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Norwich Pharmacal Applications **– How “mixed up” must a respondent be and how frank must an applicant be?**

Davidoff & others v Google LLC [2023] EWHC 1958 (KB)

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The judgment in the Part 8 Claim of Davidoff & others v Google LLC [2023] EWHC 1958 (KB) runs to 113 paragraphs over 33 pages. Much of the judgment focuses on the problems faced by the Claimants in making good the intended claims for libel and malicious falsehood, but there are two specific aspects worthy of wider consideration. The first is the explicit statement by the Judge that the Claim engaged the duty of full and frank disclosure; the second is the consideration of what degree of involvement meant that the Defendant was “mixed up in the wrongdoing”.

The Claim was the second brought by the six Claimants in their efforts to identify the sources of Trustpilot reviews critical of a business in which each of the Claimant was involved.

The first Claim against Trustpilot has been granted and had produced information provided to it by the reviewers (whom it was intended to pursue for libel and/or malicious falsehood) as well as the IP addresses from which the eleven reviews complained of had been posted. Some of the IP addresses showed a degree of similarity that suggested that the reviewers were not (as the details provided to Trustpilot suggested) entirely unconnected.

That second Claim was eventually dismissed on a large number of bases, most of which relate to the specific causes of action under consideration. Two issues of wider application were also considered by the Judge.



As provided for in the Rules, the Claim had been made to be listed before a Master. However, the Judge in charge of the Media and Communications List decided that he would hear it given some of the issues raised (many of which were relevant to the Article 10 rights of freedom of expression). The Claim was properly served on the Defendant but as is common in such cases it chose not to incur the costs of attending, indicating that it would abide by whatever Order the Court made.

An obligation of Full and Frank Disclosure?

In advance of the hearing the Judge (prompted by some of the reviews) performed some google searches on one of the Claimants. These produced records of Court Orders (the First Tier Tribunal) which appeared to support some of the criticisms within one of the reviews. These records had not been provided (or referred to) by the Claimants, on whose behalf the evidence had been that the allegations in the reviews were false. On their being produced by the Judge, the Claim in respect of the relevant review was abandoned.

The Judge considered that this was *“a matter of very real concern...on an ex parte application”* [87] having (at [42-46]) set out some of the conduct required by that duty. It is not immediately clear that the Judge was right to apply those duties to the case before him. At [45] he accepted that the Claim had been properly served on the Defendant which had chosen not to attend. However, he approached the matter on the basis that because the “target” of the Claim (the reviewer(s)) had no notice of the Claim and because their rights could not be equated with those of the on-notice Defendant, the duty of full and frank disclosure applied. Thus, the Claimants were obliged to fairly identify any point that the reviewers might reasonably take in opposition to the Claim, including those going to the underlying merit of the proposed libel/malicious falsehood claims.

However, the Judge cites no authority for that proposition (in a lengthy judgment not otherwise lacking in citation) and it is not clear whether his conclusion will be adopted in other cases (especially where Article 10 is not engaged). It is important however for practitioners to be aware that there is now authority capable of imposing upon all Claimants seeking Norwich Pharmacal relief where the eventual “target” is not the Defendant (and upon their lawyers) these onerous obligations.

What constitutes being “mixed up in the wrongdoing”?

The Claimants asserted that the Defendant was “mixed up” in the wrongdoing of the reviewers because the reviewers needed email addresses (which had been provided by the Defendant) to open accounts with Trustpilot (and possibly needed to maintain those addresses to remain able to post reviews).

It seems ([69]) that this issue was not the subject of any significant consideration at the hearing, but generated significant written submissions after the Judge raised the point when considering his judgment.

At [101-110] the Judge decided that the correct test was that set out in NML Capital v Chapman Freeborn Holdings Ltd [2013] EWCA Civ 589 which was not cited in the later case of EUI Ltd v UK Vodafone Ltd [2021] EWCA Civ 1771. Thus, being “*mixed up in the wrongdoing*” meant being “*involved in the furtherance of the transaction identified as the relevant wrongdoing*” and “*having some connections [with the wrong] which enables the purpose of the wrongdoing to be furthered*”.

On that basis, the provision by the Defendant to the reviewers of the email accounts which they then used to open accounts with Trustpilot was an insufficient link because the reviews about which the Claimants complained had been posted without any use of the email accounts.

This is a salutary reminder of the need to take care in analysing the wrongdoing alleged and the manner in which it is said that the Defendant has been (innocently) “mixed up” in it.



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