***Sakho v WADA* – article meanings relevant to serious harm, even if not sued on**

In *Sakho v WADA*[1] professional footballer Mamadou Sakho brought negligence and defamation proceedings against the World Anti-Doping Agency over emails that WADA had sent to journalists at The Telegraph and The Guardian. Those newspapers then published articles that Mr Sakho relied on as republications of the emails, but did not sue on as causes of action.

In a preliminary trial on meaning, the High Court found that the article meanings were relevant to the serious harm test under section 1(1) of the Defamation Act 2013, and that determining their meanings accorded with the overriding objective under the Civil Procedure Rules. The court went on to find that the meaning of each article was substantively different from the meaning of the email on which it was based.

Background

Mamadou Sakho is a professional footballer who currently plays for Crystal Palace Football Club. He and MS Top Limited, his image rights company, issued negligence and defamation proceedings against WADA in relation to anti-doping proceedings brought against him in 2016. His claim in libel related to two emails sent by WADA. The first was sent to The Telegraph on 23 August 2016 and the second to The Guardian on 20 April 2017.

Articles were published by the newspapers on 23 August 2016 and 20 April 2017 respectively. Each article included the wording of the relevant email from WADA. The article published by The Telegraph bore the headline "Exclusive: Mamadou Sakho cleared of being a drugs cheat after the World Anti-Doping Agency choose not to appeal Uefa verdict". The Guardian's article was headed "Uefa slams Wada over incorrect handling of Mamadou Sakho's drug test".

Mr Sakho sued only over the emails; he did not sue over the articles as a separate cause of action. Rather, he relied on the articles as "republications of the words complained of" in support of his case on "publication, serious harm and damages".

The meaning of the emails was to be determined as a preliminary issue. Yet, unusually, an initial issue arose as to whether the court should also determine the meaning of the articles.

Mr Sakho contended that, as he did not rely on the articles as giving rise to separate causes of action, there was no basis for determining the meaning of the articles. WADA, on the other hand, argued that, as Mr Sakho had sued on the emails as the "primary" publications but had brought his case on publication, serious harm and damages in relation to the wide, foreseeable republication of those articles, the court should, in addition to determining the meaning of the emails, determine the meaning of the words in the context of the articles in order to be able to assess whether the republications repeated the sting (or part of the sting) of the original emails.

Issues

There were three issues for the court to consider:

(a) whether the meaning of the articles should be determined;

(b) if the meaning of the articles should be determined, the meaning of each of the articles; and

(c) the meaning of each of the emails.

[1] *Mamadou Sakho and MS Top Ltd v World Anti-Doping Agency* [2020] EWHC 251.

Decision

Whether the meaning of the articles should be determined

The fact that Mr Sakho had relied on the articles to demonstrate that the emails had been published, did not, in Steyn J's view, provide any support for WADA's contention that the court should determine the meaning of the articles. This was because publication of the emails was not in issue, as WADA admitted it had published the emails, and because, even if publication were in issue, it would not be necessary to determine the meaning of the articles to decide whether the emails had been published, as was alleged by Mr Sakho.

Whether publication of the emails had caused or was likely to cause serious harm to Mr Sakho's reputation was a live issue on the pleadings. Although each email had been published to two journalists (making a total of four people who received WADA's emails), and although Mr Sakho contended that the publication to those four people alone met the serious harm threshold, Mr Sakho also relied on the republication in the articles to "millions of readers of The Telegraph and The Guardian".

Noting that the gravity of the libel and the extent of publication were key factors in assessing whether the serious harm threshold at section 1(1) of the Defamation Act 2013 had been met, Steyn J considered that, in a case such as this, where it was said that the primary publications were to four people, whereas the republications were published to millions, it was important to determine whether there was, as WADA contended, a stark difference in the seriousness of the imputations conveyed by the articles in comparison with the emails.

Steyn J considered that, in the circumstances of the case, determining the meaning of the articles manifestly accorded with the overriding objective. She acknowledged the statement in paragraph 6.1 of Practice Direction 53B that, at any time "in a defamation claim the court may determine (1) the meaning of the statement complained of" did not refer to republications which were not sued on as a cause of action, but noted that nothing in Practice Direction 53B precluded the court from determining the meaning of a republication as a preliminary issue. She also accepted that there did not appear to be any precedent for determining the meaning of a republication that had not been sued on as a separate cause of action, but noted that this appeared to be because the issue had not arisen.

On the face of it, there was an inconsistency in the fact that WADA had only asked for the meaning of two of 19 republications to be determined. Counsel for WADA explained that this was because WADA had limited its request for meaning determinations to the two articles in the interests of proportionality, and because it considered that would be sufficient to resolve, or at least largely to resolve, any disputes between the parties as to meaning. Noting that, as the two articles had not been chosen arbitrarily from among the republications but were clearly more prominent in Mr Sakho's pleadings than any others, and there were sound reasons to limit the determinations sought, Steyn J was not persuaded that this inconsistency was a reason not to determine the meaning of the articles.

Steyn J did not, however, consider that Mr Sakho's reliance on the articles as adding to his claim in damages provided a further reason to determine the meaning of the articles as a preliminary issue. This was because the words of WADA's email to The Telegraph were reproduced in The Telegraph article and the words of WADA's email to The Guardian were reproduced in The Guardian article. Although WADA contended that the gravity of the allegations conveyed by the articles was lower than that conveyed by the emails, it was admitted that the articles were defamatory at common law. In those circumstances, it was unnecessary to determine the meanings of the articles in order to ascertain that they conveyed the sting of the emails and so might be relied on to increase the damages flowing from publication of the emails. Any mitigating effect of the articles would fall to be considered at the stage of assessment of damages.

So, the judge concluded that the meanings of the articles were relevant to the determination of whether publication of the words complained of had caused, or was likely to cause, serious harm to Mr Sakho's reputation, and that determining their meanings as a preliminary issue was in accordance with the overriding objective.

Determining meaning

The court's task, in determining meaning, is to determine the single natural and ordinary meaning of the words complained of. The focus is on what the ordinary reasonable reader would consider the words to mean. As Steyn J noted, it was the "court's duty to step aside from a lawyerly analysis",[2] and the key principles had been conveniently re-stated by Nicklin J, as follows:[3]

"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 …

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

v) … a judge … should not fall into the trap of conducting too detailed an analysis of the various passages …

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

vii) … 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 …

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 …

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)."

[2] *Stocker v Stocker* [2019] UKSC17, per Lord Kerr of Tonaghmore JSC.

[3] In *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48.

The meanings of the emails and articles

The relevant text of each of the emails and articles is set out in full in the judgment. Steyn J found the meaning of each to be as follows:

- *Email to The Telegraph* – Mr Sakho was guilty of taking a prohibited, performance, enhancing substance which fell within the S3 class of WADA's Prohibited List, in breach of the WADA Code; however, his low degree of fault was such that it was uncertain whether it would justify more than the one month's suspension he had already served voluntarily.

- *Email to The Guardian* – Mr Sakho was guilty of taking a prohibited, performance-enhancing substance which had been prohibited since 2004 and fell within the S3 class of WADA's Prohibited List, in breach of the WADA Code. This conduct was culpable.

- *The Telegraph article* – Mr Sakho has been absolved of taking a prohibited, performance-enhancing substance after a positive test gave rise to grounds to investigate whether he had done so. WADA maintains that the substance he took falls within a class which is on the Prohibited List, but when its position was tested it failed to stand up to scrutiny and WADA is not appealing the verdict.

- *The Guardian article* – Mr Sakho has been absolved of taking a prohibited, performance-enhancing substance after a positive drugs test was wrongly flagged up. Grounds to investigate arose when Mr Sakho took a fat-burner which resulted in one of WADA's laboratories finding he had higenamine in his system; however, the substance is not specifically named on the Prohibited List or consistently tested for by the laboratories and even the experts were unsure whether it falls within a prohibited class. WADA maintains that the substance Mr Sakho took has been on the Prohibited List since 2004, but it is not appealing.

Comment

The main point to note is that the meanings of the articles, which Mr Sakho relied on as republications of the emails from WADA, were found to be relevant to the serious harm test under section 1(1) of the Defamation Act 2013, and that determining their meanings as a preliminary issue was manifestly in accordance with the overriding objective. Yet that point may have limited application in practice, since, until this case and as was acknowledged by the court, determining the meaning of a republication that had not been sued on as a separate cause of action was not an issue that appears to have arisen previously.

Steyn J went on to find that the meaning of each article was substantively different from the meaning of the email on which it was based: the court-determined meanings for both emails start with the assertion that Mr Sakho "was guilty of taking a prohibited, performance-enhancing substance", while the meanings for both articles start with the assertion that Mr Sakho "has been absolved of taking a prohibited, performance-enhancing substance".

Mr Sakho and MS Top Limited's case against WADA will now proceed. They are seeking damages, estimated at over £13 million, namely on the basis that the anti-doping proceedings precipitated his move away from Liverpool FC. WADA denies all liability and also disputes quantum.

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