

Lessons Learnt from Meghan Markle's Defective Pleadings in Daily Mail Case

1 June 2020

In May 2020, judgment was handed down by Warby J striking out a number of allegations made in the case of *HRH The Duchess of Sussex v Associated Newspapers Limited* [2020] EWHC 1058 (Ch).

Although the case concerns matters of privacy law, the case serves as a useful reminder to all commercial litigants to ensure that allegations are both adequately particularised and relevant to the “key elements” of the pleaded cause of action. In cases involving allegations of fraud or dishonesty, that burden is greater.

The Underlying Claim. The claim is brought by Meghan Markle, the well-known actress and wife of Prince Harry, the Duke of Sussex. The defendant is Associated Newspapers Limited, the publisher of the *Mail on Sunday* and operator of the *MailOnline* website.

Central to the claim is what Ms Markle describes as a “*private and confidential*” letter sent to her estranged father, Thomas Markle, in August 2018. The allegations relate to five articles commenting on, and in part disclosing, the contents of that letter, which were published by the *Mail on Sunday* and the *MailOnline* on 10 February 2019.

There are three underlying causes of action:

- **Misuse of private information**, in that the contents of the letter were private and confidential and contained Ms Markle's personal data;
- **Breach of duty under the General Data Protection Regulation (EU) 2016/679 (“GDPR”)**, in that the information contained in the letter constituted personal data within the meaning of the regulation, and was unlawfully and unfairly processed by the defendant; and
- **Infringement of copyright**, in that the letter is alleged to be an original literary work of which Ms Markle is the author, wrongfully reproduced by the defendant.

Associated Newspapers' defence is, broadly speaking, premised on Ms Markle being a "major public figure" whose conduct is of public interest.

The Strike Out Application. In support of those claims, Ms Markle had made a number of other allegations, including that: (1) the defendant acted dishonestly and in bad faith; (2) the defendant deliberately "dug up" or "stirred up" conflict between Ms Markle and her father; and (3) the defendant had an "obvious agenda of publishing intrusive or offensive stories [about Ms Markle]". It is those allegations that Associated Newspapers sought to have struck out pursuant to CPR 3.4(2), which provides that:

"(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."

All three grounds fell to be considered by the Court.

Dishonesty and Malice. Allegations of dishonesty, malice and bad faith were made in support of the claim for misuse of private information. All such allegations were struck out primarily on the basis that they were "irrelevant to liability for misuse of private information", the "essential ingredients" of the cause of action having long since been established and there being no requirement of deliberate wrongdoing on the part of the defendant. On that basis, the inclusion of such allegations was such that it would be likely to "obstruct the just disposal of the proceedings."

The Court also accepted the defendant's submission that such allegations should be struck out pursuant to CPR 3.4(2)(c) for being inadequately pleaded. In particular, both CPR Practice Direction 16PD paragraph 8.2 and the Chancery Guide expressly provide that any allegation of fraud, misrepresentation or willful default must be fully particularised, with reference to credible material in support of the contentions made. In this case, the pleadings failed to identify the alleged dishonest acts and their perpetrator (in circumstances where the defendant is a corporation) and to set out in detail the acts from which dishonesty could be inferred.

"Stirring Up" In a similar vein, the Particulars of Claim alleged that the defendant had "deliberately [sought] to dig or stir up issues between the claimant and her father." Such an

allegation was problematic in two respects: not only did it infer bad faith or impropriety on the part of the defendant, but it also introduced allegations of misconduct “*extraneous to the Articles complained of*” in the pleadings. Though the Court recognised there may be circumstances in which such matters may be relevant at a later stage, by way of rebuttal of a Defence, this was not a sufficient justification of pleading them in the Particulars of Claim.

In any event, what was pleaded was “*impermissibly vague and lacking in particulars*” and therefore once again fell short of the requirements in CPR PD 16 and the Chancery Guide. The “*broad-brush assertions about unspecified journalistic ‘attempts and methods’*” set out in the Response to the Defendant’s Request for Further Information only served to exacerbate the situation, putting the defendant in the “*embarrassing*” position of being unable to tell what case it had to meet.

“**Obvious Agenda**”. Finally, in respect of the claim for misuse of private information, Ms Markle had sought aggravated damages. In support of that, the Particulars of Claim provided that, as Ms Markle had been “*distressed to realise*”, the defendant’s actions were “*wholly consistent with the Defendant’s obvious agenda of publishing intrusive or offensive stories about the Claimant intended to portray her in a false and damaging light.*” The Particulars of Claim reference nine further articles about the claimant.

Again, the Court found that allegation to have been inadequately particularised: any finding on the “agenda” would have required detailed consideration of a number of articles, including a determination of whether they were, in fact, intrusive or offensive; whether they were intended to be so; and whether, taken together, they demonstrated an “agenda”. Such an exercise would also require “*very considerable time and effort*”, and the “*costs and time...required to investigate and resolve the factual issues.... bear no reasonable relationship of proportionality with the legitimate aim of recovering some additional compensation for emotional harm.*” Though that could potentially be justified where the claimant was seeking damages for the additional articles on the basis that they were tortious in their own right, that was not the pleaded case.

Defective Pleadings—A Common Issue in Other Jurisdictions. The decision in Ms Markle’s case is not an uncommon or novel issue. Defective pleadings have been a persistent problem across common law jurisdictions, including in Hong Kong. Indeed, in a 1997 Hong Kong case, Mr Justice Seagroatt commented that “*proper, sensible and effective pleading is a skill or art. I rarely see examples of that*”.¹ This observation was later

¹ *Chan Shiu Wah v Wu Kwok On* [HCPI 1123/1997].

referenced in a 2018 Hong Kong case where the Master in that case added, “unfortunately, the position has not been improved”.²

Many of the civil procedural rules in Hong Kong are similar to the English rules. In Hong Kong, according to Order 18 r.12 of the Hong Kong Rules of the High Court (RHC), pleadings must contain the necessary particulars of the claim and, where an allegation of fraud is made, it should be pleaded “*distinctly and with the utmost particularity*”.³

Where a party fails to particularise its claim or includes a large amount of irrelevant matters, Order 18 r.19 of the RHC (analogous to CPR 3.4(2)) provides the Hong Kong Court the power to strike out any pleading on ground that it may prejudice, embarrass or delay the fair trial of the action.

Key Takeaway. The key takeaway is to ensure that a dispassionate and careful approach is taken to pleading a case. Whilst it may be tempting to seek to add flourishes to pleaded allegations by reference to extraneous events or circumstances, relevance, proportionality, and substantiation remain key:

“The overriding objective of deciding cases justly and at proportionate cost requires the Court to monitor and control the scale of the resources it devotes to each individual claim. Irrelevant matter should, as a rule, have no place in Particulars of Claim. There may be cases where the court would allow the inclusion of some minor matters that are, on a strict view, immaterial. But where the irrelevant pleading makes serious allegations of wrongdoing which are partly implicit, unclear, lacking in the essential particulars, and likely to cause a significant increase in cost and complexity the case for striking out is all the clearer.”

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² *Lo Wai Cheong v Pui Kee Stevedore Co Ltd* [2018] HKCFI 485.

³ *Aktieselskabet Dansk Skibsfinansiering v. Wheelock Marden & Co. Ltd* [1994] 2 H.K.C. 26.



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