Case No: HQ17M03937

Neutral Citation Number: [2018] EWHC 457 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 March 2018

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Churchil Limited	**Claimant**
- and -	
The Open College Network South Eastern Region Limited (Trading as Laser Learning Awards)	**Defendant**

- -
- -

Chike Onyeari (a director) for the **Claimant**
Paul de la Piquerie (instructed by **ASB Law LLP**) for the **Defendant**

Hearing dates: 12 and 14 February 2018

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Judgment

The Honourable Mr Justice Nicklin :

1. The parties in this case have been locked in litigation since 2015. Three claims have been issued by the Claimant in three courts. Given the conclusion I have reached, this judgment represents the final chapter.

History

2. The Claimant company, who has been represented throughout these proceedings by a director, Chike Onyeari, provided training and qualifications in the security industry. The Defendant is one of eight bodies who, at the moment, are able to award entities such as the Claimant the required approval to offer and training and qualifications. The Defendant is regulated by Ofqual, the qualifications regulator for England & Wales, and is also approved by the Security Industry Authority ("the SIA") to offer licence-linked qualifications in the security sector.

3. By a written contract dated 24 January 2015 ("the Agreement"), the Defendant approved the Claimant to provide training and qualifications for a term of 5 years subject to compliance with the terms of the Agreement.

4. On 1 April 2015, the Defendant terminated the Agreement on the grounds of alleged breaches of its terms ("the Termination Notice"). As it was required to do by Ofqual and the SIA, it sent a notification of the termination of the Agreement to other awarding bodies ("the Notifications").

5. The Claimant contended that the purported termination of the Agreement was a breach of contract. In light of that stance, and no doubt borne of prudence and the hope that it might simplify matters, the Defendant, on 1 May 2016, wrote a letter terminating the Agreement pursuant to what amounts to a 'no fault' clause in the Agreement, which allowed either party to terminate the Agreement on 1 month's notice.

Proceedings in the County Court

6. On 10 April 2015, the Claimant issued a Claim Form in the Lambeth County Court (B00LB883) ("the County Court Claim"). Before issue, on 8 April 2015, he had issued an Application Notice seeking an interim injunction. Particulars of Claim, also dated, 8 April 2015, were prepared by the Claimant. In them, the Claimant sought damages for breach of contract to be quantified later. On 17 April 2015, the Claimant served Amended Particulars of Claim ("Particulars of Claim"). In paragraph 7, the Claimant stated that it had now quantified its claimed damages in the sum of £4,480.

7. The Particulars of Claim contained the following:

    i) Paragraphs 1 and 2 identified the parties.

    ii) Paragraph 3 set out the material terms of the Agreement.

    iii) Paragraph 4 claimed that the Termination Notice was a breach of the Agreement.

    iv) Paragraph 5 complained about the Notifications and pleaded:

> "The defendant immediately notified the regulator (the Security Industry Authority – the SIA) and all other awarding organisations of this decision and included the name 'Chike Onyeari' in the adverse and derogatory notification where this person has not previously authorised his name to be used for this purpose under the data protection act 1998."

I would note here that Mr Onyeari was not personally a claimant to the action and, although there was a reference to the Data Protection Act 1998, no claim alleging any breach or a claim for any remedy was included.

v) There is a heading: "PARTICULARS OF BREACH" under which, in Paragraph 6, the Claimant contended that the Defendant had not sought any explanation from the Claimant for the alleged breaches of the Agreement and that the decision to terminate was procedurally unfair and was not made in good faith.

vi) Under the heading: "PARTICULARS OF DAMAGE", in Paragraph 7, the Claimant set out its claimed loss. This was calculated based on an alleged loss of 35 candidates during the period from 1 to 30 April 2015. This produced a total claim of £4,480.

vii) There is a heading: "IN ADDITION TO INJUNCTION ORDERS" under which it was pleaded:

> "The adverse notifications to regulatory authority and awarding institutions are derogatory and would impact negatively on the claimant's chances of obtaining recognition with those other awarding bodies. One of the awarding organisations has already refused to grant our request for their approval in circumstances of this decision. Damages will therefore not be adequate as a remedy. It is not possible to quantify future losses at the moment."

viii) Under the heading: "PARTICULARS OF REMEDY", in Paragraphs 8-15, the Claimant set out a list of the remedies that it sought, including (a) an injunction "*for the defendant to revoke the unlawful decision to withdraw the claimant's centre approval*", "*for the defendant to notify the regulatory authorities and other awarding organisations of the revocation*", "*that the defendant to send to the claimant copies of each revocation at the same time*" and "*that the defendant fulfils all of its outstanding obligations… including dispatching our candidates' results…*"; (b) the Defendant to "*revoke and request the SIA and other awarding bodies to delete the name of Chike Onyeari and disassociate it from the adverse and derogatory notification…*"; (c) disclosure of documents; (d) damages; and (e) interest. The prayer for relief included: "*Damages as stated in paragraph 7 above*".

8. On 28 April 2015, the Claimant's Application for an interim injunction came before District Judge Worthington. Formal permission to amend the Particulars of Claim was granted, but the injunction application was adjourned to 11 August 2015.

9. The Defence was filed on 15 May 2015. Save to note that liability was denied, its terms are not important for the matters I need to resolve.

10. On 28 July 2015, the Claimant issued a further Claim Form against the Defendant using the Money Claims online service (B59YM055) ("the Second County Court Claim"). The claim relied on the same facts, and alleged breach of the Agreement, as the County Court Claim.

11. On 11 August 2015 there was supposed to be a hearing at Lambeth County Court to hear the Claimant's interim injunction application. No hearing took place and the case was re-listed for 17 November 2015.

12. Meanwhile, on 25 August 2015, the Defendant issued an Application Notice seeking to strike out the Second County Court Claim as an abuse. That application came before District Judge Zimmels at the re-listed hearing on 17 November 2015. The Judge struck out the Second County Court Claim. The Claimant's application for an interim injunction was adjourned because of lack of court time.

13. On 27 November 2015, District Judge Zimmels allocated the County Court Claim to the Small Claims Track and listed it for a trial on 16 February 2016. The Judge dismissed the Claimant's claim for an interim injunction and made an order that the Claimant should pay the Defendant's costs of the application.

14. On 1 December 2015, although the documentation was defective, the Claimant the sought to appeal the dismissal of the interim injunction application.

15. Whilst that appeal was pending, the trial of the County Court Claim was listed for 16 February 2016. As a result of some mix-up, the Defendant did not attend and was not represented. The Defendant's representatives applied by telephone for the hearing to be adjourned. Adopting some vigorous case management, District Judge Desai (a) refused to grant an adjournment; (b) struck out the Defence; and (c) entered judgment for the Claimant in the sum of £4,480 plus £615 costs. In relation to the claim for an injunction (which by that stage would have been a final injunction following the entry of judgment) the Order recorded: "*The Claimant's application for injunction is adjourned generally with liberty to restore and if no application to restore is made by 16 August 2016, the injunction claim shall be struck out without further notice.*"

16. Considering the Order striking out of its defence and entering judgment to be a misfortune, on 24 February 2016, the Defendant applied to set-aside the Order of 16 February 2016. In fact, far from being a misfortune, the Order of 16 February 2016 has turned out to be particularly serendipitous for the Defendant for reasons I will explain below.

17. On 26 July 2016, the Claimant's application for permission to appeal against the refusal of the *interim* injunction came before HHJ Mitchell, on paper, in the Central London County Court. Since the Claimant had been granted judgment on the claim on 16 February 2016, the question of *interim* relief was now academic. The Judge refused permission to appeal. By this stage, all that was left was the adjourned question of the Claimant's claim for a final injunction. Nevertheless, the Claimant renewed its application for permission to appeal against the refusal of an interim injunction and a hearing was listed for 23 December 2016.

18. On 23 December 2016, at the renewed oral application, the Claimant was refused permission to appeal in relation to the interim injunction but granted permission to appeal the order for costs that had been made against the Claimant on 27 November 2015.

19. On 7 January 2017, the Claimant sought 'restoration' of the further claims that it was contended still remained to be determined in the County Court Claim. This application was listed for 24 April 2017 but adjourned, without a hearing, by HHJ Wulwik. The County Court then listed the Claimant's costs' appeal and the application issued on 7 January 2017 for hearing on 13 June 2017.

20. On 13 June 2017, there was a hearing before HHJ Wulwik. The Defendant agreed that the Claimant's costs' appeal should be allowed. The Judge adjourned the balance of the Claimant's Applications to 23 October 2017. The hearing on that occasion was to determine (a) what, if any, final injunctive relief the Claimant should be granted; and (b) whether there remained anything else to be resolved in the claim; the Claimant by that stage contending that, notwithstanding that judgment had been granted and a sum in damages awarded, it still had (1) a large claim for damages that had not been determined; and (2) a defamation claim which had not been dealt with.

21. On 23 October 2017, there was a hearing before HHJ Wulwik. The Claimant contended that it had (a) a further claim for damages; and (b) a defamation claim, neither of which had been determined and which it wanted the Court to resolve. Abandoning its application to set-aside the judgment granted against it on 16 February 2016, the Defendant submitted that (a) the damages to which the Claimant was entitled following the entering of judgment had been assessed at £4,480 and that issue was now *res judicata*; (b) the Particulars of Claim did not include a claim for defamation and so there was nothing to restore and, post judgment, there was no question of such a claim now being added; and (c) there was no further final injunctive relief to which the Claimant was entitled.

22. In his judgment, HHJ Wulwik analysed the claims advanced in the Particulars of Claim, set out the history of the claim including the Claimant trying (but failing) to get the Court to hear his application for an interim injunction and noted, correctly, that following judgment being entered on 16 February 2016, the only matter left to be determined in the County Court Proceedings was the outstanding application for a final injunction [28]. The Judge set out his conclusions, including in particular [29]:

    i) that the Claimant could not pursue a further claim for damages because the entitlement to damages had been determined on 16 February 2016;

    ii) that the Particulars of Claim contained: "*no recognisable pleading… of a cause of action in defamation*";

    iii) that, in any event, the County Court had no jurisdiction to deal with defamation claims; and

    iv) that, of the forms of injunctive relief pursued by the Claimant, none could properly be granted.

23. The Judge recorded, somewhat plaintively, that he had tried to resolve all the outstanding issues at the hearing: "*I am conscious that this is a small claim [and] that the parties' contractual relationship is long since over…*" [41]. In light of his ruling, the Judge ordered that the Claimant's claims for further relief were refused. He made no order for costs.

24. It appears clear, however, that the Judge had managed to mediate a possible solution to resolve what were clearly Mr Onyeari's genuinely held concerns. Although, considering his ruling, there was no order the Court could make, his Order nevertheless records that the Defendant had agreed to issue a statement to Ofqual, the SIA and the six awarding bodies previously sent Notifications in the following terms:

> "The Open College Network South East Region Limited (t/a Laser Learning Awards) accepts that it was inappropriate to terminate the relationship with Churchil Limited without notice on 1 April 2015. It should, however, be noted that the subsequent contractual termination by notice given on 1 May 2015 remains effective and The Open College Network South East Region Limited (t/a Laser Learning Awards) no longer has any contractual relationship with Churchil Limited. Nevertheless, The Open College Network South East Region Limited (t/a Laser Learning Awards) wishes Churchil Limited and Mr Onyeari the very best for the future."

25. Given the history of the litigation, and even though the Claimant had no entitlement to any further relief, it is a tribute the Judge and the Defendant that this effort at final resolution was achieved.

26. Sadly, however, matters did not rest there. In response to HHJ Wulwik's order of 23 October 2017, the Claimant did two things:

    i) by Claim Form issued on 27 October 2017, the Claimant commenced these High Court proceedings advancing a claim for defamation arising from the Notifications ("the High Court Claim"); and

    ii) by Appellant's Notice dated 8 November 2017, he sought to appeal HHJ Wulwik's order ("the County Court Appeal").

27. In his submissions to me, Mr Onyeari has expressed his position clearly. He says (1) if the County Court Claim did not contain a claim for defamation (and he submits that it did), then the Claimant was entitled to launch fresh proceedings in the High Court to advance that claim; and (2) HHJ Wulwik was wrong to dismiss the Claimant's claim for further relief, in particular the claim for further damages, and wrong to conclude that the County Court Claim did not contain a defamation claim which he should have transferred to the High Court pursuant to s.40(1) County Courts Act 1984.

28. The Defendant was no doubt dismayed to find that it was a defendant to a third claim, now issued in the High Court. Its response was to issue an Application Notice dated 15 December 2017, but (judging by the stamp) not issued until 3 January 2018, seeking (1) to strike out the High Court Claim on the basis that they were an abuse of process ("the Striking Out Application"); and (2) a civil restraint order against the Claimant and Mr Onyeari (for which purpose it also sought to join Mr Onyeari as a

Defendant to the claim). The latter application has not been fully argued as, at the hearing, Mr Onyeari indicated that he would be willing to give undertakings to deal with the Defendant's concerns. Whether those undertakings are ultimately acceptable and so obviate the need for me to decide the application for a civil restraint order will be dealt with at the handing down of this judgment.

29. Despite their obvious connection, procedurally, the High Court Claim and the County Court Appeal were entirely separate. The application for permission to appeal in the County Court Appeal was refused, on paper, by Lavender J on 26 January 2018. The Claimant sought a hearing to renew the application for permission to appeal. That hearing was listed for 14 February 2018. I am not sure whether it was by coincidence or design, but the Defendant's Application to strike out the High Court Claim was listed for 12 February 2018. The hearing of the strike out application was listed before me and, when it was, I was aware of the renewed application for permission to appeal in the County Court Appeal listed for 14 February 2018. It was clear to me that I should deal with both, and that I should give my judgment on the strike out application after I had heard the submissions of both parties in relation to the strike out application and the Claimant's submissions in support of its renewed application for permission to appeal. In that way, I would understand and see the full history.

30. The Claimant has issued a separate Application Notice dated 29 November 2017 seeking permission to amend the Particulars of Claim ("the Amendment Application"). For reasons I will explain below, the fate of the Amendment Application is tied to the outcome of the Striking Out Application

County Court Appeal

31. I heard the renewed application for permission to appeal on 14 February 2018. Mr Onyeari's submissions were clear and helpful. It was clear to me that, as a non-lawyer, he was struggling to understand why the Claimant had not been allowed to pursue what he thought were the full remedies to which he considered the Claimant was entitled.

32. After hearing submissions, I refused permission to appeal. I gave an *ex tempore* judgment. As I explained at the time, I took longer than I would have normally done to explain my reasons for refusing permission to appeal because (a) I felt it necessary and appropriate to give a full explanation to Mr Onyeari why the HHJ Wulwik had been correct to find that the Claimant was not entitled to any further remedies; and (b) I recognised that the decision in the County Court Claim was going to be relevant to the Defendant's strike out application.

33. In summary, I refused permission to appeal because HHJ Wulwik had been correct to find that the issue of damages had been determined by the judgment entered against the Defendant on 16 February 2016. It was not possible for the Claimant to reopen the issue of damages in light of that judgment. Further, the Claimant was not entitled to any injunctive relief. Finally, the Judge had been right to conclude that, although there had been mention that the Notifications had been 'derogatory', no recognisable claim for defamation had been included in the County Court Action.

34. Mr Onyeari was kind enough to thank me for taking the time to explain what he said had not been explained to him before. Mr Onyeari is clearly an intelligent man, but

the twists and turns of this litigation and the legal consequences of the various decisions and orders are perhaps difficult for a non-lawyer to appreciate fully. On that basis alone, I am therefore satisfied that it was right to take longer than usual on a permission to appeal application to explain the position and why I was refusing permission. Where possible, litigants (particularly those acting in person) should leave Court, if not necessarily agreeing with the Court's decision, at least understanding the reasons for it.

Striking Out Application

35. The Defendant asks the Court to strike out the High Court Claim on two grounds:

i) the raising of the defamation claim is an abuse of process under the ***Henderson -v- Henderson*** principle; and/or

ii) the cause of action is time-barred.

Henderson -v- Henderson **abuse**

36. I recently reviewed the authorities on this jurisdiction in ***Alsaifi -v- Trinity Mirror plc*** **[2017] EWHC 2873 (QB)**:

> [54] The principle from ***Henderson –v- Henderson*** can be summarised that a party is expected to bring forward their entire case in a single action and that it is an abuse of process to raise in later proceedings matters which could and should have been raised in the earlier proceedings.
>
> [55] The principle was endorsed by the House of Lords in ***Johnson –v- Gore-Wood & Co*** **[2002] 2 AC 1**. In his speech, Lord Bingham explained the rationale and extent of the principle (p.31):
>
> > "… ***Henderson –v- Henderson*** abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account

of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

[56] Lord Millett, however, urged caution as to the limits of the principle (at pp.59-60):

> "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In ***Brisbane City Council –v- Attorney General for Queensland*** **[1979] AC 411, 425** Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in ***Henderson –v- Henderson*** **3 Hare 100** is abuse of process and observed that it "*ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation*". There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action. This question must be determined as at the time when Mr Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr Johnson could have brought his action as part of or at the same time as the company's action. But it does not at all follow that he should have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court. As May LJ observed in ***Manson –v- Vooght*** **[1999] BPIR 376, 387**, it may in a particular case be sensible to advance claims separately. In so far as the so-called rule in ***Henderson -v- Henderson*** suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should

always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.

The rule in ***Henderson –v- Henderson*** **3 Hare 100** cannot sensibly be extended to the case where the defendants are different. There is then no question of double vexation. It may be reasonable and sensible for a plaintiff to proceed against A first, if that is a relatively simple claim, in order to use the proceeds to finance a more complex claim against B. On the other hand, it would I think normally be regarded as oppressive or an abuse of process for a plaintiff to pursue his claims against a single defendant separately in order to use the proceeds of the first action to finance the second, at least where the issues largely overlap so as to form, in Sir James Wigram V-C's words, at p. 115, "*the same subject of litigation*".

Particular care, however, needs to be taken where the plaintiff in the second action is not the same as the plaintiff in the first, but his privy. Such situations are many and various, and it would be unwise to lay down any general rule. The principle is, no doubt, capable in theory of applying to a privy; but it is likely in practice to be easier for him to rebut the charge that his proceedings are oppressive or constitute an abuse of process than it would be for the original plaintiff to do so."

[57] In the more recent case of ***Virgin Atlantic –v- Zodiac Seats UK Ltd*** **[2014] AC 160**, Lord Sumption observed [24]:

> "The principle in ***Henderson –v- Henderson*** has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigations points which could and should have been raised before"

and at [25]:

> "It was clearly not the view of Lord Millett in ***Johnson –v- Gore-Wood*** that because the principle in ***Henderson –v- Henderson*** was concerned with abuse of process it could not also be part of the law of *res judicata*… *Res judicata* and abuse of process are juridically very different. *Res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive duplicative litigation."

[58] In ***Aldi Stores Ltd –v- WSP Group plc*** **[2008] 1 WLR 748** [6], the Court of Appeal approved Clarke LJ's summary of the principles to be derived from ***Johnson –v- Gore-Wood*** in ***Dexter –v- Vlieland-Boddy*** **[2003] EWCA Civ 14** [49]:

(i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.

(ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.

(iii) The burden of establishing abuse of process is on B or C or as the case may be.

(iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

(v) The question in every case is whether, applying a broad merits-based approach, A's conduct is in all the circumstances an abuse of process.

(vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.

Submissions

37. On behalf of the Defendant, Mr de la Piquerie submits that if, in addition to the breach of contract claim, the Claimant wanted to advance a claim in defamation arising from the sending of the Notifications, then it was required to bring both of those claim in one action. He contends that bringing a second defamation claim arising from publication of the Notifications after determination of the County Court Claim is an abuse of process under ***Henderson -v- Henderson***. In fact, absent the consent of the Defendant, it would not have been possible for the Claimant to issue a claim in the County Court which included a claim for defamation as the County Court does not have original jurisdiction over such claims (see s.15(2)(c) and s.18 County Courts Act 1984). As a result, the Claimant would have had to bring its claims for breach of contract and defamation in an action in the High Court. The principle, however, is the same. Whatever the level of court, all the Claimant's claims had to be brought in the same action. The inclusion of a defamation claim would have meant that the claim had to be commenced in the High Court.

38. He submits that the defamation claim arises out of the same facts as were relied upon in the County Court Claim. The Claimant could and should therefore have brought the defamation claim together with the breach of contract claim.

39. Mr Onyeari for the Claimant has maintained that he did include a claim for defamation in the County Court Claim. However, that submission is not open to the Claimant. It was an argument that was addressed to, but rejected by, HHJ Wulwik and the Claimant is bound by that decision. The Court has determined that the County Court Claim did not include a claim for defamation. In my view, that decision was plainly correct. Even if it were wrong, and the County Court Claim *did* include a defamation claim, the Claimant's position would not improve. The terms of the order of 16 February 2016 would have meant that judgment would have been granted against the Defendant on the defamation claim as well.

40. Mr Onyeari's fall-back submission is that, the County Court having ruled that the County Court Claim did not include a claim for defamation, the Claimant should now be permitted to bring that claim in the High Court Claim.

Decision

41. I am quite satisfied that the High Court Claim should be struck out as an abuse of process under the ***Henderson -v- Henderson*** principle.

    i) It was the Claimant's case in the County Court Claim that the sending of the Notifications was a breach of contract. It is clear that the Claimant objected also to their derogatory terms and contended that this had damaged its reputation.

    ii) The Claimant had all the necessary information and evidence in order to bring a defamation claim together with the breach of contract claim. Indeed, it is Mr Onyeari's submission that the Claimant had sought to advance a defamation claim in the County Court Claim.

    iii) If the High Court Claim is allowed to continue, then the Defendant would be required to defend a second claim arising from substantially the same facts as the County Court Claim. The Court would also be required to devote resources on a second occasion to resolving such a claim.

    iv) Applying a broad merits-based approach, I am quite satisfied that the Claimant could and should have brought the claim it now advances in in the first action and that the High Court Claim is therefore an abuse of process. With the benefit of hindsight, the Claimant may consider that its failure to do so was a mistake, but that does not relieve it from the consequences that the second claim is an abuse of process. It would be oppressive for this Defendant to have to face a second action on effectively the same facts as the County Court Claim.

42. For those reasons, the High Court Claim will be struck out as an abuse of process.

Amendment Application

43. Although there have been a number of iterations of the draft Amended Particulars of Claim for which the Claimant has sought permission, the Claimant's position at the hearing was that it ought to be allowed to amend the Particulars of Claim principally to advance a further cause of action for "*unlawful (tortious) interference with the claimant's business*" and to add some further particulars of damage.

44. I can deal with the Amendment Application very shortly. The new cause of action upon which the Claimant seeks to rely is based on the same facts as the original County Court Claim. The amendment is therefore seeking simply to add to the claim something that should also have been advanced in the County Court Claim. As such, permitting it to be argued would be as much an abuse of process under ***Henderson -v- Henderson*** as the original High Court Claim. Consequently, I refuse permission to amend.

Limitation

45. The alternative basis upon which the Defendant seeks to strike out the High Court Claim is on the ground that the claims are time barred. Given my decision on abuse of

process, a decision on this point is strictly not necessary. However, it was fully argued, and I consider that I should state my conclusion in case I were wrong about the abuse of process decision.

46. The limitation period for defamation claims is 1 year: s.4A Limitation Act 1980. The Claimant alleges that the Notifications complained of were sent between 1 April 2015 and 8 July 2015. The Claim Form in the High Court Claim was issued on 27 October 2017. The claim was issued at least 15 months after the limitation period had expired. The limitation defence was pleaded in the Defence.

47. Recognising this problem, in its Reply, the Claimant sought to rely upon s.32A Limitation Act 1980 and to invite the Court to disapply the limitation period.

48. s.32A provides, so far as material:

> (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
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> (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
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> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,
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> the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.
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> (2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
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> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
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> (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A—
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> (i) the date on which any such facts did become known to him, and
>
> (ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
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> (c) the extent to which, having regard to the delay, relevant evidence is likely—
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> (i) to be unavailable, or
>
> (ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.

Submissions

49. Mr de la Piquerie contends that the action is plainly time-barred and that the Court should decline to disapply the limitation period under s.32A. He relies upon three submissions:

    i) reliance on s.32A is directly contrary to the Claimant's primary argument that it *did* bring a defamation claim in the County Court Claim;

    ii) the Claimant cannot contend that the facts relevant to the cause of action did not become known to it until after the expiry of the limitation period – it knew all of the relevant facts at the time the County Court Claim was commenced; and

    iii) the Claimant has no good reason for not issuing a defamation claim within the limitation period.

50. Mr Onyeari on behalf of the Claimant submits that the limitation period ought to be disapplied because:

    i) he had thought that he had brought a claim for defamation in the County Court Claim which was issued within the limitation period; and

    ii) the Defendant had not told the Claimant that claims for defamation had to be brought in the High Court;

Decision

51. The second basis for the application to strike out is not procedurally sound. The Application Notice seeks to strike out the Claimant's Claim Form and Particulars of Claim under CPR Part 3.4(2)(a) and (b).

52. CPR Part 3.4(2) provides that the Court may strike out a statement of case is it appears to the Court

    (a) that the statement of case discloses no reasonable grounds for bringing the claim; and/or

    (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.

53. The Defendant cannot – and does not – contend that the Claimant's statements of case do not *disclose* a cause of action or "*reasonable grounds for bringing the claim*". Limitation is a *defence* to a claim; it does not negate the claim. The existence of a limitation defence *may* lead to the conclusion that the claim has no real prospect of success but disposing of a claim on such a basis would require an application for summary judgment. No such application has been made. Equally, it is not *abusive* to bring a claim that is *prima facie* time-barred. First, limitation is a matter to be raised as a defence to the claim. Second, in this case, the Claimant is entitled to rely and has relied upon s.32A to ask the Court to disapply the limitation period.

54. The Court does not actually have an application by the Claimant seeking the determination of the issue of whether the limitation period ought to be disapplied. It is clear, however, that in order to exercise the discretion given under s.32A the Court must have regard to all the circumstances and in particular the reasons for delay on the part of the Claimant. That requires an assessment of evidence. I have a witness statement from Michael Olley, the Defendant's solicitor, dated 15 December 2017 in support of the application to strike out, but it provides no relevant evidence on this issue. I also have a witness statement from Mr Onyeari dated 22 January 2018 and the Claimant's written submissions dated 21 January 2018.

55. In the written submissions, Mr Onyeari sets out the reasons upon which the Claimant relies for the delay in bringing the defamation claim. His principal submission is that he always believed that the Claimant had brought a defamation claim in the County Court Claim.

> "If I had at any point known that the County Court was the wrong court I would have immediately issued the second claim in the appropriate court. The defendant who has been legally represented by a team of professional Solicitors and Counsel did not know that the County Court was the wrong place to argue defamation matters. The defendant was equally to blame for the delay in issuing the defamation claim in the appropriate court. They are now asking the court to assist them to reap the benefit of a bad situation which they helped to create… s.4A [Limitation Act] 1980 was intended to ensure that persons seeking vindication are expected to do so with vigour. The claimant has not relented in pursuit of this case…"

56. Mr Onyeari has referred me to a witness statement of Vida Stewart dated 23 April 2015. Ms Stewart is the Deputy Chief Executive of the Defendant. The witness statement was relied upon in the County Court Claim to resist the Claimant's claim for an injunction. Under the heading "Defamation", she said this:

> "The Claimant appears to be alleging that it and/or Mr Onyeari has been defamed. However, Mr Onyeari has made these allegations without first having sight of the notifications and it is notable that Mr Onyeari has provided no documentary evidence to support the allegation."

Later in the same witness statement, she added:

> "As regards the allegation of defamation, the comments contained within the notification were fact based and concise. It is a matter for each of the other [organisations] to determine to (sic) whether the conduct of Mr Onyeari and the Claimant whilst acting as an approved trainer with LASER deters them from providing him with approval in the future…"

57. Ms Stewart is not, apparently, a lawyer and she clearly thought that included within the Claimant's County Court Claim was a complaint that it had been defamed in the Notifications. I have some sympathy for Mr Onyeari's submissions that he believed that he had made a defamation claim in the County Court Claim, indeed he continues to believe that he had. He is not a lawyer either. The issue only really came into focus when HHJ Wulwik ruled that the Claimant had not made a defamation claim in the County Court Claim on 23 October 2017. That is the principal explanation for the Claimant's delay in issuing the High Court Claim and it is not without substance or

merit. Before I could strike out the claim at this stage on this ground, I would have to be satisfied that the application to disapply the limitation period would be bound to fail. I cannot be so satisfied. The matter would require proper investigation and determination.

58. In light of these matters, I would not have been satisfied that it was right to strike out the claim on the basis of the limitation defence advanced by the Defendant. There was no application for summary judgment, but even if there had been I would not have been satisfied that it was a case suitable for summary judgment for the same reasons.