IN THE HIGH COURT OF JUSTICE **Claim No. QB-2020-000201**

QUEEN'S BENCH DIVISION

MEDIA AND COMMUNICATIONS LIST

B E T W E E N:

NINA BURLEIGH

Claimant

- and -

TELEGRAPH MEDIA GROUP LIMITED

Defendant

WRITTEN SUBMISSIONS
ON BEHALF OF THE DEFENDANT
FOR THE TRIAL OF THE PRELIMINARY ISSUES

References to [Tab/Page Number] are to the pages of the agreed electronic trial bundle.

A. Introduction

1. This is a claim for libel in which C seeks damages and an injunction arising from the online publication by D at www.telegraph.co.uk (the "Website") on and since 26 January 2019 of a short item in which D apologised to Melania Trump, the First Lady of the United State of America (the "Apology"). This followed D's publication of an article in the *Telegraph* magazine the previous week, under the headline "*The mystery of Melania"* (the "Original Article" **[44 - 49]**). C was the author of the Original Article, but the Apology **[58]** made no mention of C by name or otherwise. Whether and/or to what extent readers of the Apology knew or recalled the identity of C as the author of the Original Article is in issue.

2. On 29 April 2020, Master Davison made an order by consent for preliminary issues to be determined on the papers without an oral hearing, as follows **[38 - 40]**:

(a) *"On the assumption that there were readers of the [Apology] who upon reading the [Apology] knew or recalled the identity of the Claimant as the author of the original article, what natural and ordinary meaning, if any, the [Apology] bears in respect of the Claimant" and*

(b) *Whether that meaning is defamatory of the Claimant at common law."*

3. The Master made a further order on 25 June 2020 providing directions for the determination of these issues **[41 - 43]**.

B. The rival meanings

4. C's meaning is "*that the Claimant negligently or maliciously wrote a piece so littered with serious and defamatory falsehoods about Mrs Trump that it should not have been published and justified the payment of substantial damages to her, as well as a full and prompt retraction and apology*" **[9]**.

5. D contends in respect of C's meaning:

(i) that, by its employment of alternatives, "*negligently or maliciously*", it is embarrassing and fails to comply with the single meaning rule;

(ii) that, in either alternative: (i) it is far-fetched, involving an artificial and strained interpretation of the Apology which is impermissibly built upon an assumption as to the conjecture or inferences that might be engaged in by some readers as to why the newspaper was publishing the Apology; (ii) it is 'avid for scandal', and (iii) there is no basis for implying such meaning in the actual words of the Apology;

(iii) that, when properly analysed according to the well-established principles, the Apology does not bear any meaning defamatory of C; and

(iv) that this conclusion, which arises from the orthodox approach to determining meaning, is reinforced by compelling policy reasons (including having regard to the Article 10 ECHR rights of publishers, and the Article 8 ECHR rights of those defamed by publishers), namely that the court should be slow to find meanings that are not

unequivocally dictated by the words of a correction and apology. Publishers should be encouraged to acknowledge error where appropriate and not discouraged by threats and claims of libel from authors, contributors or sources.

6. It is D's case that the Apology conveyed no more than that: "*The Daily Telegraph had published an article containing statements about Mrs Trump which it accepts were false, which it should not have published, and for which it is appropriate that it publishes a correction and apology to her and pays her damages."*

7. The case of **Oversea-Chinese Banking Corp Ltd v Wright Norman & Others** [1994] 3 SLR 760 is directly analogous, in which it was held that the author of a letter published in a newspaper was not defamed when the newspaper published an apology in which the letter's author was named and in which the newspaper accepted that the statements in his letter were wholly unfounded (see further at 20 and 27 below).

C. Outline Background of the Claim

8. On 19 January 2019, D published the Original Article. It was the cover story of the *Telegraph magazine,* which is included with the Newspaper for distribution in the UK and Ireland only.[1] C was its author.

9. On 22 January 2019 and 23 January 2019 respectively, D received letters of claim for lawyers acting for Melania Trump in the United States and this jurisdiction. The letters advanced claims for defamation, and sought a retraction, apology and payments of costs, substantial damages and (in this jurisdiction) breach of clause 1 (*Accuracy*) of the IPSO Editor's Code of Practice. Following negotiations, those claims were settled on confidential terms, but which included publication of the Apology.

10. On 30 January 2019 **[61 - 65]**, C complained through her lawyers about the publication of the

[1] A substantially similar version of the Original Article was also published on the Website under the headline "*The secret life of Melania Trump: White House insides, Slovenian school friends and photographers reveal all*". This was removed from the Website on 23 January 2019 at 9.48 am (UK time).

Apology. C claimed that the Apology was defamatory of her, but her complaint at that stage was that "*the overall effect of the Apology is to make the reasonable reader believe that Ms Burleigh is an incompetent and unprofessional journalist, who made multiple unsupported allegations or deliberate lies without sources or without checking them".* C sought the removal of the Apology, an undertaking not to repeat, publication of an apology to her, and the payment of damages and costs.

11. D responded by letter dated 5 February 2019 **[x-reference]**. In its letter, D:

    (i) reminded C that Mrs Trump had complained that a number of statements in the Original Article were false and that D had corresponded with her about the complaint, seeking her input on the allegations which Mrs Trump said were false;

    (ii) explained D was regulated by the Independent Press Standards Organisation, and that the regulatory regime required publishers to correct significant inaccuracies promptly, with an apology where appropriate;

    (iii) explained that after having taken into account C's responses, D had settled Mrs Trump's claim because it considered that "*there was no evidence that would be sufficient to defend a legal action or an IPSO complaint*";

    (iv) provided a detailed explanation as to why D was unable to defend each relevant part of the Apology, including by reference to the information which C had provided D in response to Mrs Trump's complaint;

    (v) explained that different legal standards applied as between the United States and this jurisdiction; and

    (vi) denied that the Apology traduced C's reputation and also denied C's claim for remedies in defamation because the Apology was true and/or privileged and/or published on a matter of public interest.

12. C issued her claim on 20 January 2020. The Claim Form along with Particulars of Claim **[1-16]** were served on 23 January 2020.

13. On 6 February 2020, D's solicitors wrote indicating that D disputed C's defamatory meaning and inviting C to agree to a preliminary issue trial on meaning. D also served a Request for Further

Information in respect of C's case on publication and damages. C's response was served on 9 March 2020 **[23 - 37]**. C initially did not agree to a preliminary trial of meaning.

14. In a detailed letter dated 27 March 2020 **[71 - 73]**, D's solicitors explained why it was appropriate to have a preliminary trial of meaning and stated that such a determination should take place on the papers. They further explained why D contended that the Apology was not defamatory of C, and set out that its case was that the Apology bore the meaning set out in 6 above.

15. On 1 April 2020, C agreed to a preliminary issues trial. On 8 April 2020, C agreed to the determination of the preliminary issues trial on the papers. A consent order to that effect was filed on 29 April 2020. A further consent order was made on 21 April 2020 extending the period of time for filing and serving any Defence until 28 days until after the determination of the preliminary issues trial.

D. The applicable legal principles

16. The legal principles for determining the meaning of a publication are well-established. They were conveniently summarised by Mr Justice Nicklin in **Koutsogiannis v Random House Group Limited** [2019] EWHC 48 (QB); [2020] 4 W.L.R. 25 at [11] – [12]:

> *"[11] 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. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways: Slim -v- Daily Telegraph Ltd [1968] 2 QB 157, 173D-E, per Lord Diplock.*
>
> *[12] The following key principles can be distilled from the authorities: see e.g. Slim -v- Daily Telegraph Ltd 175F; Charleston -v- News Group Newspapers Ltd [1995] 2 AC 65, 70 ; Gillick -v- Brook Advisory Centres [2002] EWCA Civ 1263 [7]; Charman -v- Orion Publishing Co Ltd [2005] EWHC 2187 (QB) [8]-[13]; Jeynes -v- News Magazines Ltd & Anor [2008] EWCA Civ 130 [14]; Doyle -v- Smith [2018] EWHC 2935 [54]-[56]; Lord McAlpine of West Green -v- Bercow [2013] EWHC 1342 (QB) [66]; Simpson -v- MGN Ltd [2016] EMLR 26 [15]; Bukovsky -v- Crown Prosecution Service [2017] EWCA 1529 [2018] 1 WLR 18; Brown -v- Bower [2017] 4 WLR 197 [10]-[16] and Sube -v- News Group Newspapers Ltd [2018] EWHC 1234 (QB) [20]:*
>
> *i) The governing principle is reasonableness.*
>
> *ii) The intention of the publisher is irrelevant.*

iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.

iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.

vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.

vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).

ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.

x) No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.

xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning).”

17. The context of any publication is fundamental to meaning. That involves a focus on both principles ix and xi of **Koutsogiannis**. This principle was emphasised by the decision of the Supreme Court in **Stocker v Stocker** [2019] 2 W.L.R. 1033 at [38] – [40], where the Court held that

"38. All of this, of course, emphasises that the primary role of the court is to focus on how the ordinary reasonable reader would construe the words. And this highlights the court's duty to step aside from a lawyerly analysis and to inhabit the world of the typical reader of a Facebook post. To fulfil that obligation, the court should be particularly conscious of the context in which the statement was made, and it is to that subject that I now turn.

39. The starting point is the sixth proposition in Jeynes —that the hypothetical reader should be considered to be a person who would read the publication—and, I would add, react to it in a way that reflected the circumstances in which it was made. It has been suggested that the judgment in Jeynes failed to acknowledge the importance of context—see Bukovsky v Crown Prosecution Service [2018] 4 WLR 13 where at para 13 Simon LJ said that the propositions which were made in that case omitted "an important principle [namely] … the context and circumstances of the publication".

40. It may be that the significance of context could have been made more explicitly clear in Jeynes, but it is beyond question that this is a factor of considerable importance. And that the way in which the words are presented is relevant to the interpretation of their meaning— Waterson v Lloyd [2013] EMLR 17, para 39."

18. In **Allen v Times Newspapers Ltd** [2019] EWHC 1235 (QB) at [28], Mr Justice Warby emphasised the important difference between what is *implied* by a publication as distinct from what a reader may *infer* from it:

"…The words infer and imply are often used as if they were interchangeable. There clearly is, however, a distinction in principle between an implication conveyed by written words, and something that is inferred from them. The first is something conveyed to the reader by the words used by the writer; the second is a conclusion drawn by the reader as a result of a process of deductive reasoning undertaken by him or her. It is also, I think, a distinction which can be important in practice, because an implication can only flow from what is expressly stated, whereas the basis for an inference may include something extraneous. It might be an extraneous fact, added to the reasoning process by the reader. Or it could be a religious, moral or political value, to which the reader adheres… Maintaining the focus on implication, rather than inference, may help ensure that the Court does not arrive at a meaning which is unreasonable because it does not emerge from the words themselves."

19. When determining meaning, the court must be cautious about the consequences for freedom of expression if it determines that a publication bears an unreasonably strained meaning which cannot then be defended. In **John v Guardian News & Media Ltd** [2008] EWHC 3066 (QB) at [16] - [17], Mr Justice Tugendhat stated that:

"[16] I do not read these authorities as saying that a judge hearing a meaning application may more safely err on one side than on the other. That would not be consistent with the overriding objective. If the judge does err in holding words to be incapable of bearing a meaning pleaded by a claimant, then he deprives the claimant of his right to vindicate his reputation before a court. If the judge errs in holding words to be capable of a meaning pleaded by a claimant, then the defendant is wrongly burdened with defending libel

proceedings. This can be a very onerous burden and one which interferes with the right of freedom of expression.

[17] … There is a real risk of a violation of Art 10 if a claimant strains to attribute to words complained of a high factual meaning, which cannot be defended as true… "

20. It is not of itself defamatory of a contributor to a publication for the publisher to admit that the information published was unfounded and should not have been published by it - **Oversea-Chinese Banking Corp Ltd v Wright Norman & others** (see 7 above).

E. Application of these principles to the present case

21. The meaning advanced by C, at paragraph 27 of the PoC **[9],** does not comply with the single meaning rule. C contends that the meaning was that she "*negligently **or** maliciously wrote a piece so littered with serious and defamatory falsehoods…*" (our emphasis).

22. There is an obvious difference between negligence on the one hand and dishonesty on the other in an individual's professional performance. These are not only quite distinct concepts but moreover, at least in general usage, inconsistent with each other.

23. This is not however simply an issue of C's failure to comply with a technical but central feature of libel law. The tension which C's meaning highlights is illustrative of a more fundamental problem at the heart of C's case, namely whether the Apology says anything that imputes culpability to C. D contends that the central difficulty for C is that it does not. While D has accepted for the purpose of this preliminary issues trial that the court should proceed on the assumption that there were readers of the Apology who knew or recalled the identity of C as the author of the Original Article, what is critically missing from the Apology is any mention of or reference to, or blame in respect of C. The Apology is not about C at all or her standards of work.

24. C invites the court to read in a meaning defamatory of her which could only be the product of conjecture on the part of readers; whereas the language used in the Apology plainly yields no support whatever for such a conjecture. This is why, from the outset of her complaint, C has had to cast about (inconsistently) amongst some, but far from all, of the possible explanations for a

publication by D which D later admitted contained a number of false statements. On her case, the possible explanations range from C being supposedly "*incompetent and unprofessional"* (see 10 above) to C having supposedly acted "*negligently or maliciously".* The possible explanations, of course, also include failings on the part of D which involve no failings on the part of C and/or errors or worse on the part of those from whom the statements about Mrs Trump were sourced and published in perfectly good faith. No reasonable reader could take from the Apology that D was in any way pointing the finger of blame at the author of the Original Article. Indeed, the reasonable reader would conclude that it was D who bore responsibility for the Original Article and any blame attached. In the Apology, D alone is accepting, without more, that the Original Articles "*contained a number of false statements which we accept should not have been published"*. There is no ambiguity or nuance in the manner of expression and the wording is conspicuous in not suggesting where blame, if any, may lie; let alone that blame, if any, may not lie with D itself.

25. This is all entirely in line with the requirement that an apology by a newspaper should include two central features namely (i) the withdrawal of the false allegations and (ii) an expression of regret. As the authors of *Gatley, 12th edition,* note at paragraph 29.2, an apology should *"invariably include a 'full and frank withdrawal of the charges or suggestions conveyed".*[2] *Further the apology would be unlikely to be regarded as adequate without some expression of regret that such charges or suggestions were ever published."* (See also footnotes 6 to 9 to paragraph 29.2). That is why newspaper apologies commonly take a form very similar to the Apology under complaint.

26. The reasonable reader would have recognised the Apology as an unexceptional and properly framed apology to Melania Trump consistent with D's duty to apologise and withdraw statements which it cannot prove or otherwise defend. This can occur for a variety of reasons. Newspapers regularly publish apologies as a way of putting things right when they have gone wrong. The reasonable reader would have been familiar with the practice of apologising, not least because (i) D is subject to a duty to publish, promptly, appropriate apologies under Clause 1ii of the IPSO Editors' Code of Practice and (ii) everyone knows that mistakes or errors are made in journalism, just as they are in any profession, or that things are written in good faith which it is not possible to

[2] Per Cockburn CJ in *Risk Allah Bey v Johnstone* (1868) 18 L.T. 620 at 621.

prove in court in the event of a complaint. It does not follow, and no reasonable reader would conclude from reading such an apology, that there must have been negligent or dishonest culpability on the part of C. It would be a wholly unsubstantiated 'jump' on the part of the reader to draw such a conclusion in the absence of any indication (let alone a sufficiently clear indication) to sustain it in the Apology.

27. This conclusion is reached not only by applying established principles of meaning to the Apology. It is also directly supported by authority – **Oversea-Chinese Banking Corp Ltd v Wright Norman and others** [1994] 3 S.L.R. 760. In that case, the newspaper, the *Business Times*, published an apology arising out of its publication of a letter by Mr Wright, a senior executive at an international executive search firm. The letter alleged that there was "*a prima facie case of rank amateurism or carelessness"* on the part of the bank, OCBC, in permitting a breach of confidentiality to occur. Following a complaint of libel by OCBC, the *Business Times* subsequently published an apology which stated:

> *"Unreserved apology: In the 28 November 1987 issue of the Business Times, we published a letter of Mr Norman Wright, managing partner of Egon Zehnder International South-East Asia, titled 'Searching for Executives' and subtitled 'Need to Maintain Confidentiality'.*
>
> *Business Times is satisfied and accepts that the statements concerning the Oversea-Chinese Banking Corp Ltd in the said letter were and are wholly unfounded. We know of no carelessness or failing on the part of Oversea-Chinese Banking Corp Ltd. To have allowed any breach of confidentiality to happen and we accept that we know of no basis or foundation whatsoever for the statements.*
>
> *Business Times is glad to take this earliest opportunity of expressing to the Oversea-Chinese Banking Corp Ltd its unreserved regrets for any distress, inconvenience or embarrassment caused to them by the said statements."*

28. Mr Wright brought a libel claim over the apology, claiming it bore the meaning that he had "*recklessly, irresponsibly and mischievously written a letter for publication*" which contained a "*wholly unfounded and indefensible libellous statement about a major banking corporation"* and that he had "*shown himself to be unreliable, unsound, lacking in judgment and unfit to occupy a senior executive position in an executive search or any other firm*". The sting was therefore that Mr Wright was reckless, irresponsible and mischievous when he wrote the letter. The Judge firmly rejected this conclusion. The ratio of the judgment on Mr Wright's action was that the publication

was not defamatory of him. It was not defamatory of a professional individual to say that a person got his facts wrong or that what he said was not true or was unfounded. The reasoning of the Judge of the Singapore High Court, Chao Hick Tin J, at p 781 was that:

> *"…I cannot see any justification why a reader may not say that what a journalist wrote is wrong or not correct without at the same time being construed as having attacked his integrity or competence. For example, judgments of court are being criticized all the time, particularly by academics, and nobody has ever suggested that it is defamatory to say that a judge has gone completely wrong or has failed to take into account this factor or that factor. How could it be defamatory to merely say that a person has erred or made a mistake?*
>
> *In any event, Mr Wright is not a journalist. The present apology must be read in its true context. It meant that Wright drew the wrong inference or reached a wrong conclusion. Nothing therein sought to attack him in relation to his business or profession. The only reason why his designation was mentioned in the apology was because Wright mentioned it in his offending letter of 28 November 1987. It had to be stated in the apology for correct identification. In my view, it would be straining the language to suggest that implicit in the words is the allegation that Wright wrote the three paragraphs recklessly or mischievously. To the ordinary fair-minded reader, not avid to scandal, the apology meant that BT admitted that the allegations made by Wright against OCBC were not correct and that BT had published something was wrong and which it should not have published; it therefore apologised to OCBC for that."*

29. The same reasoning and rationale apply equally in this case and D invites the court to follow it. Indeed, if anything the position of D is stronger because C, the author of the Original Articles was not mentioned in the Apology. The point made in 24 above is repeated.

30. This is why D's position is that the natural and ordinary meaning of the Apology is that the Daily Telegraph had published an article containing statements about Mrs Trump which it accepts were false, which it should not have published, and for which it is appropriate that it publishes a correction and apology to her and to pay her damages. Self-evidently this is not defamatory of C at common law, let alone under s.1 of the Defamation Act 2013.

31. D's submission is reinforced by a fundamental point of public policy in this context, namely that the courts should be slow, without more, to construe the publication of an unexceptional and orthodox apology by a publisher (especially where it does not even refer to the author) as imputing a meaning which is defamatory of the original author at common law. There is a strong foundation in public policy (reflected in the Pre-Action Protocol for Media and Communications Claims, the IPSO Editors' Code of Conduct, at common law, and in statute, for example the offer of amends

procedure in s.2 of the Defamation Act 1996) of encouraging and not discouraging the publication of prompt apologies when mistakes are made by publishers. For example, paragraph 1.4 of the Pre-Action Protocol for Media and Communications Claims recognises, an immediate correction and apology are a critical aspect of the process of restoring damage to reputation. This applies to both claimants and responsible publishers equally. It should not be necessary for a publisher in such circumstances to be faced with the cost and burden of advancing available defences, for example of qualified privilege at common law and under s.2 and/or s.4 of the Defamation Act 2013. Otherwise, there is a real risk of creating a significant chilling effect which prevents publishers from publishing apologies voluntarily in appropriate cases. Publishers may be more resistant to apologising proactively and promptly or they might require any apology to take the form of a Statement in Open Court, attracting absolute privilege as a result. This involves delay, unnecessary use of court time and additional costs. Both are unattractive and run the risk of undermining and inhibiting the rights of both publishers and claimants who both wish to benefit from prompt and unequivocal apologies in cases where such is justified.

F. Conclusion

32. For these reasons, the Apology does not bear C's pleaded meaning and is not defamatory of her. C's claim should be rejected and judgment entered for D accordingly.

33. If the Court agrees with D in this conclusion, D should be awarded its costs of the claim. Its costs of and occasioned by the preliminary issue trial (which are the majority of its costs to date) are £30,000 as set out in the agreed and approved costs budget dated 19 June 2020 **[76 - 82]**. If D is successful, it contends that:

    i. C should be ordered to pay D's costs of this Preliminary Issues Trial in the sum of £30,000 within 14 days of the date of the order; and

ii. C should be ordered to pay D's costs of the claim (other than the Preliminary Issues Trial), to be the subject of detailed assessment if not agreed.

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28 JULY 2020