Neutral Citation Number: [2024] EWHC 400 (KB)

Case No: QB-2022-000650

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2024

Before :

His Honour Judge Lewis
(sitting as a Judge of the High Court)

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Between :

(1) DYSON TECHNOLOGY LIMITED
(2) DYSON LIMITED

Claimants

- and -

(1) CHANNEL FOUR TELEVISION CORPORATION
(2) INDEPENDENT TELEVISION NEWS LIMITED

Defendants

- -
- -

Hugh Tomlinson KC and **Ian Helme (**instructed by **Schillings International LLP**) for **the Claimants**
Adam Wolanski KC and **Gervase de Wilde** (instructed by **Simons Muirhead Burton LLP**) for **the Defendants**

Hearing date: 15 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 February 2024 by circulation to the parties or their representatives by e-mail and release to the National Archives

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HIS HONOUR JUDGE LEWIS:

1. The claimants are UK-based companies forming part of the Dyson Group, known for the design and sale of household appliances.

2. The first defendant is the broadcaster responsible for the television service known as "Channel 4". The second defendant makes the programme Channel 4 News.

3. The claimants have brought libel proceedings over a news item first broadcast by the defendants on Channel 4 News on 10 February 2022 ("the Broadcast").

4. The Broadcast examined allegations of "appalling abuse and exploitation" in the factories of ATA, a Malaysian company that manufactured Dyson products.

5. The Broadcast lasted around twenty minutes and comprised a studio-based introduction, followed by a pre-recorded report and then a live interview with Dyson's Global Manufacturing and Procurement Director.

6. There are two reported decisions in this case. On 31 October 2022, Nicklin J handed down judgment following the first trial of a preliminary issue, ***Dyson & Ors v Channel Four Television & Anor*** **[2022] EWHC 2718 (KB)**. On 25 July 2023, the Court of Appeal gave judgment following an appeal, ***Dyson Technology Ltd & Anor v Channel Four Television & Anor*** **[2023] EWCA Civ 884**.

7. By order dated 11 September 2023, Nicklin J directed that there be a trial of the following preliminary issues:
    a. The natural and ordinary meaning of the publication complained of in the Re-Amended Particulars of Claim;
    b. Whether the meaning found is defamatory at common law; and
    c. Whether the publication complained of was or included statements of fact or of opinion.

8. A transcript of the Broadcast is annexed to the judgment of Nicklin J.

9. The claimants' pleaded case is that the natural and ordinary meaning of the Broadcast was that:

    a. the claimants were complicit in the systemic abuse and exploitation of workers at ATA, one of their suppliers located in Malaysia;

    b. the claimants were also complicit in the persecution and torture of a worker who blew the whistle on the working practices at ATA;

    c. the claimants claim to act in a responsible and ethical way but when serious abuses of workers were brought to their attention these abuses were not properly investigated but were ignored and tolerated for a prolonged period while the claimants tried to cover them up and shut down public criticism.

10. The defendants' case is that the Broadcast contained a statement of opinion about the claimants, namely that:

a. the first and/or second claimants were responsible for the abuse and exploitation of workers at ATA, one of their supplier companies located in Malaysia;

b. the first and/or second claimants were also responsible for the persecution by ATA of a worker who blew the whistle on working practices at ATA; and

c. therefore, the first and/or second claimants have not lived up to their advertised standards of ethics and corporate social responsibility.

11. The defendants have pleaded the following facts that they say were indicated in the Broadcast and on which they say the statements of opinion were based:

a. The first and/or second claimants portray themselves as socially responsible and ethical businesses;

b. Concerns were raised with the first and/or second claimants from 2019 onwards by Andy Hall, a labour rights activist, initially about forced working conditions, and subsequently also about squalid accommodation, and about workers living in fear at an ATA factory;

c. The concerns raised by Mr Hall were valid. Serious issues over the conditions in which ATA employees worked persisted at the ATA factory until the first and/or second claimants broke off the contract with ATA in late 2021;

d. Both before and after Mr Hall's concerns were raised, the first and/or second claimants failed adequately to monitor the employment practices of ATA and the conditions under which workers at the ATA factory lived and worked. After concerns were raised, the first and/or second claimants failed adequately to investigate the concerns and remedy the issues raised;

e. One example of the serious problems at ATA, which took place after Mr Hall's concerns were raised, related to a factory worker, Mr Limbu. ATA identified Mr Limbu as a whistle-blower after seizing his phone. An ATA manager then handed Mr Limbu over to the police, who tortured him. A senior ATA executive also sought to intimidate Mr Limbu by threatening him with imprisonment if he did not cooperate with the police and subsequently pressured him into making a false confession about having received payment by labour rights activists to leak information and into providing labour rights activists with false information, in order to show ATA in a positive light;

f. When concerns about working conditions at ATA were reported in the media, the first and/or second claimants responded by launching a PR drive claiming that they did not recognise the allegations and that there was no evidence to support the allegations. This was despite the fact that concerns about ATA had in fact previously been brought to the first and/or second claimants' attention by Mr Hall and were subject to an investigation by U.S. Customs and Border Protection. The first and/or second claimants also sought to close down public criticism by making threats of litigation;

g. In October 2021 the first and/or second claimants obtained a report substantiating concerns that had previously been raised about working conditions at ATA. However, they refused to make that report public despite requests from the media to do so.

12. The defendants have also pleaded an alternative case if the Broadcast is found to contain a statement of fact, rather than one of opinion. The defendants say that the natural and ordinary meaning of the Broadcast was that that there were reasonable grounds to suspect that:

    a. the first and/or second claimants were responsible for the abuse and exploitation of workers at ATA, one of their supplier companies located in Malaysia;

    b. the first and/or second claimants were also responsible for the persecution by ATA of a worker who blew the whistle on working practices at ATA; and

    c. therefore, the first and/or second claimants have not lived up to their advertised standards of ethics and corporate social responsibility.

13. The defendants accept that the words were defamatory of the claimants at common law, in either their or the claimants' pleaded meanings.

Main areas of dispute

14. The parties have identified the three main areas of dispute as being:

    a. Whether the primary allegations are of 'complicity' (as contended for by the claimants) or 'responsibility' (as contended for by the defendants).

    b. Whether the allegations are of actual wrongdoing (Chase Level 1) (as contended for by the claimants) or of 'reasonable grounds to suspect wrongdoing' (Chase Level 2) (as contended for by the defendants, as their alternative case).

    c. Whether the words were statements of fact or of opinion.

Law - Meaning

15. The court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear.

16. In ***Jones v Skelton*** **[1963] 1 WLR 1362** the Privy Council explained what is meant by a natural and ordinary meaning:

> "The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the

> language used can be a part of the ordinary and natural meaning of words. …. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words." per Lord Morris at 1370.

17. I must first view the publication complained of to form a provisional view about meaning, before turning to the parties' pleaded cases and submissions, see ***Tinkler v Ferguson*** **[2020] EWCA Civ 819** at [9].

18. In ***Corbyn v Millett*** **[2021] EWCA Civ 567** at [18], Warby LJ commented on the approach to be taken when the publication complained of is a television programme:

> "With a broadcast such as this, this is not a matter of studying the transcript, which cannot tell you how words are spoken, in what tone, or with what emphasis. It means watching and listening to the interview as a whole, bearing in mind that the ordinary viewer will do so only once. The Court should avoid over-elaborate analysis and give weight to its own impression. This approach applies equally to the methodology for deciding meaning, and whether the offending statement is fact or opinion."

19. The long-established principles to be applied when reaching a determination of meaning were re-stated by Nicklin J in ***Koutsogiannis v Random House Group Ltd*** **[2019] EWHC 48 (QB)** at [12]. Of particular relevance in this case are principles (iii), (iv), (viii), (ix) and (xiii).

20. The courts commonly refer to various levels of possible defamatory meaning, to distinguish between different types of defamatory allegation. This was explained by Nicklin J in ***Brown v Bower and another*** **[2017] EWHC 2637 (QB)** at [17]:

> "… I need to refer to what are called the Chase levels of meaning. They come from the decision of Brooke LJ in Chase –v- News Group Newspapers Ltd [2003] EMLR 11 [45] in which he identified three types of defamatory allegation: broadly, (1) the claimant is guilty of the act; (2) reasonable grounds to suspect that the claimant is guilty of the act; and (3) grounds to investigate whether the claimant has committed the act. In the lexicon of defamation, these have come to be known as the Chase levels. Reflecting the almost infinite capacity for subtle differences in meaning, they are not a straitjacket forcing the court to select one of these prescribed levels of meaning, but they are a helpful shorthand."

21. In this case, reference has been made to the "repetition rule". In ***Stern v Piper*** **[1997] QB 123**, Simon Brown LJ defined the rule as follows:

> "The repetition rule… is a rule of law specifically designed to prevent [the court] from deciding that a particular class of publication – a publication which conveys rumour, hearsay, allegation, repetition, call it what one will – … bears a lesser defamatory meaning than would attach to the original allegation itself."

22. This rule does not mean that the Court is bound to find that the defamatory meaning that attaches to the repetition is, in all cases, at the same level as the original allegation. In ***Brown v Bower*** (supra), Nicklin J noted at [32] (and see also [19] – [31]):

> "When the authorities speak of rejecting submissions that words repeating the allegations of others bear a lower meaning than the original publication that is a rejection of the premise that the statement is less defamatory (or not defamatory at all) *simply* because it is a report of what someone else has said. That kind of reasoning is what the repetition rule prohibits when applied to meaning. The meaning to be attached to the repetition of the allegation has still to be judged, applying the rules of interpretation… looking at the publication as a whole".

23. In ***Hewson v Times Newspapers Limited*** **[2019] EWHC 650 (QB)**, Nicklin J considered the impact of the repetition rule on the natural and ordinary meaning of reports of allegations made by others:

> "40. There are myriad ways in which the allegations of others can be reported in a publication. It is impossible to lay down hard and fast rules. Over and over again the authorities make clear that it is the effect of the publication overall that matters. In determining meaning, the cardinal principle is that "it is the overall effect of the article that counts": Poulter -v- Times Newspapers Ltd [2018] EWHC 3900 (QB) [43]-[44]; and Poroshenko -v- BBC [2019] EWHC 213 (QB) [28].
>
> 41. The effect of the repetition rule is that the use of verbs like "alleged" or "claimed" (however often they are repeated in a publication) is unlikely, in itself, to insulate a publisher from the effect of the rule. If the impact of the repetition rule on the meaning of reports of allegations made by others is to be mitigated or avoided, the material that has that effect must be found elsewhere in the publication.
>
> "42. The classic example of such mitigation is an article that contains two sides of a dispute. A direct application of the repetition rule to part of an article that reported the allegations defamatory of the claimant would produce a level 1 meaning. But that would be to ignore the context and the fact that the Claimant's rebuttal of the charge has also been included. How far that goes to reduce (or even extinguish) the meaning that application of the repetition rule would otherwise produce depends upon the context of the publication as a whole… [an] example is where an article presents both sides in a way that the reader will see as roughly even-handed; or certainly not containing any steer as to which side should be believed. At that point, the ordinary reasonable reader can only suspend judgment on whether the claimant is guilty. Instead, and depending on context, s/he may well alight on either a Chase level 2 or 3 meaning. I am deliberately using straightforward examples and a level of generality to demonstrate the point, but it cannot be repeated too often: context is everything."

<u>Positions of the parties</u>

24. On meaning, for the claimants, Mr Tomlinson KC says:

    a. The main focus of the Broadcast was contrasting the image which Dyson seeks to project (and protect) and the reality of the abuse and exploitation shown.

    b. The Broadcast leaves the viewer in no doubt that there has been serious wrongdoing. It makes clear that Dyson has clearly known about these matters for some time, and not dealt with them. The viewer is told that Dyson is being left to "clean up its image", facing claims of appalling abuse, and of there being a "dark side to Dyson's supply chain". It also explained how the company was facing legal action, with a Leigh Day lawyer explaining how Dyson had tried to silence complaints rather than putting things right. Mr Tomlinson also says that during the interview, the presenter repeatedly suggested to the Dyson representative that it was Dyson that was responsible for the workers' pay – for example saying "you paid" [your workers a pittance], or similar. This again suggested that Dyson was doing something wrong.

    c. The Broadcast made clear allegations of "complicity" in the abuse of ATA workers and the mistreatment of the named whistleblower. "Complicity" in this context means "actual knowledge and involvement". Mr Tomlinson says that "if someone points out that terrible things are going on, and you do nothing and deny it, that is complicity".

    d. The concept of "responsibility" might encompass an allegation of complicity. However, a person may have responsibility for something, and a duty to act, but have no actual knowledge or involvement. This is not what the Broadcast was saying. The suggestion of mere "responsibility" is too broad and vague.

    e. These are all allegations of actual wrongdoing, not of "reasonable grounds to suspect" complicity. In respect of the denials, the viewer is left in no doubt that these have no substance given the overwhelming evidence to the contrary. Indeed, Mr Tomlinson says the denials make it look worse, as if Dyson were not facing up to their responsibilities. He says that at the end of the Broadcast, viewers saw the presenter ask Dyson for the release of a key audit report seven times and would have been left with the clear implication that Dyson was not being transparent and was continuing to hide facts about the treatment of workers at ATA, and its knowledge of them.

25. On meaning, for the defendants, Mr Wolanski KC says:

    a. The allegation made by the Broadcast was of "responsibility", rather than complicity in the abuses described. Complicity suggests that Dyson took an active role, and either participated in, authorised or endorsed these acts. Nothing in the Broadcast alleges active involvement on the part of Dyson itself, or even knowledge by Dyson of those abuses when they were occurring. In fact, Mr Wolanski says that the Broadcast made clear that Dyson did not

know, and things were hidden from them by ATA. He says it was ATA that was painted as the "baddies".

b. The Broadcast made clear the abuses occurred at ATA, that Dyson had undertaken six audits, that it had terminated ATA's contract and that claims were being brought on grounds of negligence. At most, the claimants are said to bear moral or legal responsibility for the problems at ATA on the basis that Dyson is by far ATA's biggest customer.

c. The Broadcast takes a "scrupulously even-handed" approach to the question of the responsibility of the claimants for the problems at ATA, and to setting out Dyson's side of the dispute. By way of example Mr Wolanski relies on:

i. The extensive space given to Dyson's side of the story. Denials were threaded throughout the Broadcast, in respect of the ATA allegations, but also the suggestion that Dyson might have been negligent. There was also the lengthy interview with Ms Shi, who was subject to robust questioning and was given significant airtime in which to answer.

ii. The Broadcast made clear that Dyson conducted five audits, none of which identified any significant issues that could not be remedied quickly. Dyson's denials in respect of allegations published by the Sunday Mirror are detailed, along with the fact that the company "issued a notice to the media" setting out its position in relation to the "false and defamatory" report. Dyson is said to have "immediately acted on" Mr Limbu's claims of torture, and viewers were told this was one of the reasons the contract was terminated with ATA.

d. This amounts to significant mitigation, when considering the level of meaning. Both sides of the dispute are presented to the viewer. This means that the *Chase* level of the imputations about the company can only be at a lower level than guilt.

Fact or Opinion

26. Section 3 of the Defamation Act 2013 provides a defence of "honest opinion". At s.3(2) the "first condition" which must be met for a defendant to establish the defence is that "the statement complained of was a statement of opinion".

27. In ***Koutsogiannis*** at [16] Nicklin J provided a summary of the common law principles to be applied in relation to the "first condition", which were approved by Warby LJ in ***Corbyn v Millett*** **[2021] EWCA Civ 567** at [12]:

> "… when determining whether the words complained of contain allegations of fact or opinion, the court will be guided by the following points:
>
> (i) The statement must be recognisable as comment, as distinct from an imputation of fact.

> (ii) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.
>
> (iii) The ultimate question is how the word would strike the ordinary reasonable reader. The subject matter and context of the words may be an important indicator of whether they are fact or opinion.
>
> (iv) Some statements which are, by their nature and appearance opinion, are nevertheless treated as statements of fact where, for instance, the opinion implies that a claimant has done something but does not indicate what that something is, i e the statement is a bare comment.
>
> (v) Whether an allegation that someone has acted 'dishonestly' or 'criminally' is an allegation of fact or expression of opinion will very much depend upon context. There is no fixed rule that a statement that someone has been dishonest must be treated as an allegation of fact."

28. In ***Butt v Secretary of State for the Home Department*** **[2019] EWCA Civ 933** at [39] Sharp LJ (as she then was) said that when deciding whether a statement is one of fact or opinion: "The ultimate determinant … is how the statement would strike the ordinary reasonable reader … – that is, whether the statement is discernibly comment (to such a reader) ... In that regard, the subject matter, the nature of the allegation and the context of the relevant words may well be important."

29. In ***Triplark v Northwood Hall*** **[2019] EWHC 3494 (QB)** at [17] Warby J (as he then was) said:

> "Although an inference may amount to a statement of opinion, the bare statement of an inference, without reference to the facts on which it is based, may well appear as a statement of fact: see *Kemsley v Foot* [1952] AC 345. As Sharp LJ, DBE, pointed out in *Butt* at [37], not every inference counts as an opinion; context is all. Put simply, the more clearly a statement indicates that it is based on some extraneous material, the more likely it is to strike the reader as an expression of opinion."

30. The claimants say:

    a. The Broadcast made defamatory factual allegations against the claimants. It formed part of a news programme. It was saying what had happened and was telling facts. Viewers were told what has been "revealed" by the investigation, what the documents show. Mr Tomlinson says these are factual allegations about what Dyson has done or failed to do, making clear that Dyson is facing legal claims as a result of its wrong-doing. He points out that there was no expressed opinion, for example an opinion that Dyson should be held responsible for the actions of its supplier.

    b. In the defendants' solicitors' detailed response to the letter before action, there was no suggestion that the defendants considered that the Broadcast might

have contained opinion as opposed to fact. Mr Tomlinson says this was not an oversight.

31. The defendants say:

a. The context is that the ordinary reasonable viewer would be well aware of the ethical concerns which arise from well-known Western brands outsourcing their manufacturing operations to countries in the developing world. The issue of responsibility on the part of a well-known Western brand for specific failings within a supply chain, in a developing country where its suppliers are based, is inherently recognisable to the viewer as a matter of opinion. The question of whether a company is open to criticism on the basis that it is morally responsible for failings within its supply chain is a classic value judgement.

b. In respect of legal responsibility, whilst this can (in different circumstances) be a statement of fact, in this case it was an inference or deduction, the words going no further than raising the prospect that the claimants may be found in legal proceedings to be liable for negligence. The Broadcast did not convey that the claim was bound to succeed, not least because of the emphatic denials by Dyson.

c. The Broadcast did not say that Dyson was responsible. It set out certain matters which it said happened, and the inference is that they were responsible – which is a matter of opinion, not fact. Mr Wolanski says the status of the imputations in the Broadcast as statements of opinion is bolstered by the way in which the extraneous material upon which the opinions are based is set out in detail.

d. The issue of whether a person's conduct matches up to their self-presentation is an archetypal value judgment, amounting to an imputation of hypocrisy or a lack of integrity, which is very readily recognisable by the viewer as comment.

Decision

32. I find the Broadcast had the following ordinary and natural meaning:

a. There are reasonable grounds to suspect the claimants were responsible for the abuse and exploitation of workers at ATA, one of their supplier companies located in Malaysia.

b. There are reasonable grounds to suspect the claimants were also responsible for the persecution by ATA of a worker who blew the whistle on working practices at ATA;

c. There are reasonable grounds to suspect the claimants tried to cover up the allegations and shut down public criticism.

d. The claimants have not lived up to their advertised standards of ethics and corporate social responsibility.

33. The text that is underlined is comment.

34. It is important that I have in mind that the ordinary reasonable viewer would have watched the Broadcast once. They would not have had the benefit of a transcript, nor the helpful submissions of counsel. They would not have undertaken a forensic or elaborate analysis of precisely what was said but would have formed an impression based on the Broadcast as a whole.

35. A television broadcast is not just about words. The images and background sounds can be just as an important part in conveying meaning to a viewer. Every case will turn on its facts. Here, the Broadcast started with images of Dyson's stylish adverts and promotional material, Sir James Dyson demonstrating the company's products and Dyson's gleaming, professional looking manufacturing facility in Singapore, accompanied by upbeat background music. In contrast, the viewer was then taken to "the dark side of its supply chain", and shown the grim conditions at ATA, with many shots appearing to have been taken at dusk, or taken covertly, accompanied by rather sombre music.

36. The Broadcast leaves the viewer in no doubt what to think about ATA. We are told how it has treated or abused its workers in the most appalling and exploitative manner – breaching local laws, paying a pittance, demanding excessively long working hours, relying on migrant labour, employing staff without valid visas, making staff sleep in squalid, over-crowded rooms, and persecuting those who tried to speak up about what was happening.

37. This case is, however, about Dyson. The Broadcast made clear from the outset that ATA was a supplier, and the viewer was informed that Dyson has now terminated its contact with ATA.

38. I do not consider that the reasonable viewer would come away from the Broadcast thinking that Dyson was "complicit" in the actions of ATA. The Broadcast was clear that the actual abuse was down to ATA. The Dyson spokesperson explained very clearly how six audit reports had been carried out, including four by external, international audit companies. This would not have conveyed to the viewer that Dyson was directly responsible. It would have given impression that, in fact, Dyson had taken steps to find out what was happening.

39. The reasonable viewer would, however, have come away thinking that Dyson had some "responsibility" for what happened. Both parties have made submissions about whether this might be legal or moral responsibility. Whilst a lawyer might approach matters in this way, I do not think the same is true for the ordinary reasonable viewer, who would focus instead on the overall impression given.

40. Most of what was said about Dyson would have been understood by viewers to be statements of fact. The Broadcast set out facts about what happened at the ATA factory. It then made factual allegations about what Dyson did or did not do in response. It stated repeatedly - from the start to the very end – that Dyson was being

sued, again suggesting responsibility, which was then reinforced by the suggestion that Dyson might need to pay compensation. It was said the claims arise out of serious abuse and exploitation at Dyson's factories, and the viewer was told about some of the factual matters in respect of which Dyson was being sued. The allegations being made were factual, with the interviewer also focussing on how this situation had arisen. The focus of the Broadcast was not commenting on Dyson's role.

41. The Broadcast included a lot of mitigating material, including repeated denials, a proper explanation of Dyson's position, details of the audits and the fact that Dyson has terminated ATA's contract. There was also the lengthy, detailed interview with the Dyson director. Mr Tomlinson says viewers would not have believed Dyson's denials, but I do not agree. It was a challenging interview. The gist of the questions was that Dyson had done things wrong. The interviewee was given significant opportunity to deal head on with what was being said, and she gave clear answers to most of the questions.

42. I consider that the Broadcast did, however, contain a significant steer on which side is to be believed, reinforced by the types of question raised in the interview. Taken together, the mitigating material was enough for the viewer to suspend judgment on whether Dyson is guilty. For this reason, I consider the level of meaning to be reasonable grounds to suspect that Dyson was responsible.

43. Limb (c) is taken from the claimants' proposed meaning. The Broadcast referred several times to Dyson denying matters, including when it was claimed the company was aware of the abuses at ATA. What is said about the Mirror is the most striking example of this – and the ordinary viewer would have taken away from the Broadcast that there are reasonable grounds to suspect that Dyson had given incorrect statements about what had happened, and then tried to shut down discussion of the issue by threatening proceedings and sending out a press notice.

44. In respect of (d), from the start of the Broadcast, the viewer is told about the contrast between Dyson's publicly stated values, and image, and the realities of what was happening at ATA. This is reinforced through the difference in visual presentation, as noted above, and the inclusion of the comment from the Leigh Day lawyer about how Dyson depicts itself as responsible and ethical. I agree with the defendants that whether someone's conduct matches up to, or falls short of, their self-presentation is a value judgment, and would have been seen as such by the ordinary and reasonable viewer. This aspect of the Broadcast is recognisable as comment.

Costs

45. On 11 September 2023, Nicklin J directed that at this hearing the court would consider the position of costs in respect of an interlocutory application issued by the claimants on 28 November 2022 ("the Reference Amendment Application").

46. The claimants seek an order that the defendants pay £79,853 in costs. The defendants oppose this and say the claimants should pay the defendants' costs of £49,974.

47. To consider the costs application, it is necessary to consider the procedural history.

48. In these proceedings, the claimants seek an injunction, damages, and orders under s.12 of the Defamation Act 2013 (publication of a summary of the court's decision) and s.13 (order to remove statement or cease distribution).

49. To bring an action for libel, a claimant must establish that they were identified or referred to in the words complained of. A cause of action requires the broadcast to be "of and concerning" the claimant, see Hulton v Jones [1910] AC 20 at 23.

50. There are two main ways in which a person may be proved to be the person identified or referred to in a statement, commonly known as "reference". The position was explained by the Court of Appeal in its judgment in these proceedings:

> "34. … The first way is if the claimant is named or identified in the statement or where the words used are such as would reasonably lead persons acquainted with the claimant to believe that he was the person referred to, using the test derived from *Knupffer* and other authorities (the judge called this an "intrinsic reference").
>
> 35. The second way is where a claimant is identified or referred to by particular facts known to individuals. This has been called in the textbooks "reference innuendo" (and which the judge called "extrinsic reference"). It is common ground that those particular facts need to be pleaded in the Particulars of Claim and the issue of identification or reference decided on the facts found to be proved. This second way of identification or reference was not the subject of the preliminary issue ordered by the judge in this case, because it might have led to the calling of evidence. The case of Dyson Technology Limited and Dyson Limited on this way of identification or reference is covered by paragraph 7B of the amended Particulars of Claim…".

51. The Claim Form and Particulars of Claim were served on 8 April 2022.

52. The defendants served a request for further information seeking clarification of the claimants' case on reference. On 13 May 2022, the claimants replied. They confirmed that they do not plead a reference innuendo and explained that they rely upon the content of the words complained of, which would be understood by an ordinary, reasonable viewer of the Broadcast to refer to the two corporate claimants.

53. On 13 May 2022, the parties made an agreed application to the court for a trial of preliminary issues ("TPI"), namely (i) the natural and ordinary meaning of the publication complained of in the Particulars of Claim; and (ii) whether the meaning found is defamatory at common law.

54. In response to the application, the court sought clarification from the parties in respect of the scope of any trial of a preliminary issue, including in respect of reference.

55. As it became apparent that there was a dispute on the issue of reference, the claimants wrote to the defendants on 6 June 2022 with draft Amended Particulars of Claim, which included an alternative reference innuendo case (paragraph 7B). The claimants said that "since a TPI would be a final determination of the matter in these

proceedings (subject, of course, to any appeal), the claimants will obviously be required to plead their secondary case of reference innuendo in the alternative at this stage and not later". The defendants consented to the pleading amendments.

56. On 13 June 2022, Nicklin J gave permission to the claimants to amend their particulars of claim to include their case on reference innuendo. By agreement, he directed that the TPI should also determine: (iii) whether the publication complained of in its natural and ordinary meaning referred to the [now] first and second claimants; and (iv) whether the publication complained of was or included statements of fact or opinion. Within the reasons set out in the order, Nicklin J explained that he had amended the direction in respect of reference "to make clear that the Court is determining reference on the natural and ordinary meaning. That means that the amendments to introduce innuendo reference facts will have no bearing on the determination under [limb (iii) above]. The Court will not be determining reference in respect of any innuendo case and no evidence is being advanced by either side on the issue of reference."

57. The trial took place on 6 October 2022. On 31 October 2022, Nicklin J handed down judgment. He determined that (i) the Broadcast did not bear any defamatory meaning of Sir James Dyson; (ii) based solely on intrinsic evidence in the Broadcast, the Broadcast did not refer to either of the corporate claimants; and (iii) it was not appropriate to resolve the balance of the preliminary issues.

58. The court made the following consequential directions:

    a. Sir James Dyson's case was dismissed, with judgment entered for the defendants.

    b. The corporate claimants' primary case on reference (set out in Paragraph 7A of the Amended Particulars of Claim) was struck out.

    c. The corporate claimants must file an application for permission to re-amend their Particulars of Claim by 21 November 2022 (which was later extended). It was said that any draft Re-Re-Amended Particulars of Claim must identify clearly the company or companies that it is contended the Broadcast referred to, and the particulars relied upon.

    d. If such an amendment application was not made, the corporate claimants' claims would be struck out, with judgment entered for the defendants.

59. The claimants lodged an appellant's notice on 24 November 2022. Within this, they requested a stay of the directions in respect of any amendment application. This is because the claimants said that there would be no need for the hearing of such an application if the claimants were successful on their appeal.

60. On 28 November 2022, the claimants issued the Reference Amendment Application. The application notice stated that in accordance with paragraph 3 of the order of Nicklin J dated 31 October 2022, the claimants were seeking permission pursuant to CPR 17.1(2)(b) to amend their Re-Amended Particulars of Claim dated 14 June 2022.

61. On 12 December 2022, the defendants served a "notice" confirming that: (i) they do not consent to the Reference Amendment Application; and (ii) they do not admit that the Broadcast refers to the two corporate claimants.

62. On 15 December 2022, the defendants wrote to the Court of Appeal in opposition to the claimants' application for a stay. They pointed out that the claimants had not said that if their appeal succeeded, and their case on "intrinsic reference" was permitted to proceed, that they would abandon the Reference Amendment Application. The defendants said that it followed that the Amendment Application would need to be determined at some point, and so the current timetable should be kept.

63. The following day, the claimants confirmed in writing that: "if the appeal succeeds and the claimants' case on intrinsic reference is permitted to proceed, the claimants will abandon the [Reference Amendment Application]".

64. On 19 December 2022, Warby LJ granted permission to appeal on some grounds. He refused the application for a stay, determining that the balance between delay and expense fell in favour of "parallel processes".

65. On 28 December 2022, the defendants served their evidence in response to the Reference Amendment Application.

66. On 9 January 2023, the claimants served evidence in reply to that served by the defendants.

67. On 17 January 2023, Nicklin J's clerk approached the parties for proposed directions for the substantive proceedings. The claimants maintained their position that there should be a stay. The defendants said that the proceedings should continue. On 26 January 2023, Nicklin J stayed the Reference Amendment Application.

68. On 25 July 2023, the Court of Appeal allowed the appeal and set aside the order that "based solely on intrinsic evidence in the broadcast, the broadcast does not refer to the second and third claimants". The court also determined the issue of reference in favour of the claimants at [60]:

    "For the detailed reasons set out above we conclude that a hypothetical reasonable viewer, acquainted with Dyson Technology Limited and Dyson Limited and therefore knowing the matters set out in paragraph 2 of the Particulars of Claim, would identify Dyson Technology Limited and Dyson Limited as being referred to in the broadcast."

69. As a result, on 28 July 2023, the claimants confirmed that they would not be pursuing the Reference Amendment Application. They sought agreement for the payment of their costs of, and occasioned by, the Reference Amendment Application on the basis that it had been issued as direct consequence of Nicklin J's decision on reference, which had now been overturned.

70. On 11 September 2023, Nicklin J directed that the question of costs associated with the Reference Amendment Application be determined at this hearing.

71. The parties agree that the application needs to be considered pursuant to CPR rule 44. This provides that the court has a discretion as to whether costs are payable by one party to another. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. In deciding what order to make on costs, the court must have regard to all the circumstances, including the conduct of the parties (see CPR 44.2(5)).

72. During the hearing, the claimants sought to hand up an additional bundle of 300 or so pages. I was told that this had only been provided to the defendants a short while before the hearing had started, and so it had not been considered. Any bundle should have been lodged in accordance with the CPR. To prevent unfairness, I declined to accept the bundle, although three documents were handed up which would have been very familiar to the parties, namely two witness statements, and a notice.

73. The claimants say:

    a. The application was made in respect of the issue of "reference". The Court of Appeal has now determined the issue of reference in the claimants' favour. They are, therefore, the successful party on that issue.

    b. They were compelled to make the application, under sanction of being struck out. The claimants would not have made the application had they been successful on the question of intrinsic reference before Nicklin J.

    c. If the defendants had taken the correct position at first instance (as later confirmed by the Court of Appeal), none of the costs of the Reference Amendment Application would have been incurred.

    d. The claimants had wanted the Reference Amendment Application to be stayed to be considered (if necessary) after the appeal. The defendants had three opportunities to stop costs being incurred unnecessarily and could have supported the stay, or not filed submissions in active opposition.

    e. If the Reference Amendment Application had been pursued, the claimants would have won that application (whether at first instance or on appeal) and the defendants would have been liable for the claimants' costs as a result.

74. The defendants say:

    a. The "general rule" applies, and costs should follow the event, and so the claimant should pay the defendants the costs of the withdrawn application.

    b. The decision to make, and then abandon, the Reference Amendment Application was the claimants', and the claimants' alone. Nobody made them do this: they did not have to put "a second horse in the race", but they chose to do so. Their decision resulted in the defendants having to incur significant costs in responding to the application.

    c. The claimants have not explained why they decided not to plead a case of reference innuendo at the outset, then introduce such a plea, then make the

Reference Amendment Application, and then abandon it. Without the claimants choosing to waive privilege in their decision making, the court cannot reach any conclusions as to the reasons behind the claimants' decisions. Mr Wolanski says that perhaps the claimants realised that their application was hopeless? He says we simply do not know, and the court cannot speculate.

d. The fact that the defendants did not want the hearing of the Reference Amendment Application to be delayed is irrelevant to the question of who should pay the costs thrown away as a result of the claimants making, and then abandoning, their application.

Discussion on costs

75. The claimants have been successful on the issue of reference, making the Reference Amendment Application superfluous.

76. The need for the claimants to issue the Reference Amendment Application arose out of the decision of Nicklin J, that has since been overturned by the Court of Appeal.

77. If Nicklin J had found for the claimants on the question of reference at the TPI, the issue would have been resolved. There is no reason to think that the claimants would nevertheless have sought to amend their case, to pursue further findings on reference beyond those already made. Such a course would make little sense and be at odds with the overriding objective.

78. It is quite clear from the materials before me that the claimants only made the Reference Amendment Application because the court had ordered that if they did not do so, their claim would be dismissed, and judgment entered for the defendants.

79. Whilst technically it is correct that the claimants "chose" to issue the Reference Amendment Application, the reality is that they had little choice. They consider that they have been libelled and suffered serious harm because of the Broadcast. They seek vindication from the court. If they did not make the application, the claim would have been struck out and they would have been denied the opportunity to do so.

80. As soon as the Court of Appeal had resolved the position on reference, the claimants confirmed that they were not pursing the Reference Amendment Application.

81. I note as well that the claimants did what they could to try and get matters stayed, so they did not need to incur additional costs. The defendants chose to actively oppose such a stay, even though they would have known that this would put them, and the claimants, to additional expense. Whilst ultimately a stay is a matter for the court, and Warby LJ refused one on the papers, the defendants could have responded on this issue differently, which may in turn have assisted the court in its management of the case.

82. I direct that the costs of the Reference Amendment Application shall be paid by the defendants to the claimants, such costs to be assessed on the standard basis if not

agreed. It is not possible for the costs to be summarily assessed on the information that was provided within the TPI bundle.