

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: A2/2019/0451/PTA



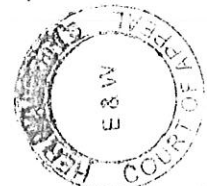
BURGON -v- NEWS GROUP NEWSPAPERS LIMITED

ORDER made by the Rt. Hon. Lord Justice Haddon-Cave

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision: Refused**Reasons**

1. This an application for permission to appeal against a judgment by Dingemans J where he held that the Defendants had defamed the Claimant and awarded £30,000 of damages.
2. **Meaning of article** - The meaning of the online article was that the claimant had "joined a band which he knew took great pleasure in using Nazi symbols". The inclusion of the claimant's quote about the band was an antidote. The article therefore did not mean that the claimant was actively sympathetic to Nazi beliefs and ideology, or that there were reasonable grounds for that suspicion, (see paras 65-68 of judgment).
3. **Serious harm** - It was defamatory because the Nazis were uniquely evil, and no right-minded person would join a band which he knew took great pleasure in using Nazi symbols. The publication of the article to the thousands of people who read it had caused serious harm to the claimant's reputation. The publication of the article in the newspaper did not affect that conclusion. The words used in that article were different, there was express reference to Black Sabbath as the source for the Dream Troll image and the symbols used, and the meaning of the newspaper article was different from the online article. Further, there was nothing to suggest that the readership of the online article mirrored the newspaper's readership (paras 73-75).
4. **Defence of truth** - The claimant had made a guest appearance on a song for the band, but had not joined the band. However, that minor difference would not defeat the defence of truth if the imputations were shown to be substantially true. However, the evidence did not show that the band took great pleasure in using Nazi symbols. The image was produced as a form of tribute to the Black Sabbath album cover. Further, the two "S"s were not "Nazi symbols". They were not positioned together, the angle of them was different from the SS symbol. The colour scheme of red, white and black; the gothic writing, and the umlaut for the words "Dream Troll" could not convert a symbol into something it was not. There was no evidence that anyone in the band thought that the image was similar to the "S" in the Nazi symbol (paras 84-88).
5. **Defence of honest opinion** - The meaning identified above was a question of fact, and the first condition set out in the Defamation Act 2013 s.3(2) could therefore not be satisfied (para.89).
6. **Defence of publication in the public interest** - The online story did not attract the protection of s.4 because, having contacted the claimant and having been told of the source of the symbols in the Dream Troll image, the journalist failed to include that in the online article. He had included the claimant's quotation in the article, but that made the failure to include the reference to Black Sabbath even more inexplicable, as it showed that there would have been time to include it. In order to obtain the protection of s.4 a reference to Black Sabbath was necessary as part of responsible journalism. D2 claimed that he had not included it because he thought that this was said to him off the record but the Judge did not accept that account (paras 98-101).
7. **Damages and injunction** - The online article continued to be published until proceedings were issued. There had been no apology by the defendant. An award of £30,000 in damages was appropriate. An injunction was also granted to restrain further publication of the article (paras 108-109).



Grounds of Appeal

8. Ground 1 – Meaning: The Judge was wrong to have found that the article meant that the Claimant was a member of the band as opposed to having made a guest appearance

The Judge was entitled to find that the article meant that the Claimant was a member of the band (“he has joined a heavy metal band”). In any event, it is hard to see how this matters. As the Judge said that at [84] this was an immaterial difference to whether the defence of justification would succeed or not. Accordingly, I refuse permission on Ground 1.

9. Ground 2 – Justification: The Judge wrongly concluded that the Dream Troll image did not use Nazi symbols or was strongly reminiscent of Nazi iconography

The test is whether the Judge's conclusion was unreasonable. It plainly was not. Accordingly, I refuse permission on Ground 2.

10. Ground 3 – Justification: The Judge was wrong to conclude that the fact the members of the band did not think the image had Nazi associations was relevant.

The Applicant accepts this is contingent on Ground 2. Accordingly, I refuse permission on Ground 3 for the same reasons as Ground 2 above.

11. Ground 4 – Justification: Having reached the wrong conclusion on the Nazi characteristics of the image the Judge wrongly rejected the defence of truth (if he had concluded that the image had Nazi characteristics he would have been bound to find that the article was substantially true)

Again this is parasitic on Ground 2 (see above).

12. Ground 5 – Public Interest: The Judge wrongly concluded that the communication between the Press Team and D2 about the Black Sabbath album cover was on the record.

Although there was a dispute about the evidence, the Judge reached a conclusion that was open to him. Accordingly, I refuse permission on Ground 5.

13. Ground 6 – Harm: The Judge wrongly concluded that the meaning of the online article was materially different from the print one. The harm to the Claimant's reputation came from the print article (which had a wider circulation) and not the online one.

In my view, the Judge did not fall into error here. Accordingly, I refuse permission on Ground 6.

14. Ground 7 – Honest Opinion: Having wrongly concluded that the meaning did not include a statement of opinion, the Judge wrongly dismissed the defence of honest opinion.

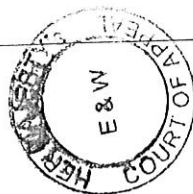
This Ground misses the point. The Judge had found that there was a statement of fact and so the defence of honest opinion would not help. Accordingly, I refuse permission on Ground 7.

15. Ground 8 – Damages: The damages of £30,000 are manifestly excessive.

In my view, the damages are not manifestly excessive. Accordingly, I refuse permission on Ground 8.

16. The nub of this Applicant's complaint is that the Judge gave a benign interpretation to the Death Troll album cover. His view was one which was plainly reasonable and open to him. The Court of Appeal will not interfere.

Information for or directions to the parties



Mediation: Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)?

Yes/No (delete as appropriate)

Pilot categories:

- | | |
|--|--|
| <ul style="list-style-type: none">• All cases involving a litigant in person (other than immigration and family appeals)• Personal injury and clinical negligence cases;• All other professional negligence cases;• Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual; | <ul style="list-style-type: none">• Boundary disputes;• Inheritance disputes.• EAT Appeals• Residential landlord and tenant appeals |
|--|--|

If yes, is there any reason not to refer to CAMS mediation under the pilot?

Yes/No (delete as appropriate)

If yes, please give reason:

Non-pilot cases: Do you wish to make a recommendation for mediation?

Yes/No (delete as appropriate)

Where permission has been granted, or the application adjourned

- a) time estimate (excluding judgment)
- b) any expedition



By the Court

Signed:

Date: 7th June 2019

Notes

- (1) Rule 52.6(1) provides that permission to appeal may be given only where –
 - a) the Court considers that the appeal would have a real prospect of success; or
 - b) there is some other compelling reason why the appeal should be heard.
- (2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.
- (3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **A2/2019/0451/PTA**

DATED 7TH JUNE 2019
IN THE COURT OF APPEAL

ORDER

Copies to:

Reynolds Porter Chamberlain Llp
Dx 600
London City
Ref: ST07/KAM/NEW46.75

Carter Ruck Llp
Dx 333
Chancery Lane
Ref: NT/PBB/16355.1

Lower Court Ref: HQ17M03630