargrave') which were available as search returns for ABC Estates at the time when the said statement was published;
>
> 8.2.5 Each of the Second to Fourth Claimants was named on Companies House as a current or previous director/person with significant control in respect of one or more companies within the ABC Estates group."

18. The natural and ordinary meaning of the pleaded statements is said at paragraph 9 of the APC to be:

> "that the Claimants had committed fraud, were dishonest in business, and had permitted staff to steal from residents, and had then sued individuals for making alleging [sic] that they had done so despite knowing that those allegations were substantially true. The Claimants cynically had chosen to sue individuals who would be unable to defend themselves despite the substantial truth of their allegations. The Claimants had improperly and abusively used legal proceedings to obtain an apology to which they were not in fact entitled."

The defendant's Statement of Case

19. Paragraph 9 of the Nicklin Order extended the time for service of the Defence until the Court gave further directions following determination of the Strike Out Application and Preliminary Issues Application.

20. On 10 March 2023, the defendant served a Statement of Case "for a Trial of Preliminary Issues".

21. As regards the 7 May 2022 Tweet, the document contends that:

    i) The ordinary reasonable reader would read the quote-tweet by the defendant and the underlying tweet by Leasehold Knowledge together (paragraph 5);

    ii) The words complained of did not bear a natural and ordinary meaning defamatory of any of the claimants; the tweets referred to ABC Estates and not to the claimants (paragraph 6);

    iii) The ordinary reasonable user of Twitter would not click on the hyperlink in the underlying tweet and then read the article relied upon by the claimants (paragraph 7);

    iv) Even if the ordinary reasonable user of Twitter did do this, the fact that the individual claimants were named in the article would not have been understood to mean that the defendant's words were about each or any of them (paragraph 8);

    v) The alternative innuendo case pleaded at paragraph 11 of the APC was defective, as it was premised on an acceptance that an ordinary, reasonable reader would not click on the hyperlink, but that individuals did in fact do so, but no proper particulars had been pleaded that identifiable readers did so (paragraph 9); and

    vi) Accordingly, the Tweet did not bear the meaning relied on at paragraph 9 of the APC and did not bear any defamatory meaning about each or any of the claimants (paragraph 10).

22. In relation to the 11 May 2022 Post, the defendant indicated that;

    i) The ordinary, reasonable reader would read the 11 May 2022 Post after reading the article published in *The Negotiator* referred to in the APC (paragraph 11);

    ii) The link in the post is to something recorded to have been said by Sir Peter Bottomley MP in Parliament was relevant and permissible context for his comment (paragraph 12). The text that was linked to said:

> "*We know about some of the abuses, because people who were working in firms that I would respectfully declare to be dodgy provided information anonymously. Will the hon. Gentleman join me in saying to Richard Davidoff, who might take defamation action against people who have blown the whistle on practices that we would condemn, that the courts should not be*

used to stop people blowing the whistle on practices that are questionable, if not completely wrong?"

iii) The ordinary reasonable reader would understand that the defendant's post was not adopting the report of the proceedings in the article and, to the contrary, was dissociating himself from the accusations made against the management of ABC Estates recorded in the article (paragraph 13);

iv) He was saying, and would be understood as saying, that they were onto something, but it was not as serious as recorded (paragraph 14); and in linking to what Sir Peter Bottomley MP had said in Parliament – which the ordinary reasonable reader would have read – he was saying that what Sir Peter had said about the first claimant was more accurate (paragraph 15). Consequently, in so far as the defendant's post bore any defamatory meaning, it meant that the first claimant had engaged in questionable practices (paragraph 16);

v) As regards the other claimants:

"The Post does not refer by name to the Second to Fourth Claimants and does not bear any defamatory meaning about them or each of them. They seek to plead a case on reference which is defective and highly artificial:

a. The pleaded case, at sub-paragraph 8.1, Particulars of Claim, is defective in failing to identify any reader who would have or did read the words complained of as well as a report from six months earlier (December 2021) and remembered the names of the Second to Fourth Claimants or would have or did use the highly contrived Google search terms pleaded before reading the words complained of. There are, therefore, no proper particulars pleaded in sub-paragraph 8.1, Particulars of Claim. There is also no case of direct or indirect evidence of identification and the Court can so rule.

b. The pleaded case, at sub-paragraph 8.2 (and sub-sub-paragraphs thereof), Particulars of Claim, is also defective in failing to identify any reader who would have read the words complained of knowing the facts pleaded. There are, therefore, no proper particulars pleaded in sub-paragraph 8.2, Particulars of Claim. There is also no case of direct or indirect evidence of identification and the Court can so rule." (Paragraph 17)

vi) Accordingly, the Post did not bear the meaning relied on at paragraph 9 of the APC; it bore a different and lower defamatory meaning about the first claimant; and it did not bear any defamatory meaning about the second to fourth claimants (paragraph 18).

The Point of Law

23. As I referred to in the Introduction, the Point of Law which counsel agreed that I should resolve at this stage is: "Are the parties permitted to adduce evidence regarding the

defendant's followers in relation to the question of whether the hypothetical reasonable reader would click on the hyperlink in the 7 May 2022 Tweet".

24. It will be apparent from my summary of the parties' pleaded case that there is an issue in relation to the 7 May 2022 Tweet, as to whether the ordinary reasonable reader would click on the hyperlink in the underlying tweet from @LPKleasehold to the article on the Leasehold Knowledge website which referred to the claimants by name. This is of potential significance because the quote-tweet and the underlying tweet did not name any of the claimants.

25. To be actionable, words in a publication that are alleged to be defamatory must refer to the claimant. I set out the applicable principles when a claimant is not named and a reference is relied upon when I consider the Strike Out Application from paragraph 44 below. For present purposes, I am concerned with the situation where the claimant is named in material that s/he contends the ordinary reasonable reader would read as part of the publication.

26. Mr Bennett submitted that the assessment of whether the hypothetical reasonable reader would click on a hyperlink in the publication complained of, may be informed by evidence relating to the characteristics of the defendant's followers on Twitter. In support of this submission he relied upon paragraph 36 of Warby J's (as he then was) judgment in *Monroe v Hopkins* [2017] EWHC 433 (QB), [2017] 4 WLR 68 ("*Monroe*") and its subsequent citation by Nicklin J at paragraph 14 of his judgment in *Falter v Altzmon* [2018] EWHC 1728 (QB) ("*Falter*").

27. Mr Speker KC, on the other hand, contended that this submission was bad in law and unsupported by any authority.

28. I conclude that Mr Speker is correct, for the reasons that I set out below.

29. The principle concerning the determination of the ordinary and natural meaning of the words complained were summarised by Nicklin J in the well-known passage at paragraphs 11 – 12 of *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB), [2020] 4 WLR 25 ("*Koutsogiannis*"). He referred to the court's task of determining the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words to bear. At paragraph 12 he set out the principles to be derived from the authorities. His summary included the following:

> "(i) The governing principle is reasonableness.
>
> (ii) The intention of the publisher is irrelevant.
>
> (iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines...
>
> (iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

> (viii) The publication must be read as a whole, and any 'bane and antidote' taken together...
>
> (ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.
>
> (x) No evidence beyond publication complained of, is admissible in determining the natural and ordinary meaning.
>
> (xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.
>
> (xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader."

30. On the face of it the correct approach is clear: no evidence beyond the publication complained of is admissible in determining the natural and ordinary meaning of the words complained of. Furthermore, sub-paragraph (xi) identifies, in terms, the approach that is to be taken to assessing the reasonable reader of the publication in question. The question of whether the hypothetical reasonable reader would understand the words complained of to refer to the claimant is an objective test, in relation to which the court adopts the same approach as it does in determining the natural and ordinary meaning of a publication: *Monir v Wood* [2018] EWHC 3525 (QB) ("*Monir*") at paragraph 96; and *Dyson* at paragraph 20.

31. In paragraphs 34 – 38 of his judgment in *Monroe*, Warby J discussed the "Principles applied to Twitter". This included the following (upon which Mr Bennett relies):

> "36. As to the characteristic of the readership, it has been said that in a Twitter case, 'The hypothetical reader must be taken to be a reasonable representative of users of Twitter who follow the Defendant': *McAlpine* [58] (Tugendhat J)..."

32. The judgment of Tugendhat J was from *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB). I accept Mr Speker's submission that paragraph 36 of *Monroe* is simply a statement of the principle that is summarised at paragraph 12(xi) in *Koutsogiannis,* applied to the Twitter context. Mr Justice Warby does not give any indication that he is intending to depart from the usual orthodoxy and that, unlike the reasonable reader of other media, it is permissible for evidence to be called in relation to the characteristics of a defendant's Twitter followers.

33. Mr Bennett fairly accepted that he was not aware of earlier cases that had adopted the approach that he advocated.

34. It is also noteworthy that the authorities which have considered whether a hyperlink in the publication in question would be opened by the hypothetical reasonable reader, do not afford support for the claimants' submission. I summarise this caselaw in the paragraphs that follow.

35. In *Falter* the court was concerned with the trial of meaning as a preliminary issue and in relation to an article on the defendant's website had to consider whether the reasonable reader would have clicked on a hyperlink in the article and thereby accessed an imbedded YouTube video of a Sky News interview. Counsel for the defendant in that case argued that the reasonable reader of the article would have clicked on the hyperlink and watched this footage (paragraph 9); a proposition that the claimant disputed. After citing paragraphs 34 – 38 of *Munroe*, Nicklin J observed that everything would depend upon the context in which the material was presented to the reader and it was not possible to put forward "a hard and fast rule that hyperlinks imbedded in an article that is complained of should be treated as having been read by the ordinary reasonable reader" (paragraphs 12, 13 and 15). He continued:

> "16. I suppose, ultimately, if it is a matter of dispute, the court is going to have to take a view as to what hypothetical reasonable reader is likely to do when presented by an online publication and the extent to which s/he would follow hyperlinks presented to him/her."

36. In *Poulter v Times Newspapers Limited* [2018] EWHC 3900 (QB) the court was concerned with the trial of preliminary issues of meaning in relation to a libel action brought by Daniel Poulter MP. The claim arose from the publication of two articles in the print edition of *The Sunday Times* and online. One article was written by a *Sunday Times* journalist, Caroline Wheeler and the other by Andrew Bridgen MP. In the online versions of these articles, there was a link at the foot of each article to the other article. The claimant contended that the two articles should be read separately, and the defendant submitted that they should be read together. At paragraph 21 of his judgment, Nicklin J referred to paragraphs 12 and 13 of his earlier judgment in *Falter*. In paragraph 24 he discussed a number of factors that could bear on whether the reasonable reader would follow a link provided. He did not suggest that evidence could be adduced as to the nature of the readership for the purposes of resolving this issue. He said:

> "24. ...Whether readers follow links provided like this is influenced by a number of factors, including: (1) their familiarity with the story or subject matter and whether they consider they already know that they are offered by way of further reading; (2) their level of interest in the particular article and whether that drives them to wish to learn more; (3) particular directions given to read other material in the article; (4) if the reader considers that he or she cannot understand what is being said without clicking through to the hyperlink. It might be reasonable to attribute items (3) and (4) to the hypothetical ordinary reasonable reader, but (1) and (2) will vary reader by reader."

37. In *Greenstein v Campaign Against Antisemitism* [2019] EWHC 281 (QB) the court had to determine whether the words complained of in the second – fifth articles were fact or opinion. In determining this question the court had to consider whether the hypothetical reasonable reader would have clicked on a link to the first article. Mr Justice Nicklin referred to his earlier judgment in *Falter*. Again, there was no suggestion that evidence could be adduced in relation to the characteristics of the readership.

38. Accordingly the answer to the question set out at paragraph 23 above is in the negative.

The Strike Out Application

39. As will be apparent from my earlier summary of the application and description of the APC, the Strike Out Application relates to the claimants' pleaded case based on a reference innuendo in respect of both the 7 May 2022 Tweet (paragraph 11, APC) and the 11 May 2022 Post (paragraphs 8.1 and 8.2, APC). The defendant's application notice contends that the reference innuendo paragraphs are defectively pleaded and do not support a case that anyone who read the words complained of understood them to refer to the claimants.

40. I will firstly summarise the relevant legal principles. Subject to one point that I identify at paragraph 55 below, these were not in issue.

The legal principles

41. CPR 3.4(1) states that for the purposes of this rule, reference to a statement of case includes reference to part of a statement of case. CPR 3.4(2) provides:

> "(2) The court may strike out a statement of case 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."

42. When the court strikes out a statement of case it may make any consequential order it consider appropriate (CPR 3.4(3)).

43. The court's approach to the powers in CPR 3.4(2) was summarised by Collins Rice J in *Soriano v Societe D'Exploitation De L'Hebdomadaire Le Point SA* [2022] EWHC 1763 (QB) as follows:

> "41. A court will strike out a claim under the first subparagraph if it is 'certain' that it is bound to fail, for example because pleadings set out no coherent statement of factors, where the facts set out could not, even if true, amount in law to a cause

> of action. That calls for an analysis of the pleadings without reference to evidence; the primary facts are assumed to be true. It also requires a court to consider whether any defects in the pleading are capable of being cured by amendment and if so whether an opportunity should be given to do so *(HRH the Duchess of Sussex v Associated Newspapers Ltd [2021] 4 WLR 35 at [11]; Collins Stewart v Financial Times [2005] EMLR 5 at [24]; Richards v Hughes [2004] PKLR 35)*."

44. As I have earlier noted, to be actionable, words in a publication that are alleged to be defamatory must refer to the claimant. The applicable principles where the claimant is not named were set out by Nicklin J in *Dyson* as follows:

> "19. It is not necessary for the claimant to be named. There may be some other way in which the hypothetical ordinary reasonable reader would identify him/her: *Economou v de Freitas* [2017] EMLR 4 [9].
>
> 20. When assessing reference, the Court will adopt a similar approach as it does when determining the natural and ordinary meaning of a publication: *Morgan v Oldhams Press Ltd* [1971] 1 WLR 1239, 1245C-D and 1269H-1270A.
>
> 21. The identifying material may be contained in the words complained of themselves (intrinsic identification) or may be established by proof of specific facts that would cause the reader (with knowledge of those facts) to understand the words to refer to the claimant (extrinsic identification or 'reference innuendo'): *Monir v Wood* [2018] EWHC 3525 (QB) [95]...
>
> 22. If the claimant relies upon extrinsic facts to establish reference, then s/he must plead and prove those facts. If those facts are proved (or admitted) the issue becomes whether a reasonable person knowing some, or all of, these facts reasonably believes that the publication referred to the claimant..."

45. Mr Justice Nicklin went on to explain that to establish a cause of action for defamation at common law it was not necessary for the claimant to adduce evidence that actual publishees understood the words of the publication to refer to the claimant, as the test of reference / identification was an objective one. However, "evidence relied upon by the claimant to establish that publishees did understand the publication to refer to him/her is admissible but not determinative on the issue of reference: *Monir* [103]". (The Judge then noted that such evidence may be important to the issue of serious harm under section 1 of the Defamation Act 2013 in any event.)

46. A cause of action based on a legal innuendo is a distinct cause of action from that founded upon the ordinary and natural meaning of the words complained of: *Fullam v Newcastle Chronicle and Journal Ltd* [1977] 1 WLR 651 ("*Fullam*") per Lord Denning MR at 654H.

47. Lord Denning went on to summarise the nature of a legal innuendo and the pleading requirements at 655B-D, saying:

> "If the plaintiff relies on some special circumstances which convey (to some particular person or persons knowing those circumstances) a special defamatory meaning other than the natural and ordinary meaning of the words (pleading what is called a 'legal innuendo'...) then he must in his statement of claim specify the particular person or persons to whom they were published and the special circumstances known to that person or persons. For the simple reason that these are the 'material facts' on which he relies and he must rely, for this cause of action. It comes straight within the general rule of pleading contained in RSC, Ord 18 r.7; and also within the particular rule in libel actions contained in RSC, Ord. 82, r.3. In this second cause of action there is no exception in the case of a newspaper: because the words would not be so understood by the world at large; but only by the particular person or persons who know the special circumstances." (Emphasis added.)

48. Lord Justice Scarman (as he was then) agreed with Lord Denning's identification of the general rule in respect of the pleading of legal innuendos, but at 658G – 659B, but he suggested that as regards publication by a newspaper; if the facts were very well known in the area of the newspaper's distribution, it would suffice to plead that the plaintiff relied upon the inference that some of the newspapers' readers must have been aware of the facts which are said to give rise to the innuendo. In *Grappelli v Derek Block Ltd* [1981] 1 WLR 822, at 830B ("*Grappelli*"), Dunn LJ indicated his agreement with Scarman LJ's observation that there may be cases that are exceptions to the general rule, such as where publication is in a national newspaper with a very wide circulation and "the only reasonable inference is that some of the readers of that newspaper must have knowledge of the facts which are said to give rise to the innuendo".

49. The contemporary pleading position reflects the earlier case law. The general requirements of CPR 16.4(1) include that the Particulars of Claim must provide "a concise statement of the facts on which the claimant relies" and "such other matters as may be set out in a practice direction". Practice Direction 53B provides (as relevant) at paragraph 4.2:

> "The claimant must set out in the particulars of claim –
>
> (1) the precise words of the statement complained of...
>
> (2) when how and to whom the statement was published...
>
> .....
>
> (4) the imputation(s) which the claimant alleges that the statement complained of conveyed both-
>
> (a) as to its natural and ordinary meaning; and

> (b) by way of any innuendo meaning (that is, a meaning alleged to be conveyed to some person by reason of knowing facts extraneous to the statement complained of). In the case of an innuendo meaning, the claimant must also identify the relevant extraneous facts." (Emphasis added.)

50. In *BrewDog plc v Frank Public Relations Ltd* [2020] EWHC 1276 (QB) at paragraph 35, Nicol J addressed the current pleading requirements of a legal innuendo as follows:

> "i) I agree...that the identity of the publishees who had knowledge of the special facts should be pleaded. Publication of a defamatory imputation which depends on knowledge of special facts is only actionable if the words are published to recipients who know those facts. Publication to such people is therefore essential if the cause of action is to be made out. Necessarily, the identity of such persons is a 'fact on which the claimant relies' and by CPR r.16.4(1)(a) must be pleaded in the Particulars of Claim – see *Fullam v Newcastle Chronicle and Journal Ltd*...That case was decided before the adoption of the Civil Procedure Rules, but RSC O.81 r.7(1) contained an obligation substantially the same as is now in CPR r.16.4(1)(a).
>
> ii) ...There may be circumstances where the Court can be asked to infer from other facts that the publishees would have known the specific facts...Reliance on such an inference should itself be pleaded, together with the facts on the basis of which the pleader would invite the inference to be drawn." (Emphasis added.)

51. Mr Speker referred to Warby J's judgment in *Economou v de Freitas* [2016] EWHC 1853 (QB), [2017] EMLR 4 as an example of the degree of specificity required where the claimant relied upon extrinsic circumstances as a basis for inferring that some readers would have knowledge of the relevant facts. The judgment concerned the trial of a defamation claim brought by the claimant on the basis that he was the identifiable subject of the words complained of, which accused him of falsely prosecuting the defendant's late daughter for having perverted the course of justice, and of having raped her. Although the claimant was not referred to by name, after referring to *Fullam* and *Grappelli*, Warby J noted that in this instance the claimant "has pleaded by description categories of people who knew that he had been accused, and that he had brought the private prosecution, and he has led evidence about those matters. The evidence goes into detail and gives names. There is supporting documentary material" (para 63).

52. I have already referred to *Falter* when I discussed the hyperlinks cases (paragraph 35 above). At paragraph 17, Nicklin J noted that in addition to relying upon a case that the ordinary reasonable reader would follow the hyperlink in the relevant publication:

> "Out of an abundance of caution, a claimant could also plead an innuendo meaning which relies on the hyperlink material as material that at least a large proportion of the readers would have read. That is one practical way of avoiding what may be some uncertainty about the extent to which hyperlinks can be taken into account when determining meaning."

53. A cause of action in libel arises when the words are published to the person by whom they are read or heard. Accordingly, if there are extrinsic facts relied upon to establish the cause of action, generally they must be known to the person at the time of publication and two or more statements made at different times cannot be aggregated for the purposes of giving rise to a cause of action in defamation: *Grappelli* at 825B-D. The extent of an exception to this rule was discussed by the Privy Council in *Simon v Lyder* [2019] UKPC 38, [2019] 3 WLR 537. Lord Briggs JSC indicated that it was unnecessary for the parameters of the exception to be resolved in order to determine the appeal and that it was sufficient to observe that:

> "26. ...the authorities on this question demonstrate that, for two statements made by the same person, but published at different times, to be aggregated for the purposes of giving rise to a completed cause of action in defamation, there must in the mind of the reasonable reader be created a sufficient nexus, connection or association between the two of them so that (where one is defamatory and the other identifies the subject) there comes a moment in time in the mind of the reader, the claimant is identified as the subject of the defamatory accusation. That moment in time will generally be the time of publication (i e reading) of the second statement.
>
> 27. That nexus or connection between the two statements may be established by varying means. The defendant may, in the first statement, have invited the reader to await further information in a later statement. The two statements may be part of a single saga or series. The second statement may sufficiently refer back to the first statement so as to incorporate it by reference, or its contents as a legal innuendo, in the second statement. But these are not legal categories. They are merely examples of the way in which, as a matter of fact, a claimant may prove the requisite nexus or connection between the two statements..."

7 May 2022 Tweet: paragraph 11 Amended Particulars of Claim

54. In summary, Mr Speker submitted that paragraph 11, APC did not meet the prescribed requirements for pleading a reference innuendo in respect of the 7 May 2022 Tweet because:

i) The special facts that it was said some readers would have had knowledge of were not pleaded at all;

ii) No direct evidence of reference was pleaded in the form of individual readers who it was said had followed the hyperlink, read the article on the Leasehold Knowledge website and understood the words in the defendant's tweet as referring to the claimants;

iii) No indirect evidence of reference was pleaded, for example of others referring to the relevant words and to the claimants in their own tweets; and

iv) No basis was pleaded from which the court could properly draw an inference that some readers of the tweet had followed the hyperlink and had understood the allegedly defamatory words to refer to the claimants. By way of example, nothing was pleaded in terms of readership figures or retweets, which could enable an inference to be drawn on the basis that there would have been a large number of likely readers of the tweet overall.

55. Mr Bennett's main response was to contend that the well-established requirements concerning the pleading of legal innuendos, including reference innuendos (which I have summarised above), do not apply to what he termed the "new ground" of a "hybrid innuendo". He submitted that in paragraph 17 of *Falter*, Nicklin J had identified a new means by which a claimant could establish that the words complained of referred to him/her where there was a link in the original message or article which took the reader to another document which named or otherwise identified the claimant and some readers (but not the hypothetical reasonable reader) would have done this and read that material. In such circumstances, it was sufficient to refer to the linked document and contend that a significant proportion of readers would have read it via the hyperlink, as set out in paragraph 11, APC; and it was unnecessary for any further details to be pleaded. In the alternative, Mr Bennett submitted that in any event paragraph 11 sufficiently pleaded a case based on an inference that some readers would have followed the hyperlink and read the article.

56. I reject the proposition that in paragraph 17 of *Falter*, Nicklin J identified a new route whereby a claimant could establish that words complained of referred to him or her. In the passage in question (set out at paragraph 52 above), the Judge referred to the pleading "of an innuendo meaning which relies on the hyperlink material as material that at least a large proportion of the readers would have read" (emphasis added). I do not understand Nicklin J to thereby suggest that in those circumstances the claimant's case would be advanced by anything other than a reference innuendo, to which the established pleading rules for innuendos would apply. There is nothing in the words he used that provides support for Mr Bennett's submission; and if the Judge had been identifying the radical course that is suggested, it would be expected that he would have discussed how this aligned with the caselaw orthodoxy and the CPR requirements that I have set out earlier, rather than simply making a brief *obiter dicta* observation in a single sentence. Mr Bennett accepted that there are no post-*Falter* authorities that he was aware of that have interpreted Nicklin J's words in the surprising way that he advocated.

57. As I have already indicated, absent the success of his *Falter* submission, Mr Bennett accepted that the established rules of pleading applied. As matters stand it is clear that they have not been adhered to. I conclude that Mr Speker's criticisms which I have summarised at paragraph 54 above are well-founded. Accordingly, paragraph 11 of the APC is currently defective and there is no properly pleaded cause of action based on a reference inuendo in relation to the 7 May 2022 Tweet. I consider whether I should simply strike out this aspect of the claim or give the claimants an opportunity to amend their pleading at paragraph 66 below.

11 May 2022 Post: paragraphs 8.1 and 8.2 Amended Particulars of Claim

58. In summary, Mr Speker's criticisms of paragraphs 8.1 and 8.2 of the Particulars of Claim were as follows:

i) The claimants had to prove that at the time when the defendant's post of 9 June 2022 was read there were readers who understood that the words complained of referred to the claimants. This was not pleaded in relation to the matters set out at paragraphs 8.1 or 8.2. The *Grappelli* principle applied, as these circumstances did not fall within the limited exception to it;

ii) In so far as paragraph 8.1 was intended to set out a free-standing reference innuendo, there was no pleading of the special extrinsic facts that it was said some readers would have had knowledge of and so understand that the words complained of referred to the second – fourth claimants;

iii) In so far as paragraph 8.1 was intended to rely upon an inference that a significant proportion of readers would have read all or some of the material that was referred to in advance of reading the defendant's post and from this understood his words to refer to the second – fourth claimants, the basis upon which the court was invited to draw that inference was not identified. *The Negotiator* was not a mass media newspaper and the defendant's post was added some weeks after the article appeared. In these circumstances the basis for the inference that was relied upon needed to be spelt out;

iv) In so far as the proposition referred to at sub-paragraph (iii) was based on direct or indirect evidence, as opposed to inference, this was not set out;

v) Paragraph 8.2 did not invite the court to draw an inference (in contrast to paragraph 8.1) or indicate the basis upon which an inference should be drawn;

vi) In so far as they were relied upon, paragraph 8.2 did not identify known readers who were aware of the facts that are there set out; and

vii) In any event, no viable cause of action was articulated. Taking the pleaded facts at their highest they did not disclose a reasonable cause of action.

59. Mr Bennett accepted that paragraphs 8.1 and 8.2 sought to set out a reference innuendo case and that the legal principles and pleading requirements that I have summarised above applied to this part of the APC. He began his submissions on this aspect of the case by saying that the pleading was "crystal clear". However, during the course of his address, he accepted that the claimants' case would have to be confined to the knowledge that readers had at the time of the defendant's post on 9 June 2022 and that the pleading did not currently reflect this. In response to my questions, he indicated that paragraphs 8.1 and 8.2 would have to be read together rather than as alleging two separate bases for a reference innuendo; again this is not what the pleading currently says. Mr Bennett indicated that it was an inference that was relied on, rather than there being any intention to identify particular readers. He said it could be inferred that after reading the 11 May 2022 article a number of readers would have gone to and read the material referred to in paragraph 8.1 APC because the story was a matter of considerable controversy in the leasehold world. I pointed out that this was not something that was pleaded currently as one of the building blocks supporting an inference that the court was asked to draw.

60. Accordingly, I accept that Mr Speker's criticisms that I have summarised at sub-paragraphs (i) – (vi) above, are well-founded in relation to the pleading of these aspect

of the APC as well (save that, self-evidently, the points at sub-paragraphs (iv) and (vi) are only pertinent if the claimants intend to rely on direct or indirect evidence).

61. However, I do not accept Mr Speker's further submission that I can conclude at this stage that the reference innuendo case of the second – fourth claimants is bound to fail. He relies on the proposition that it is inherently improbable that readers read the defendant's post on 9 June 2022 with the matters in mind that the claimants seek to rely upon. As well as the gap in time between the *Navigator* article and the defendant's post, he also drew my attention to the absence of posted comments in response to the defendant's post.

62. However, for the purposes of a strike out application made under CPR 3.4(2) the pleaded case in question is assumed to be true (paragraph 43 above). This is not a summary judgment application or a trial of a preliminary issue. Mr Speker did seek to place some reliance on the absence of evidence adduced by the claimants when Nicklin J's directions had made allowance for this. However, it is quite clear from the Reasons accompanying his order, that the Judge did not envisage evidence being produced at this stage. He said:

> "(D) I am not expecting or encouraging the Claimants to file evidence in answer to the Strike Out Application. This is an application made under CPR Part 3.4(2). The Defendant is not relying upon evidence and evidence is not usually admitted on a strike out application. Nevertheless, I have provided a timetable should the Claimants believe that evidence is necessary."

63. Mr Speker also placed reliance on Collins Rice J's reference to an inferential case being based on evidence rather than on speculation in *Sivananthan v Vasikaran* [2022] EWHC 2938 (KB), [2023] EMLR 7 (para 53). However, this was said in the context of an absence of evidence of "serious harm" at a trial, not in the context of a strike out application.

64. The difficulty at this stage is that the claimants' case is not properly pleaded in relation to the reference innuendos that are apparently relied upon. I do not consider that at this stage I can confidently conclude that the current deficiencies are incapable of remedy such that a viable claim cannot be pleaded. Accordingly, I decline to strike out paragraphs 8.1 and 8.2 APC on this basis.

An opportunity to amend the claimants' pleading

65. As I indicated at paragraph 43 above, where a pleading is defective, the court should consider whether the matters in question are capable of being addressed by amendment and whether an opportunity should be allowed for this.

66. I have concluded that the claimants should be given that opportunity on this occasion for the following reasons:

    i) I do not consider that I can say at this stage that the reference innuendo claims are bound to fail in respect of either publication;

ii) It appears from the nature of the current defects that I have identified in respect of paragraphs 8.1, 8.2 and 11 APC that they are of a kind that may be remediable by a clearer articulation of the way that the claimants put their case in respect of the reference innuendos that they rely upon;

iii) Striking out the pleading of a cause of action is a relatively draconian sanction. It would mean that the claims of the second – fourth claimants were at an end in relation to the 11 May 2022 Post; and that the four claimants would only be able to rely on their paragraph 10 APC route in relation to the 7 May 2022 Tweet; and

iv) The appropriate costs consequences can be visited on the claimants so that the defendant is not put to additional expense as a result of them being afforded the opportunity to amend.

67. In arriving at this conclusion I have borne in mind and weighed in the balance Mr Speker's point that the claimants have been on notice since April 2023 of deficiencies in the APC such that they could have provided an amended pleading in advance of the 4 July 2023 hearing. However, whilst there is some force in this point, I do not consider that it outweighs the factors that I have already identified. I am satisfied that the interest of justice require that the claimants are given an opportunity to get their house in order.

68. I will give counsel an opportunity to discuss and agree the terms of an order after seeing this judgment in draft. I do not anticipate that the claimants should have a lengthy period of time for amending their pleading and I anticipate that this will be undertaken after careful reflection as to the way in which their case is put forward. Furthermore, I expect the timetable that will then be set out in the court's order to be adhered to.

Conclusion

69. For the reasons that I have identified at paragraphs 26 – 38 above, I conclude that the parties are not permitted to adduce evidence regarding the defendant's followers in relation to the question of whether the hypothetical reasonable reader would click on the hyperlink in the 7 May 2022 Tweet.

70. For the reasons that I have identified at paragraphs 54 – 64 above, I consider that the pleading of the reference innuendos relied upon by the claimants in paragraph 11 APC (in respect of the 7 May 2022 Tweet) and in paragraphs 8.1 and 8.2 APC (in respect of the 11 May 2022 Post) are defective. However, I am persuaded that I should give the claimants an opportunity to amend their pleading to remedy these matters (paragraph 66 above).

71. I will give the parties an opportunity to agree the terms of an order after seeing this judgment in draft. I envisage a relatively tight timescale being imposed for the opportunity to amend the APC. I consider that the parties will be in a better position to make written submissions on the Preliminary Issues Application and other consequential directions after the APC has been provided and the timetable that counsel discuss should make provision for this.