[2022] EWHC 2128 (QB)

QB-2020-003141

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

Royal Courts of Justice
Strand, London, WC2A 2LL

12 August 2022

Before :

MASTER DAVISON

- -

Between :

RAFFAELE MINCIONE **Claimant**

- and -

(1) RIZZOLI CORRIERE DELLA SERA MEDIA GROUP SPA
(2) FIORENZA SARZANINI
(3) MARIO GEREVINI
(4) FABRIZIO MASSARO **Defendants**

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Miss Lorna Skinner QC and **Ms Kirsten Sjøvoll** (**Withers LLP**) for the **Claimant**
Mr Adam Wolanski QC and **Ms Victoria Jolliffe** (**Crowell & Moring**) for the **Defendants**

Hearing date: 27 July 2022

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Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii and The National Archives.

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1. This is my reserved judgment on the defendants' application for permission to rely upon expert evidence as to Italian law and journalistic practice. That application was made at a CCMC on 27 July 2022 and took up nearly the whole of the half day allocated, with the effect of displacing the costs budgeting exercise that had been the main item on the agenda. Costs budgeting will now be dealt with in September and will be able to take into account the outcome of the expert evidence application.

Introduction

2. The claimant is a financier and is the founder of the WRM Group of companies which specialise in private equity, special situations and activist investing. He is an Italian national with British citizenship. The claim is limited to publication in this jurisdiction, with which the claimant has strong personal connections. The first defendant is the publisher of Corriere della Sera ("the newspaper"), a daily Italian language newspaper which is published in print and digital editions and is also published free of charge or on a paid subscription basis online (depending on the number of articles viewed). The newspaper has a daily global print circulation of around 250,000, a daily global digital circulation of around 50,000 and online daily unique visitors numbering around 4.4 million globally. It is no longer sold in hardcopy in this jurisdiction. The second, third and fourth defendants are journalists who at all material times were employed and/or retained by the newspaper.

3. On 8 November 2019 the newspaper published an article written by the second defendant with the headline *'Roma, la truffa del palazzo venduto al Vaticano con i soldi di Enasarco'* (the 'First Article'). It was published on page 21 of the hardcopy edition and online at Corriere.it (the first defendant's website) where it continues to be published.

4. On 23 June 2020 the newspaper published an article written by the third and fourth defendants with the headline *'Vaticano, il finanziere Raffaele Mincione fa causa alla Segreteria di Stato per il palazzo di Londra'* (the 'Second Article'). It was published online on the first defendant's website where it continues to be published.

5. The meaning of the words complained of is agreed by the parties, as set out in the Re-Amended Particulars of Claim dated 15 March 2021.

> First Article:
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> "there are reasonable grounds to suspect that the Claimant is guilty of criminal conspiracy to corrupt and fraud in connection with the investment of Vatican funds in a luxury building on Sloane Avenue, London, and the subsequent sale of that property to the Vatican for three times the price it had been valued at a few months earlier, causing damage to the Vatican's finances."
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> Second Article:
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> "(a) that in the transaction(s) in which the Vatican Secretariat had invested over US$200 million in the Claimant's Athena fund which invested a large part of it in 60 Sloane Avenue, London, there were reasonable grounds to suspect that the Claimant had acted in flagrant conflict of interest in his position as manager of the Athena Fund, had wrongly appropriated part of the money invested by the Vatican in the Athena Fund and had used that money for his personal benefit.
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> (b) in the above circumstances there are reasonable grounds to suspect that the Claimant is guilty of embezzlement.
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> (c) in circumstances where the Claimant's Time & Life company had acquired 60 Sloane Avenue on 18 December 2012 for £129 million, but the overall sums paid by the Vatican Secretariat to obtain full ownership of the property were €350 million of funds paid, 128

million of mortgage plus other charges paid over the years, there are reasonable grounds to suspect that the Claimant is guilty of embezzlement."

6. It is common ground that these meanings are defamatory at common law. But "serious harm" is not admitted and the defendants also rely upon the public interest defence set out in section 4 of the Defamation Act 2013, which, in relevant part, provides as follows:

> "(1) It is a defence to an action for defamation for the defendant to show that–
> (a) The statement complained of was, or formed part of, a statement on a matter of public interest; and
> (b) The defendant reasonably believed that publishing the statement complained of was in the public interest.
> (2) subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
> […]
> (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgment as it considers appropriate."

7. It is in relation to these defences (and, if relevant, the issue of damages) that the defendant wishes to rely upon expert evidence.

The application

8. The application was made on 29 June 2022 and sought "permission to call expert witnesses and rely on expert evidence at trial in relation to: (a) Italian and Vatican law; and (b) Italian journalistic practice". Other than to add that the (single) expert for whom permission was sought was Mr Luigi Giuliano, the draft order accompanying the application was phrased in equally general terms. Following the hearing, (at which this high level of generality was criticised), I invited the defendants to supply a further draft order setting out more precisely the scope of the expert evidence sought. This produced the following refinement:

> "The issues of Italian law and Italian journalistic practice are:
> (1) The existence, scope and application of the Italian law referred to in the pleadings namely:
> (a) the statutory right of reply;
> (b) the procedure required before bringing a criminal complaint in defamation;
> (c) the ADR process;
> (d) the law relating to the obligation of the Public Prosecutor's Office to record details in the *Registro delle notizie di reato* ("the Register") of any alleged offence it receives or has acquired of its own initiative, along with the name of the person to whom the offence is attributed.
> (2) Italian causes of action (both civil and criminal) arising from the disclosure of information concerning an investigation which is not public, and the available defences.
> (3) The common practice of Italian journalists in relation to seeking comment from an individual who is under investigation, prior to publishing information relating to that investigation.
> (4) The common practice of Italian media defendants in relation to requests for mediation."

9. Condensed to the essentials, the context in which these categories of expert evidence are sought is as follows.

10. In relation to serious harm, the points taken by the defendants include the availability to the claimant of redress in Italy and under Italian law. One such means of redress is a statutory "right of reply" arising under Article 8 of Law number 47 of 8 February 1948. The scope of this right of reply is set out in paragraph 14.2.1 of the Defence. It is alleged (and not contested) that the claimant did not avail himself of this remedy. Another means of redress is a claim for defamation, which, in Italy, may be pursued by way of both criminal and civil process. Under

Italian law, ADR procedures are obligatory prior to bringing a claim for defamation. It is alleged that the claimant did not pursue any mediation request in respect of the two offending articles, though he did lodge requests in relation to a different article (which is not the subject of this claim). In relation to these requests, it is averred (and not contested) that the defendants "chose not to participate in the mediation procedure" and that this is "a common position taken by media defendants in Italy".

11. In relation to the public interest defence, the defendants aver that the First Article was, or formed part of, a statement on a matter of public interest namely the existence and progress of two formal and related investigations; (see paragraph 18 of the Defence). These were (a) the investigation by the Rome Public Prosecutor's Office into investments by the pension fund "Enasarco" in a building in Sloane Avenue, London, including the role played by the claimant in those investments and (b) the investigation by the Vatican into the Vatican Secretariat of State's investment into the same building. Under the heading "confidential sources", the matters relied upon by the defendants (see paragraph 21 of the Defence) include that the second defendant had been told by a confidential source that the claimant was under investigation by the Rome Public Prosecutor. The source told her that the claimant's name was on the "*Registro degli indagati*" (also called the "*Registro delle notizie di reato*"). Pursuant to paragraph 1, Article 335 of the Italian criminal procedural code, the Public Prosecutor's Office is required to record details in the register of any alleged offence it receives or has acquired on its own initiative, along with the name of the person to whom the offence is attributed. The second defendant knew there was a legal obligation to record the name of individuals accused of an offence on the register. The alleged crimes were those of: "*associazione per delinquere finalizzata alla corruzione e alla truffa*" (criminal association to commit bribery and fraud for the Enasarco investments).

12. Arising in one way or another out of the Public Prosecutor's investigation and/or the inclusion of the claimant's name on the *Registro delle notizie di reato* are the following matters:

    (i) It is both "denied" (Reply, paragraph 12) and "not admitted" (paragraph 16.2) by the claimant that there was a Rome investigation at all. And, if there was, it is averred that it was, at the time of publication of the offending articles, confidential.

    (ii) It is alleged by the defendants that in Italy, where it is believed that a person does not know that they are under investigation, "it is common not to approach that individual before reporting the fact that they are being investigated", (Defence, paragraph 29).

    (iii) The claimant alleges that the second defendant acted irresponsibly by failing to contact the claimant for comment prior to publication.

13. (The pleaded issues range much more widely than the matters set out above. But a fuller summary will not contribute to an understanding of the expert evidence issue.)

Discussion

14. The "headline" position taken by Mr Wolanski QC on the application was set out in paragraphs 8(d) & (f) of his and Ms Jolliffe's skeleton argument. In those paragraphs, they asserted that the circumstances which the court was directed by section 4(2) of the 2013 Act to consider "must, quite obviously, include the applicable legal and journalistic standards in Italy at the time the articles were prepared and published". They said that if it was the claimant's case that the defendants' journalism in relation to the articles had to be judged solely with reference to the applicable legal and journalistic standards in England then that was "absurd". It was absurd because it "entirely ignored the most important circumstances of the case, namely that the articles were written in Italy, and in Italian, by Italian journalists, for an Italian audience. Moreover, the implications more widely of the claimant's position would be potentially highly oppressive for journalists across the globe – any overseas publisher who published online would need to educate themselves about, and operate in accordance with, English law and journalistic practice in order to be able to advance a public interest defence if sued in England".

15. Notwithstanding the confident language of the skeleton argument, my view is that the perspective of section 4 is indeed, at least primarily, an English one. I do not agree that Mr Wolanski QC's and Ms Jolliffe's first proposition is "obvious". And I do not think that it would be either "absurd" or "oppressive" for the defendants' journalism to be judged solely by reference to the laws and journalistic standards of the jurisdiction in which publication took place and the claim is brought. Indeed, that seems to me to be the clear and obvious starting point. I would respectfully adopt the approaches of Dingemans J (as he then was) in *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) and of Warby J (as he then was) in *HRH The Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch):

16. In *Weller* Dingemans J said this:

> "44. It is common ground that the law that I have to apply in this case is the law of England and Wales. This is because the relevant publication by Mail Online occurred within the jurisdiction of the Courts of England and Wales. The controversy is over the extent to which the laws of England and Wales should take into account evidence of the laws of where the photographs were taken, in deciding whether there is a claim for misuse of private information.
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> 45. In my judgment the fact that it was lawful under the laws of California to take the photographs is something that I will take into account when assessing the legal tests in this case. However the fact that it would be lawful to publish the photographs in California does not, in my judgment, determine either the first or second tests that I have to apply. The relevant act complained of in this case is the publication in England and Wales of photographs of the children with unpixellated faces. *Whether this is lawful will have to be determined by a fair application of the tests set out in English law (which as noted above have, since the enactment of the HRA 1998, been affected by the ECHR). The tests are not determined by the law of California. To permit the foreign law to determine the issue would mean that publishers and private individuals would be dependent on foreign laws, which might mirror the laws of England and Wales, or be very strict or very lax.* In this respect it might be noted that it is apparent that many jurisdictions have developed their own laws in response to, among other matters, an increasing appreciation of the importance of rights of children. It would be unfortunate to end up attempting to second guess an issue of the constitutionality of a foreign statute (assuming it to have been applicable) in the Courts of England and Wales where the relevant event, namely the publication, had happened in England and Wales."

17. In *Sussex* Warby J said this:

> "77. The defendant has pleaded that the claimant's expectations of privacy in the Letter's contents were undermined by the fact that (a) as she knew, or believed, her father was likely to disclose the contents to third parties or the media and "bound to" do so if the existence and/or contents of the Letter were referred to in the public domain, and (b) under US Law "the publication of the existence and contents of the Letter was at all times lawful".
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> 78. Point (a) is about the propensity or disposition of the addressee, Mr Markle, to make unwanted disclosure, and the extent to which this was or should have been known to the claimant. The pleaded case is denied, and it is certainly debatable, not least because it appears to be contradicted by Mr Markle's own position prior to the People Article, as reported by the defendant in the Mail Articles, and hard to reconcile with the specific reasons given by him for making the disclosure in the event. But even assuming the facts to be as pleaded, they are not capable of defeating the claimant's case that, objectively speaking, she had a right to expect her father to keep the contents of the Letter private. A person's rights against another are not defeated by the prospect that those rights may be ignored or violated. A high level of risk-taking might be capable of affecting the assessment of damages, but does not excuse an intrusion into privacy: see *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) [2008] EMLR 20 [225-226] (Eady J).
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> 79. Point (b) is not admitted, but it is not contradicted. It is supported by evidence. Permission has been granted to adduce expert evidence on this issue at the trial, and a

> letter from a New York attorney, Mr David Korzenik, is exhibited by Mr Mathieson stating that "there is no law in any state of the US or under any federal law that would render the publication of the Letter or any of its content unlawful." In my judgment, however, the fact - if it be so - that Mr Markle or someone else might lawfully have published in the USA does not assist the defendant.
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> 80. *The issue before me is whether the claimant had a legitimate expectation that the defendant would not publish in this jurisdiction. That is a matter of English law*. In our law a person does not lose their right to object to a specific disclosure by A on the grounds that B could lawfully make it. An argument to that effect was rejected as "wholly misconceived" in 1988: *Stephens v Avery* [1988] 1 Ch 449, 454-5 (Browne-Wilkinson V-C) and see also cases cited in The Law of Privacy and the Media 3rd ed (OUP, 2016) para 11.47 and n 129. *Similarly, the rights which the claimant and Mr Markle might or might not enjoy under foreign law in respect of some different hypothetical disclosure in a foreign jurisdiction appear to me irrelevant*: see the interim and final decisions in *Douglas v Hello!* (a claim in respect of the publication in England and Wales of photographs taken by a paparazzo in New York): *Douglas v Hello! Ltd (No 2)* [2003] EWCA Civ 139, [2003] EMLR 28 [41] (Rix LJ) and *Douglas v Hello! Ltd (No 6)* [2003] EWHC 786 (Ch) [2003] 3 All ER 996 [211], [277] (Lindsay J) affirmed *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595 [2006] QB 125 [100-101]."

18. *Weller* and *Sussex* were both claims for misuse of private information. But the principles (in particular the passages I have italicised) seem to me to be applicable to a claim in defamation where the defendant offers a public interest defence which requires "all the circumstances of the case" to be taken into account. *Prima facie*, those circumstances do not, as it seems to me, include the rights and remedies that might be available to the parties under the laws of Italy – even though Italy is what I might call the jurisdiction of "primary" publication. The claimant has not claimed in Italy and to explore the rights and remedies he might or might not enjoy under Italian law would, as Warby J put it, be both hypothetical[1] and irrelevant. Exploring that hypothetical would have the additional vice that it would, all too readily (as Miss Skinner QC memorably remarked in her oral submissions) have us "disappearing down a parallel rabbit hole". From the point of view of proportionality and case management, that is extremely undesirable.

19. The same goes for foreign journalistic practices which also seem to me to be *prima facie* irrelevant. As Miss Skinner QC and Ms Sjøvoll observed in their skeleton argument, there is no example in the decided cases of a public interest defence (at common law or, as now, under section 4) being determined by reference to expert evidence of journalistic practice, still less foreign journalistic practice. *Jameel & Others v Wall Street Journal Europe Sprl* [2006] UKHL 44 involved a foreign publisher. But there was no suggestion that the assessment of the Reynolds defence required expert assistance as to foreign journalistic practice for the purpose of determining reasonableness.

20. With those general remarks in mind, I turn to the individual categories of expert evidence for which permission is sought. For reasons that will become apparent, I have re-ordered them.

The existence, scope and application of the Italian law referred to in the pleadings namely:

(a) the statutory right of reply;

(c) the ADR process;

21. I will not give permission for expert evidence on these categories of Italian law (or practice). There is no dispute about the availability of these procedures. The claimant will submit that they are either not relevant, or, go to mitigation of damage only – matters for argument at trial.

[1] I have not overlooked the fact that Warby J was referring to a hypothetical publication in a foreign jurisdiction. Here, there was an actual publication. But it remains the case that the justiciability and merits of any claim arising out of that publication in Italy are a hypothetical.

That is enough to decide this part of the application. But, had there been a dispute, I would have refused permission for the same reasons as are set out in the following three paragraphs.

(d) the law relating to the obligation of the Public Prosecutor's Office to record details in the *Registro delle notizie di reato* ("the Register") of any alleged offence it receives or has acquired of its own initiative, along with the name of the person to whom the offence is attributed.

and

(2) Italian causes of action (both civil and criminal) arising from the disclosure of information concerning an investigation which is not public, and the available defences

and

(b) the procedure required before bringing a criminal complaint in defamation;

22. To the extent that it is in issue (which is not clear to me) I will give permission for expert evidence of Italian law on the status of the investigation by the Rome Public Prosecutor's Office and the status of entries in the Register. By status, I mean whether, under Italian law, they were private and/or confidential. If they were not private and/or confidential in Italy and under Italian law, then that would be a matter that might properly be taken into account as a circumstance going to the existence and scope of the defendants' public interest defence; (this will be a matter for the trial judge). But I do not regard the remedies that the claimant might have had in Italy in respect of the disclosure of the information as relevant. Still less would it be relevant to speculate on how such remedies might have turned out if the claimant had chosen to exercise them, (though Mr Wolanski QC did not go this far in his submission). If am wrong about relevance, I would regard "the law relating to the obligation of the Public Prosecutor's Office etc" and "Italian causes of action … arising from the disclosure etc" as going manifestly beyond what would be "reasonably required to resolve the proceedings"; see CPR rule 35.1 and see also the useful three stage test set out in *British Airways Plc v Spencer* [2015] EWHC 2477 (Ch). In relation to this, I consider that Miss Skinner QC was correct to submit that any expert evidence on foreign law had to be proportionate to the matters in issue. It is obvious that if I were to allow expert evidence in these very broad categories I would be opening up a host of distractions and satellite issues when the only, or only important, issue is the confidentiality or otherwise of the investigation and the Register.

23. In order to clarify the need for the expert evidence for which I have given provisional permission, I will direct that the defendants are, within a very short timeframe, to respond to the claimant's Request for Further Information numbered 11, which is to be treated as expanded to include the status of the Register. Contrary to the response presently given, the defendants' case is not "sufficiently pleaded". It is certainly not a sufficient explanation of the defendants' case on the status of the Rome investigation to say (see paragraph 31) that it "could have been made public at any point".

24. I add a word about the defendants' case on the lawfulness of the disclosures in Italy. In paragraph 25 of Mr Winston's statement in support of the application he said that the defendants would contend that "under Italian law the disclosure of the Rome investigation in the First Article was not unlawful", (i.e. was lawful). That is not pleaded and nor (contrary to what Mr Wolanski QC told me in oral submissions) is it set out in correspondence. If the defendants wish to adduce expert evidence on the lawfulness of the disclosure in Italy, they must plead a case that they acted lawfully and they must explain why. But, given that the trial will be heard in November (only some 3 months away), I feel that I should add a tentative observation about any such pleading. The combination of the immediately following paragraphs in Mr Winston's statement and the phrasing of the draft Order makes it clear that by "lawful" or "not unlawful", Mr Winston meant that the disclosure in Italy gave rise to a number of possible remedies which, for a variety of reasons, would be unavailing to the claimant. That is to treat the concept of "lawfulness" or "unlawfulness" in a somewhat extended and tendentious way and such a pleading and any evidence in support of it would *prima facie* be irrelevant. The claimant has brought his claim here, not in Italy.

(3) The common practice of Italian journalists in relation to seeking comment from an individual who is under investigation, prior to publishing information relating to that investigation.
(4) The common practice of Italian media defendants in relation to requests for mediation

25. In her oral submissions Miss Skinner QC clarified (if it needed clarification) that the claimant's attack on the "irresponsible" journalism of the defendants was by reference to English law and English journalistic and media standards, which, in an English claim being tried in England were the standards that applied. At the risk of repetition, there does not seem to me to be anything unfair or oppressive about that. It was the choice of the defendants to publish in England. But there are three additional and independent reasons to refuse permission for these categories of expert evidence. First, the "common practices" alleged are not disputed. Second, the defendants can themselves give evidence about them. They are not a matter for expert evidence. The defendants did not point to the existence of any formal, objective standards set out, for example, in a Code of Practice. Such evidence as an expert, or anyone else, could offer would, inevitably, be patchy and anecdotal. Third, the relevance of journalistic practices is, anyway, limited. To state the obvious, a court coming to scrutinise them may or may not characterise them as good or defensible practices.

Conclusion

26. I will grant permission for expert evidence on Italian law on the provisional and limited basis set out above.

27. It remains to deal with one other matter, which is that objection was taken to the suitability of the defendants' proposed expert, Mr Giuliano. The criticisms were met by further evidence as to his experience and expertise and I regard him as qualified to act.