



Neutral Citation Number: [2024] EWHC 2892 (Ch)

Case No: IL-2023-000075

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 November 2024

Before :

MASTER TEVERSON
(sitting in retirement)

BETWEEN :

SAMHERJI HF

Claimant

- and -

ODDUR FRIDRIKSSON

Defendant

Jonathan Hill (instructed by **Wikborg Rein LLP**) for the **Claimant**
The Defendant in person

Hearing dates: 25 and 26 September 2024

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This Judgment was handed down electronically at 10.00am on 14 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MASTER TEVERSON :

1. Pursuant to directions given by Master Clark, two applications are listed before me. The first is an application by the Claimant by application notice dated 14 March 2024 seeking summary judgment against the Defendant. The second is an application by the Defendant dated 13 June 2024 seeking permission to amend the Defence.
2. The Claimant is a company incorporated in Iceland. It is stated in the Particulars of Claim to be one of the largest companies in the Icelandic fishing and fish processing industry. Details of the Claimant and its business are provided on its website, located at the domain name samherji.is (“the Claimant’s Website”).
3. Since 1983 the Claimant’s business has been operated and marketed under the name and trade mark SAMHERJI (“the Mark”). The Claimant has since around 1985 used a logo forming a square with a circle shape encircling two fishes, as shown below.



4. The Claimant claims that the Mark and the Logo are inherently distinctive. The Claimant further claims that it has built up and owns substantial goodwill and reputation among UK customers in the Mark and the Logo.
5. The Defendant is an Icelandic citizen. He is known in Iceland as a performance and conceptual artist. He refers to himself as being “a cultural activist”. As an artist he uses his full name Oddur Fridriksson and the nickname “Odee”.
6. On 23 February 2023 the Defendant registered the domain name samherji.co.uk. The name and email address of the registrant was recorded on the register database as having been redacted for privacy.
7. On 11 May 2023 the Claimant discovered that a website (“the Website”) purporting to be the Claimant’s had been set up linked to the domain name samherji.co.uk. with the

web address <https://samherji.co.uk/>. The Website purported to be the official UK website of the Claimant. The homepage of the Website displayed the statement “WE’RE SORRY” in large font and blue letters. Below this was written “For more information please read our full press release statement”. Alongside there was a “Click Me” link. The link led to a press release which purported to be a press release released by the Claimant on 11 May 2023 from London.

8. The release was headed “Samherji Apologizes, Pledges Restitution and Cooperation with Authorities”. The press release purported to provide an apology on behalf of the Claimant for its involvement in the so-called “Fishrot scandal”. The Fishrot scandal is a financial scandal named after a 2019 Wikileaks release called the “Fishrot Files”. The scandal relates to the trading activities of former subsidiaries of the Claimant in Namibia.
9. The press release contained an apology and admissions which the Claimant has not made. It reads:-

“For immediate release

Samherji Apologizes, Pledges Restitution and Cooperation with Authorities

11th May 2023

London – We at Samherji would like to issue a formal apology for our involvement related to the Fishrot scandal. We acknowledge the severity of the allegations against us, which include corruption, bribery and neocolonialism. These actions have undermined Namibia’s governance and deprived the country of vital revenues for health and education.

We admit to using facilitation fees to enable corrupt financial transactions, extracting profits from Namibia and paying mineral taxes. We also concede that we have illegally benefited from mackerel quotas which led to job losses and long-lasting damage to the Namibian economy.

As a company dedicated to corporate social responsibility and human rights, we take full responsibility for our actions and pledge to cooperate with any relevant authorities in Iceland, Namibia or elsewhere.

We are aware of the partnership between Namibian NGO Affirmative Repositioning (AR) and London-based global anti-corruption fund Restitution, which aims to

recover assets suspected to have been lost through the Fishrot scandal during the period 2014 and 2019.

We are committed to working with Restitution to explore various approaches to recovering stolen assets for the people of Namibia, especially those related to the misappropriation of fishing licences in the Fishrot scandal. We emphasize the importance of economic justice and addressing the illegal treatment and plundering of Namibian marine resources.

We are prepared to provide any necessary assistance to ensure that the funds are returned to the victims and contribute to righting the injustice. We are dedicated to accountability, actively engaging in efforts to return the funds to Namibia and restore trust with the affected communities. We remain committed to learning from our past mistakes and ensuring a brighter, more responsible future.

For further information please contact

Fridrika Eysteindottir

Director of Communications

fridrika@samherji.co.uk

or alternatively

pr@samherji.co.uk

The Logo and Mark of the Claimant appeared immediately below the press release in a rectangular blue box. Fridrika Eysteindottir is a female version of the name of the Defendant's late father. The Claimant had on 22 June 2021 put out a Statement and Apology following an investigation by the Norwegian law firm Wikborg Rein. It was in a totally different form.

10. The press release was sent out on 11 May 2023 by email to a substantial number of media outlets including the BBC, the Guardian, the Independent, the Sunday Times and the Daily Mail, as well as other media organisations around the world.
11. To give authenticity to the Website, the Website contained details about the Claimant, its products, land based activities and fleet, as the Claimant's Website does. It included a button at the top of each page marked "Brochure" which when clicked results in a copy of the Claimant's product brochure, with the last page missing, being downloaded by the internet user. The Website included contact details using email addresses linked

to the domain name. The email address shown for sales, product information and distribution was sales@samherji.co.uk and that for media and press inquiries was pr@samherji.co.uk.

12. The Website included the Mark and the Logo at the top of each page. It gave contact details using the email address samherji@sameherji.co.uk. The Website was made to look as if it were the Claimant's official UK website.
13. There is evidence before me that one media outlet, the Fishing Daily, a newspaper for the Irish, Scottish and UK Fishing Industry reported the apology as genuine in an article published on 11 May 2023. Another journalist, Neil Ramsden, covering the seafood sector, emailed the purported Director of Communications shown at the bottom of the fake press release on 11 May 2023 saying:-

“We're aware it's a fake, but can you identify who has sent this out?”

He received a reply saying:-

“At this time, however, we are not providing any additional commentary beyond what has been shared in the statement released earlier today, The press release has been carefully crafted to communicate all the information we are presently able to disclose.”

14. On 11 May 2023 the Claimant in response posted on the Claimant's Website a message stating that unknown dishonest parties had sent a fake press release in its name to foreign media outlets. The response stated that the same parties also seemed to have set up a fake website in the name of the Claimant hosted in the UK and, at the same time, distributed fake advertising banners.
15. On 15 May 2023 Nominet, the operator of the domain name register database, disclosed to the Claimant the name and address of the Registrant of the domain name which had originally been redacted. The name and address given was that of the Defendant.
16. On 16 May 2023 the Claimant wrote to the Defendant requesting the Defendant to immediately stop all use of trademarks owned by Samherji and to close the website Samerherji.co.uk. The Defendant replied at 09.01 on 17 May 2023 saying that “*at this*

point, we're sorry to inform you that no changes will be made to the website or the artwork”.

17. On 17 May 2023 the Claimant applied without notice to the Chancery Division Applications Court for an interim injunction. The application came before the court on 17 May 2023 when it was adjourned by Adam Johnson J. until 19 May 2023 to enable the Defendant to have an opportunity to respond.
18. Also on 17 May 2023 the Defendant issued a press release in Iceland revealing that www.samherji.co.uk and the press release sent to the media on 11 May 2023 was the work of an Icelandic artist and cultural activist, namely himself.
19. The Claimant became aware of an article published in the Icelandic paper Heimildin at 08:00 on 17 May 2023, which reported that an apology and a website that was sent out in Samherji's name last week was part of an artwork. The article reported that the words “We're Sorry” were adorned on the wall of the Reykjavik Art Museum in large letters. The artwork was described as using the art form of cultural distortion. The article stated that the artwork consisted of a website, the press release that was sent out and a large mural painted on the wall of the Reykjavik Art Museum, as well as an apology. The piece was stated to be the Defendant's graduation from a BA program at the Icelandic Academy of the Arts and to be part of a graduation exhibition running between 18 May and 29 May 2023. The Defendant was quoted in the article as saying that the artwork is ““fuck you” Samherji and I'm sorry Namibia”. The Defendant was reported in the article as describing the apology as an apology to Namibia on behalf of the Icelandic people.
20. On 19 May 2023 the Claimant's application for interim relief came back before the court. The Defendant did not attend and was not represented although he had downloaded the case papers.
21. By paragraph 1 of his order dated 19 May 2023 Adam Johnson J. ordered the Defendant by 4pm BST on 24 May 2023 to take all steps necessary (a) to transfer the Domain Name to the Claimant (b) to take down the Website located at the Domain Name and (c) to ensure that the Website and all email accounts using the Domain Name are and

continue to be non-operational pending final order of the Court following trial or further order in the meantime.

22. By paragraph 2 the Judge ordered that:-

“Pending final order of the Court following trial or further order in the meantime, the Defendant (whether acting by himself or by his servants or agents or by procuring, instructing, encouraging or assisting others to act) shall not without the written consent of the Claimant:

(a) register, acquire, use or (except as required by paragraph 1 above) transfer any domain name featuring the word “samherji” or any confusingly similar word;

(b) use the sign “Samherji” as the name or title for a website or any publication;

(c) misrepresent, whether by using the sign “Samherji” or any other means, that:

(i) a website operated or published by the Defendant (whether acting alone or with others) is a website operated, controlled or published by the Claimant or any person in the Claimant’s group of companies or any person authorised by the Claimant;

(ii) any other form of publication or communication made by the Defendant (whether acting alone or with others) is a publication or communication made by the Claimant or any person in the Claimant’s group of companies or any person authorised by the Claimant

(iii) the Defendant or any person other than the Claimant is the Claimant

(d) copy the Claimant’s logo or brochure (as referred to in the witness statement dated 16 May 2023) or distribute, publish, transmit, broadcast or otherwise communicate any document containing a copy of the logo or any copy of the brochure.”

23. By paragraph 3 of the Judge’s order, the Defendant was ordered by 4pm BST on 24 May 2023 to make a witness statement (a) exhibiting all email messages sent and

received by or at the email accounts using the Domain Name (except for any messages subject to a valid claim to legal privilege) and (b) setting out any other domain names, websites or publications, *“which have misrepresented to readers that those domain names or websites are domain names or websites of the Claimant or any person in the Claimant’s group of companies or any person authorised by the Claimant”*.

24. On 24 May 2023 the Domain Name was transferred to the Claimant in compliance with paragraph 1 of the order (to be held unused) and subsequently the Website taken down.
25. On 25 May 2023 it was ordered by Sir Anthony Mann sitting as a Judge of the High Court that paragraphs 1 and 2 of the order be continued until final order of the Court following trial or further order in the meantime. The making of this order was unopposed. A consent order had been lodged signed by Wedlake Bell LLP solicitors on behalf of the Defendant agreeing to the continuation of the injunction on the basis that the Defendant would have the right to apply to set aside or challenge the order of 19 May 2023 on or before 16 June 2023.
26. Particulars of Claim were served on 7 June 2023. A professionally drafted Defence and Counterclaim was filed and served on behalf of the Defendant by Wedlake Bell LLP on 17 July 2023. On 4 August 2023 the Claimant made a Part 18 Request for Further Information expecting a response by 11 August 2023. The Reply and Defence to Counterclaim was served on 18 August 2023. On 18 September 2023 the Claimant applied for an order requiring further information to be given. The Defendant’s response was filed and served on 27 September 2023. On 28 September Wedlake Bell LLP came off the record as acting for the Defendant.
27. No further formal step in the claim was taken until the Claimant issued its application for summary judgment on 14 March 2024. By its application notice the Claimant is applying for summary judgment against the Defendant pursuant to CPR 24.2(b) on its claims for passing off, copyright infringement and malicious falsehood. The Claimant does not seek summary judgment on its claim for trade mark infringement or in relation to the Defendant’s counterclaim for revocation of the Claimant’s trade marks for alleged non-use. The Claimant’s alternative application to strike out the defences to those claims under CPR 3.4(2)(a) was not pursued before me.

28. In response to the Claimant's summary judgment application the Defendant proposed to amend the Defence. On 26 April 2024 Master Clark directed that if the Claimant did not consent to the proposed amendments the Defendant should file an application for permission to amend the Defence by 14 June 2024. By application notice dated 13 June 2024 the Defendant applied for permission to amend the Defence filed on 17 July 2023 in the form of the proposed amended Defence and Counterclaim dated 14 June 2024.

29. It was accepted before me on behalf of the Claimant that given the proposed amendments to the Defence, the Claimant's Summary Judgment application should be judged as against the Defendant on the basis of the Defence as proposed to be amended.

30. The hearing of the applications before me was an "in person" hearing. The Claimant was represented by Mr Jonathan Hill of counsel. The Defendant acted in person. He was assisted at the hearing by a "McKenzie Friend". It was clear to me that the Defendant had had the benefit of legal assistance in the preparation of his case and submissions.

31. CPR r. 24.3 provides that:-

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if-

(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

32. The Claimant contends that the Defendant has "no real prospect of successfully defending" its claims for passing off, copyright infringement and malicious falsehood and that "there is no other compelling reason why" those parts of its claim should be disposed of only at trial.

33. I was referred to the statement of the principles to be applied by the Court in determining whether a party (in that case the claimant) has a real prospect of succeeding on the claim, defence or issue as set out by Lewison J. (as he then was) in *Easyair Ltd*

v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] which was approved by the Court of Appeal in *AC Ward & Sons v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]. I need not set the principles out in full. On an application of this type, the court must not conduct a “mini-trial”. The court should hesitate about making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge. On the other hand, if an application under Part 24 gives rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, the court should grasp the nettle and decide it.

34. The Claimant submits that it is clear that the Domain Name and Website were targeted at the United Kingdom. This is not disputed in the Defence. The choice of a .co.uk suffix shows that the Domain Name and Website were set up to speak to a United Kingdom audience. The Domain Name and Website were not limited to Iceland. The Defendant drew the Website to the attention of media outlets and other persons in the United Kingdom on 11 May 2023. The Fake Press Release is stated to be made from London. It refers to London-based Restitution. Looked at objectively, from the perspective of the average customer or potential customer, the Website appeared to be the Claimant’s official UK website.
35. The Defendant’s principal argument in response to the Claimant’s summary judgment application is to claim his right as an artist to freedom of expression under Article 10 of the European Convention on Human Rights (“the ECHR”) as incorporated into the laws of the United Kingdom by the Human Rights Act 1998 (“HRA 1998”) outweighs the intellectual property rights of the Claimant.
36. Article 10 of the ECHR provides:-

“Freedom of Expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.”

37. As paragraph 2 provides, the exercise of the right to freedom of expression may be “*subject to such ...restrictions...as are prescribed by law and are necessary in a democratic society ...for the protection of the reputation or rights of others...*”. The “*rights of others*” includes those of the owner of a copyright or other intellectual property right.

38. In addition, Article 1 of the First Protocol provides:-

“Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

39. Section 1(1) of HRA 1998 defines “the Convention rights” as meaning

“the rights and fundamental freedoms set out in

- (a) Articles 2 to 12 and 14 of the Convention,
- (b) Articles 1 to 3 of the First Protocol, and
- (c) Articles 1 and 2 of the Thirteenth Protocol

as read with Articles 16 to 18 of the Convention.”

40. By virtue of section 2(1) of HRA 1998 a court determining a question which has arisen in connection with a Convention right must take into account, amongst other material, any judgment, decision, declaration or advisory opinion of the European Court of Human Rights, whenever made or given, so far as, in the opinion of the court, it is relevant to the proceedings in which the question has arisen.

41. Section 3(1) requires that:-

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

42. Section 6(1) provides that it is unlawful for a public authority, which includes a court, to act in a way which is incompatible with a Convention right unless it is obliged to so act by primary legislation.

43. Section 12 applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. Section 12(4) requires that:-

“The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-

(a) the extent to which-

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.”

Section 12(5) provides that “relief” includes any remedy or order (other than in criminal proceedings).”

44. In relation to Article 12(4), it has been held that the court cannot have “particular regard” to Article 10 without having regard to the qualifications in Article 10(2): *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967 per Sedley LJ at paragraph 133. The subsection does not of itself give the Article 10 right to freedom of expression pre-

eminence over other competing rights. Where the value of two rights are in conflict it is necessary for the court to look closely at the facts of individual cases and to focus intensely on their comparative importance. This includes consideration of the justification for interfering with or restricting each right: *Ashdown v Telegraph Group Ltd* [2002] Ch 149 at paragraph 45; *A Local Authority v PD* [2005] EWHC 1832 at paragraph 24.

45. In support of his case, the Defendant relies on a number of decisions of the European Court of Human Rights. These state clearly that political expression, including expression on matters of public interest and concern, require a high level of protection under Article 10: *Steel & Morris v United Kingdom* [2005] E.M.L.R 15 at paragraph 88. The court set out these principles at paragraph 89-90:-

“The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Art.10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment (see, mutatis mutandis, Bowman v United Kingdom, judgment of February 19, 1998, Reports 1998-1 and Appleby v United Kingdom, no 44306/98 (2003) ECHR)

Nonetheless, the Court has held on many occasions that even the press “must not overstep certain bounds, in particular in respect of reputation and rights of others...The safeguard afforded by Art.10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (Bladet Tromsø, at [65]), and the same principles must apply to others who engage in public debate. It is true that the Court has held that journalists are allowed “recourse to a degree of exaggeration, or even provocation, ,,and it considers in a campaigning leaflet a certain degree of hyperbole and exaggeration is to be tolerated, and even expected. In the present

case, however, the allegations were of a very serious nature and were presented as statements of fact rather than value judgments.”

46. The Defendant says that the use of symbols for the purposes of criticism or social commentary can be justified. He relies on a Judgment of the Court of The Hague in preliminary relief proceedings dated 4 May 2011 in *Nadia Plesner Joensen v Louis Vuitton Malletier SA*. [2011] E.C.D.R 14. In that case, Plesner sought to increase the public’s attention regarding the situation in Darfur by making works of art contrasting the world of glamour with the poignant situation in Darfur. For that purpose, Plesner used illustrations with symbolic or iconic value in which sometimes intellectual property rights were vested. Louis Vuitton, the well-known fashion house, sought to stop one of its fashion bags being used by Plesner in her illustrations relying on its Community designs registration. The court stated that artists enjoy a considerable protection with respect to their artistic freedom, in which, in principle, art may “offend, shock or disturb”. It noted that Plesner’s use was functional and proportional and did not serve a commercial purpose. The court said that, under preliminary judgment, it was plausible that Plesner’s intention was not to free ride with Louis Vuitton’s reputation in a commercial sense but rather to use Louis Vuitton’s reputation to pass on her society-critical message.
47. The present case has some similarities with the *Plesner* case in that the Defendant is an artist and the Claimant is a large multi-national corporation. There are also important differences. That case was concerned with Community Design rights. The Defendant in that case was using the Claimant’s reputation to pass on their message. In the present case, the Defendant created the Website as a vehicle for sending out a fake press release thereby putting words into the mouth of the Claimant which the Defendant considers the Claimant should have spoken in order to shame the Claimant and to draw attention to the Claimant’s involvement with the Fishrot scandal.
48. In contrast to the *Plesner* case, the Defendant’s performance art-work involved, albeit for a limited period, a form of deception and impersonation and misinformation. The Defendant attempted to make it appear that the Claimant had made the statements and given the apology in the press release when it had not.

49. The Defendant argues, in effect, that the end justifies the means. He says that his performance artwork was created for the purpose of attracting attention to the Claimant's involvement in the Fishrot scandal and highlighting what the Defendant claims has been a lack of real accountability for the damage it inflicted.
50. The Defendant says the artwork was particularly inspired by the Yes Men's artwork *Dow Does The Right Thing* where they orchestrated a high-profile media hoax in 2004 that involved impersonating a spokesperson for Dow Chemical Company on BBC World News where the invitation to the BBC was, the Defendant says, received via a fake website of Dow Chemical Company created by the Yes Men.
51. The Defendant argues that the interest of the Claimant in having its reputation and intellectual property protected does not prevail over the interest of society being able to be informed and to debate on matters of public interest.
52. In my view, in balancing the convention rights, the Defendant relying on Article 10 alone has no real prospect of opposing the transfer of the Domain Name to the Claimant. The Domain Name and the Website were created as vehicles for the fake press release. The Defendant's art work has been performed and there can be no justification for allowing the Domain Name to be retained or further used by the Defendant.
53. Similarly, in my view in balancing the convention rights, the Defendant relying on Article 10 alone has no real prospect at trial in successfully opposing a final injunction being granted in the form of, or substantially in the form of paragraph 2 of the order of Adam Johnson J. as continued until trial or further order by the order of Sir Anthony Mann dated 25 May 2023. The making of a final order in that form will prevent the Defendant from repeating or making further use of the Claimant's Mark and Logo. It will prevent the Defendant from further misrepresenting whether by the use of the sign "Samherji" or by any other means that the Website is a website operated or controlled by the Claimant when it is not.
54. I turn to the claims in passing off, copyright and malicious falsehood relied on by the Claimants in support of its summary judgment application and to the defences advanced by the Defendant to each of the claims.

55. The Claimant's claim in passing off is pleaded in paragraphs 36 to 41 of the Particulars of Claim and supported by the 1st and 3rd witness statements of Christopher James Grieveson and the 1st and 2nd witness statements of Gustaf Baldvinsson. To make good a claim in passing off the Claimant must prove (i) a reputation or goodwill acquired by the Claimant in its goods, name, or mark (ii) a misrepresentation targeted at the jurisdiction by the Defendant leading to confusion or deception and (iii) damage to the Claimant or in relation to behaviour which is to happen in the future, a likelihood of future damage. The question of whether there has been passing off falls to be determined at the date the Defendant commenced the acts complained of. In this case that was on or around 11 May 2023 when the Website became active.

56. The gist of passing off, as an action for the protection of goodwill, was explained by Lord Diplock in *Star Industrial Co. Ltd v Yap Kwee Kor* [1976] F.S.R. 256 at 269:

“A passing off action is a remedy for the invasion of a right of property not in the mark, name or get-up improperly used, but in the business or goodwill likely to be injured by the misrepresentation made by passing off one person's goods as the goods of another. Goodwill, as the subject of proprietary rights, is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached. It is local in character and divisible; if the business is carried on in several countries a separate goodwill attaches to it in each.”

57. The Court of Appeal in *Scandecor Development AB v Scandecor Marketing AB* [1999] FSR 26 at 42 accepted that, in an appropriate case, it is legally and factually possible for a business based overseas to acquire a goodwill in this country by the supply of its products through a subsidiary, agent or licensee. Whether or not that occurs must depend on the facts of the particular case.

58. The Claimant's evidence is that it is a vertically integrated seafood company. It has exported its own fish products from Iceland to the UK through its sales and marketing division which bears the name and brand Ice Fresh Seafood. Very substantial sales of the Claimant's sea food products, particularly cod, haddock and prawns, have been achieved in the UK. These sales have in the main been made indirectly through a UK

company Seagold Limited which was until 2022 a subsidiary of the Claimant and is now controlled by the son of the Claimant's Chief Executive.

59. In support of the Claimant's case on goodwill, two witness statements have been made by Mr Baldvinsson, the Managing Director of Seagold Limited. He together with the Claimant founded Seagold Limited in 1996. Mr Baldvinsson states that all customers are aware of the origin of the products they purchase and this includes in particular their major retail customers which include some of the largest supermarkets in the UK. These large retailers carry out audits of the Claimant's production plants in Iceland. Mr Baldvinsson says that both large and small retailers would be aware of the provenance of the product. He says that when customers purchase through an intermediary, they are always aware that the origins of the product are the Claimant, when that is the case. In his second witness statement Mr Baldvinsson disputes the Defendant's suggestion that the Claimant has no goodwill with UK clients because transactions are undertaken through Ice Fresh Seafood and Seagold Limited. He says that the Claimant is the producer of the products being sold and is responsible for their quality. Mr Baldvinsson states that it is widely recognised with the trade customers they sell to that the Claimant is the source of the fish sold.
60. This is not a case where the ownership of goodwill is being disputed between different companies in the sales and marketing chain. The companies involved are either members of the same group or with very close ties to the group. They have a shared interest in preserving and protecting the goodwill in the Claimant's products. On the evidence before me, I do not consider that the Defendant has a real prospect at trial of showing that the Claimant has no goodwill or reputation in the UK. The Claimant's goodwill amongst its customers in the UK is based on the known quality of its sea food products and the consistency of its supply chain.
61. It is recognised by the Defendant that the registration of the Domain Name and the use of the Website in the period 11 May 2023 to 17 May 2023 involved a deceit, albeit for a limited period. It was the intention during that period to convey that the Claimant had made a statement and formal apology on what purported to be the Claimant's official website in the UK in the form of the Fake Press Release. The Defendant's case that the Website, the Fake Press Release and his subsequent press release were elements in a

performance artwork following the practice known as “culture jamming” does not contradict there having been a misrepresentation by passing off the Website and Fake Press Release as that of the Claimant. It is the Defendant’s position that for the performance of the artwork to be effective, there needed to be an element of deception.

62. The remedy of passing off is not limited to cases where a defendant is seeking to pass off his own goods as those of the Claimant. In *Burge v Haycock* [2002] RPC 28, the Court of Appeal granted officers of the Countryside Alliance an interim injunction to prevent the First Defendant in that case from purporting to stand as a Countryside Alliance candidate in the Bromyard Town Council election. The Court of Appeal accepted that as a result of a potentially injurious association with the Defendant the Claimant might lose control over its own reputation and suffer consequent damage to goodwill. In the present case, the Defendant is not claiming to have been endorsed by the Claimant. Instead there was a misrepresentation that the Website was that of the Claimant. As a result, the Claimant until the court granted it interim relief had lost control of its goodwill in the UK.

63. The Claimant’s claim for passing off can be brought against the Defendant both as the person who was responsible for the misrepresentation and as the person who provided the means by which the passing off could take place. In *British Telecommunications Plc v One In A Million Ltd* [1999] 1 WLR 903 the Court of Appeal held that there is a jurisdiction to grant injunctive relief where a defendant is equipped with or is intending to equip another with an instrument of fraud. The use of the Domain Name and the Website in the Claimant’s name was a means of damaging the Claimant’s reputation. The Court will intervene by way of injunction in cases where the Defendant has equipped himself or intends to equip another with an instrument of fraud. An instrument of fraud is one that is set up in order to mislead or deceive or involves an abuse of the system of the registration of a Domain Name.

64. Where a Website has been set up and operated to make it appear that it is the official website of a trading company, when it is not, the court will infer that damage to that company’s goodwill is likely to have occurred. In the present case, the granting by the court of an interim injunction is likely to have limited the amount of damage suffered by the Claimant. The Claimant is likely to have suffered some damage to its goodwill

and reputation in the UK and has suffered damage in the form of having to take action to correct the misrepresentation caused by the Claimant. Although the Website only operated for a short period as a result of the Claimant being granted an interim injunction on 19 May 2023, the operation of the Website until then was outside the control of the Claimant. In my view, the Defendant in view of these two types of passing off has no real prospect of success in opposing at trial a final injunction in the terms of paragraph 1 and 2 of the order of Adam Johnson J. Nor in my view can it realistically be argued that the use of the Domain Name and Website caused no damage to the reputation and goodwill of the Claimant.

65. It is clear from the design of the Website that the Defendant has infringed the Claimant's copyright in the Logo and the Brochure by copying. In order to give the Website authenticity, the Logo was displayed at the top of each page alongside the Mark. There was a link to the Brochure which, if clicked on, resulted in a genuine brochure of the Claimant being downloaded by the internet user.

66. In the Defence the Defendant puts the Claimant to proof as to the ownership of the copyright in the Logo and the Brochure.

67. The issue of copyright ownership is dealt with in the second witness statement of Mr Baldvinsson. He states that the Logo was designed by Gudbjorg Ringsted, an Icelandic artist, in around 1984 for the use of the Claimant. He says that Ms Ringsted and the Claimant had proceeded on the basis that the Logo was solely the intellectual property of the Claimant. He says that in order to confirm the position a deed of assignment assigning to the Claimant all copyright interests in the Logo was entered into on 4 July 2023. The Deed records that Gudbjorg Ringsted ("the Assignor") has agreed to assign to the Claimant ("the Assignee") any Intellectual Property Rights that they retain in the Logo. By clause 6 :-

"The Assignor covenants with the Assignee that the Assignor will at the expense of the Assignee execute and deliver all such documents and perform such acts as may be required by the Assignee to give full effect to this Assignment."

68. Mr Baldvinsson states that the Brochures were created by Marketing by Design LLC ("MBD") a media company in the United States, for Ice Fresh Seafood in 2019 and

2021. The invoices concerning this work dated 28 May 2019 and 3 March 2021 both state on page 2 that

“Rights to artwork, images and web based data shall not be released to the client until the client has paid MBD in full.”

Proof of payment from Ice Fresh Seafood ehf. to MBD of the invoices on 27 June 2019 and 21 April 2021 respectively is exhibited. Ice Fresh Seafood ehf. is a subsidiary of the Claimant.

69. In paragraph 41 of the Defence “the Defendant relies on the defences in sections 30 and 30A of the Copyright, Designs and Patents Act 1988 (“CDPA 1988”), *“namely fair dealing for the purposes of criticism or review, quotation and/or parody and/or pastiche.”*

70. Section 30 so far as material provides:-

“(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise) and provided that the work has been made available to the public.

(1ZA) Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that-

- (a) the work has been made available to the public,*
- (b) the use of the quotation is fair dealing with the work,*
- (c) the extent of the quotation is no more than is required by the specific purpose for which it used, and*
- (d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise)*

(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that ...it is accompanied by a sufficient acknowledgement”.

71. Section 30A provides so far as material:-

“(1) Fair dealing with a work for the purposes of caricature, parody, or pastiche does not infringe copyright in the work”.

72. What constitutes a sufficient acknowledgement is defined in section 178 CPDA 1988:-

“sufficient acknowledgement” means an acknowledgement identifying the work in question by its title or other description, and identifying the author unless-
(a) in the case of a published work, it is published anonymously; ...”

73. It is clear that the use of the Logo and the Brochure in the design of the Website was to give the Website authenticity and not for the purpose of criticism or review or quotation. The criticism required is of *“that or another work or a performance of a work”*. This is quite distinct from criticism of the Claimant’s conduct in relation to the Fishrot scandal. Likewise, this is clearly not a case of dealing with a work for the purposes of caricature, parody or pastiche. The Logo and Brochure as well as the whole design of the Website was intended to make it appear to be the official website of the Claimant. Parody must evoke an existing work but be noticeably different from the original and constitute an expression of humour or mockery. Pastiche imitates the style of an existing work whilst being noticeably different from the original.

74. There is no specific reliance in the Defence on section 30(2), which provides that fair dealing with any work (other than a photograph) for the purpose of reporting current events does not infringe the copyright in the work provided that it is accompanied by a sufficient acknowledgement.

75. The Fishrot scandal is a current event in the sense that it is still under discussion and investigation. I accept that part of the motive of the Defendant was to draw attention to the Claimant’s involvement with the scandal. I do not however accept that the means by which the Defendant sought to draw attention to the scandal was a fair dealing. To create a website as a vehicle through which to put out a fake press release, containing admissions and commitments which the Claimant has not made cannot with any realistic prospect of success be relied upon as a fair dealing. I accept that the defence should be construed liberally to give effect to Article 10 but I do not accept that it is

realistic to invoke Article 10 where a completely false and misleading press release has been put out. It was open to the Defendant to criticise the Claimant publicly. The installation at the Museum of Art in Reykjavik although plainly seeking to shame the Claimant did not seek to pass itself off as an official statement or website of the Claimant. In creating a website that appeared to be the official UK website of the Claimant and in linking to it and sending out the fake press release, the Defendant crossed the boundary between fair and unfair dealing. The defence under section 30 (2) is also bound to fail for lack of a sufficient acknowledgement.

76. In *Ashdown v Telegraph Group Ltd* [2002] Ch 149 the Court of Appeal recognised that a public interest defence which raised considerations under Article 10 did exist and could be accommodated under Section 171(3) of CDPA 1988. On behalf of the Claimant it was submitted that since Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“the InfoSoc Directive”) came into force the position has changed. On this point I was referred by Mr Hill to paragraph 49 of the Judgment of the Court of Justice of the European Union in *Spiegel Online GmbH v Beck* [2019] Bus LR. I have not had the benefit of legal argument on this point.

77. I prefer to proceed instead on the basis that the court must have regard to the importance of freedom of expression and consider the impact of the public interest on the test of fair dealing. In the present case the Defendant put statements into the mouth of the Claimant which were factually incorrect in the sense that they were not statements made by the Claimant and were statements, apologies and commitments which the Defendant wanted it to appear that the Claimant was adopting. The fake press release, even if viewed in the context of a work of performance art, contained admissions of a very serious nature and were presented as admissions made by the Claimant and as commitments to work with Restitution. This ploy or hoax was not in accordance with the ethics of journalism whose principles must apply to others who engage in public debate: *Steel & Morris v United Kingdom* [2005] E.M.L.R 314 at 346-7. The fact that the Defendant sent out a further press release on 17 May 2023 revealing that he was behind the fake press release was not assured of bringing the deception to an end. The

Defendant's press release was issued in Iceland and not in London. The Website remained active until it was closed pursuant to the order of the court.

78. The Claimant also seeks summary judgment based on the tort of malicious falsehood. I propose to deal with this claim more briefly. This claim in tort is not included in the Claim Form although it was relied upon by the Claimant on its application for an interim injunction and is pleaded in the Particulars of Claim at paragraphs 45-50. It is responded to in the Defence.

79. The Claimant relies on the following statements ("the Statements") made by the Defendant:-

- (i) The Domain Name was an official domain name of the Claimant's;
- (ii) The Fake Press Release was a genuine statement issued by the Claimant; and
- (iii) The contents of the Website, more generally, were contents published by the Claimant.

80. For the tort of malicious falsehood to be established, a claimant must show:

- (i) a falsehood published about or concerning the Claimant;
- (ii) malice;
- (iii) damage.

81. It is consistent with the right to freedom of expression contained in Article 10 that there is a need to prove malice and either actual damage or, under section 3 of the Defamation Act, words "calculated to cause pecuniary damage" to the Claimant.

82. Malice is the key ingredient to this tort. The Claimant submits that it is clear and obvious that the Statements were maliciously made. The Claimant submits that the Defendant knew full well that they were false and that was his very intention. The Claimant submits the Defendant was motivated by the improper purpose of putting words into the mouth of the Claimant. The Claimant relies on the Defendant being quoted by Heimildin in its article published on 17 May 2023 as saying that the artwork is "'fuck you' Samherji and I'm sorry Namibia".

83. The Defendant in the Defence denies having committed malicious falsehood and says there is no proof of his malicious intent. He denies that the Statements caused the Claimant any damage. He relies on Article 10.

84. Section 3 of the Defamation Act 1952 provides:

“(1) In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage-

(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

(b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.”

85. I think the same logic applies to this claim as to the elements of misrepresentation in the passing off claim. The Domain Name and the Website were instruments of fraud in the sense that they were set up with the deliberate intention of deception and in the knowledge that their content was false. The falsehood was known to the Defendant and was central to his purpose. This was calculated to cause pecuniary damage to the Claimant.

86. For the reasons set out above, I conclude that the Defendant has no real prospect at trial of successfully defending the Claimant’s claims for passing off, including use of the Domain Name as an instrument of fraud, copyright infringement and malicious falsehood. I do not consider that there is any other compelling reason why those issues should be disposed of at trial. On the contrary, I consider that this claim ought to be disposed of at this stage without the costs of a trial. The Defendant’s artwork has been performed. His hoax has taken place.

87. In view of my conclusions on the Claimant’s summary judgment application, I will make no order on the Defendant’s application for permission to amend the Defence.

88. I will hear the parties on the precise form of relief to be granted. As I indicated to Mr Hill at the conclusion of the hearing, my strong inclination is to grant final injunctive

relief as closely as possible in the form of the interim injunction. I am prepared to direct an inquiry as to damages but I would express the hope that in view of the early stage at which injunctive relief was granted, that the costs of an inquiry could be avoided by the acceptance by the Claimant of a small sum.

89. This judgment will be handed down remotely without attendance being required at 10.00 am BST on Thursday 14 November 2024. The Defendant requested that there should be an “in person” hearing to deal with consequential matters. I will direct that such a hearing is to be listed between 11 and 20 December 2024 with a time estimate of 1 hour. If the Defendant, on reflection, would prefer for that hearing to take place remotely, avoiding the need for him to travel to London, I will direct that it be a remote hearing. In either event, I will direct that time for applying for permission to appeal is extended so as to run from that hearing.

90. The parties are to provide me with any typographical corrections to this judgment by no later than 4pm on Tuesday 12 November 2024. In addition, a minute of order is to be lodged immediately after judgment is handed down remotely.

91. This judgment remains embargoed until 10.00am on Thursday 14 November 2024. At that time the approved judgment will be sent to the parties by email and released to the National Archives.

Postscript

92. In response to the draft Judgment, the Defendant informed me by letter that he had no typographical corrections but that on 18 October 2024 he had changed his name to Odee Fridriksson both in Norway where he is resident and in Iceland where he is a national. He asks that the name of the Defendant be amended accordingly. This application should be made on notice to the Claimant by application notice in accordance with CPR Part 23. The application may then be listed alongside the hearing to deal with consequential matters.

MASTER TEVERSON (sitting in retirement)

IL-2023-00075

Approved Judgment