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Educating Ed and Coleen – Celebrities and Disclosure

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Introduction

When celebrities attempt to resolve their disputes through the courts, the media understandably focuses on the scandalous subject matter. That does not mean, however, that there is nothing for lawyers, or other parties to disputes, to learn from these cases. Two recent decisions in the High Court demonstrate this perfectly. Looking behind the tabloid gossip, the court gave useful guidance on parties' disclosure obligations in each case.

Vardy v *Rooney*

The first of these, *Vardy* v *Rooney* [2022] EWHC 304, concerned a dispute between Mrs Rebekah Vardy and Mrs Coleen Rooney. They are the wives of former England football players Mr Jamie Vardy and Mr Wayne Rooney respectively, though they became celebrities in their own right through their large social media following.

The dispute arose because Mrs Rooney was concerned that someone was leaking stories from her private Instagram accounts to the Sun newspaper. This private Instagram account was meant only for close friends and family, as opposed to her public account which anyone could view.

In order to find out who was leaking the stories, Mrs Rooney set up what could be described as a sting operation. She posted various fake stories on her personal Instagram but secretly only allowed one of her close friends to view each of them. As it turned out, the stories that she had only allowed Mrs Vardy to see subsequently appeared in the Sun newspaper.

In October 2019, Mrs Rooney posted on social media alleging Mrs Vardy was behind not only these leaks, but also the earlier leaks to the press. Mrs Vardy denied these allegations and sued Mrs Rooney for libel, while Mrs Rooney issued a counterclaim for misuse of private information and breach of rights under the General Data Protection Regulation ("GDPR").

In early 2022, Mrs Rooney applied to have Ms Caroline Watt, Mrs Vardy's agent, added to her counterclaim, but for the distinct cause of action of misuse of confidential information. Mrs Justice Steyn, who heard the application, accepted that despite the causes of action being distinct, there was significant factual and legal overlap between the two claims.

However, the application was refused on the basis that it had been made too late and Ms Watt would suffer significant prejudice if joinder was allowed. There were strict limitation periods in libel cases for a reason: parties should be able to promptly vindicate their reputations. By contrast, a claim for misuse of confidential information case would take two years to reach trial.

The procedural timetables for each, at this late stage, could not be made compatible without prejudicing either Ms Watt or Mrs Vardy. Mrs Rooney had provided no explanation for making the joinder application so late, or her failure to engage in the pre-action protocol in respect of the misuse of confidential information.

It was against this background that Mrs Justice Steyn heard the parties' disclosure applications. The first application by Mrs Rooney followed on from the refusal to add Ms Watt as a party to the proceedings. Mrs Rooney applied for permission to use the materials disclosed by Mrs Vardy in any claim against Ms Watt for misuse of confidential information relating to the same subject matter.

The collateral use of disclosed documents is governed by CPR Part 31.22, which states:

> "*(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where:*
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> *(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;*
>
> *(b) the court gives permission; or*
>
> *(c) the party who disclosed the document and the person to whom the document belongs agree.*"

The judge held that this CPR provision represents the complete code on the subject, although the history of the rule derives from the common law. The rule that documents should not be used for collateral purposes exists for reasons of public interest. Compulsory disclosure is "*an invasion of a person's private right to keep one's documents to oneself and should be matched by a corresponding limitation on the use of the document disclosed*".

Further, the rule was thought to promote full and frank disclosure if the party did not have to worry about their information being used outside of that particular dispute. The court would therefore be slow to order collateral use of disclosed documents.

Mrs Rooney argued that collateral use should be allowed in this case because there were many overlapping factual and legal issues between the claims against Mrs Vardy and Ms Watt. It was a well-established exception that disclosed documents could be used if a new cause of action arose in the same proceedings. Why should this be different if there was a new cause of action arising out of proceedings on the same subject matter that had to be tried separately?

Mrs Justice Steyn did not find this argument convincing. In her view if there was going to be a separate claim, against a separate party, with a separate cause of action this was a clear case of collateral use of disclosed documents. There was no compelling reason to allow those documents to be used in any prospective proceedings against Ms Watt. Any such proceedings would have its own disclosure process, which should be followed in the normal way.

Mrs Rooney made a further application for specific disclosure on a 'train of enquiry' basis, that is, for disclosure of documents that would normally fall outside standard disclosure but which were necessary to support a train of enquiry (often relating to dishonest conduct).

The application arose because of several highly unusual circumstances surrounding Mrs Vardy's initial standard disclosure. First, due to a software error, documents which Mrs Vardy's lawyers had tried to redact, were sent to Mrs Rooney's lawyers without those redactions. Mrs Rooney argued that the attempted redactions showed that Mrs Vardy had interpreted her disclosure obligations too narrowly.

Second, much of Mrs Vardy's disclosure was missing. The reasons given for this included that Mrs Vardy's phone had been lost over the side of a boat after it was hit by a wave and no back-up had been kept. Mrs Vardy had also deleted her Twitter account and all attachments to her WhatsApp messages when they were transferred to her solicitors. Key messages between Mrs Vardy and a reporter from the Sun had also been deleted.

Mrs Justice Steyn noted the unusual circumstances surrounding Mrs Vardy's disclosure, including the statement from Mrs Vardy's own forensic expert that such deletion of data as described was "*somewhat surprising*". Mrs Vardy's lawyers were also criticised for redacting documents based on instructions from their client that certain messages did not relate to the case. That was for the court to decide at trial. The judge held:

> "*I appreciate that a party's representatives will often need to seek their client's instructions as to what certain information relates to when determining relevance. But that does not mean that information can be withheld on the basis of the client's account if it is plain on the face of the document that there is a credible alternative interpretation which would support the opposing party's case and on which they would be bound to rely if the document is disclosed.*"

However, these facts remained to be applied taking into account the law on train of enquiry disclosure. Steyn J noted that an application for specific disclosure was exceptional and "*an order for specific disclosure should only be made if it is "necessary for fairly disposing of the proceedings": see Beck v Canadian Imperial Bank of Commerce [2009] IRLR 740" para [22]*".

She further held that the application must be properly focused on what precise disclosure is said to be necessary to that fair disposal of proceedings. Most of the disclosure sought, however, was irrelevant, or if it did exist, it was within the continuing duty of standard disclosure. Despite the highly unusual circumstances, therefore, Mrs Rooney had not made out her case that specific disclosure of the documents asked for was necessary for the fair disposal of the case.

This decision demonstrates the courts' general strict approach to specific disclosure. Highlighting defects in a party's standard disclosure will not in itself justify further disclosure. That further disclosure must be itself be justified as being necessary to fairly dispose of the case.

Sheeran v Chokri

The second case, *Sheeran* v *Chokri & Ors* [2021] EWHC 3553*,* involved the singer/songwriter Ed Sheeran. The defendants had made claims in the media that Mr Sheeran's popular song "*Shape of You*" had copied elements from a song written by the defendants called "*Oh Why*". Mr Sheeran sought a declaration from the High Court that the defendants' copyright had not been infringed.

Following disclosure by the parties, the defendants made an application under paragraph 17 of Practice Direction 51U ("PD 51U") alleging that Mr Sheeran's disclosure had been inadequate and requesting disclosure of further documents. Practice Direction 51 is part of a disclosure pilot scheme running in the Business & Property Courts, trialling a new set of rules for commercial disputes, so the applicable provisions were different from the case discussed above.

PD 51U paragraph 17.1 provides:

> "*17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—*
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> *(1) serve a further, or revised, Disclosure Certificate;*
>
> *(2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;*
>
> *(3) provide a further or improved Extended Disclosure List of Documents;*
>
> *(4) produce documents; or*
>
> *(5) make a witness statement explaining any matter relating to disclosure."*

In order to determine this application, the judge, Mr Justice Meade, saw his duty as twofold. First, he would have to identify whether there had been a failure to comply with any disclosure obligations. Second, he would have to satisfy himself that any curative order sought would be reasonable and proportionate.

By way of background the judge held that to make an order under CPR PD 51U, paragraph 17.1 there must be more than a general suspicion that there may have been a shortcoming in disclosure. Speculation is not enough. Something more is needed to show that there is a likelihood (as opposed to a possibility) of further relevant documents existing.

Turning to Mr Sheeran's disclosure itself, there were a number of problems with what had been submitted. Copies of certain documents had been provided when the court had ordered originals to be produced. Music files had been provided in the wrong format. Mr Sheeran's lawyers were singled out for having dealt with the disclosure process with "*a certain stubbornness and awkwardness*".

The major element of Mr Sheeran's disclosure that the judge was unhappy with, however, was that it was accepted that Mr Sheeran did not undertake the disclosure himself but that it was overseen by his manager. In Mr Justice Meade's view, while this was not necessarily a sign of impropriety, it was at least a matter of concern.

In relation to the disclosure that had been given it was clear that Mr Sheeran's personal knowledge was required on whether certain documents, such as diary entries, existed, and that this task could not be delegated to his

manager. The judge therefore allowed the defendant's disclosure application on the elements that related to this point.

Mr Justice Meade went further and ordered Mr Sheeran to make a witness statement stating that he had personally satisfied himself that his disclosure obligations had been met. He gave a warning that while he appreciated Mr Sheeran was a busy person with a recording and song-writing career to pursue, he did initiate the proceedings and it was important for a person in his position to take responsibility for their own disclosure.

This decision demonstrates that litigants are required to satisfy the courts that they have complied with their disclosure obligations, no matter their celebrity or work schedules. Even though it is common in commercial disputes for lawyers to oversee the disclosure process, this is a salutary reminder that it is the party to the dispute, not their lawyers, who must satisfy themselves that their disclosure obligations have been met. It is the role of a good lawyer to ensure their client is well informed on the extent of those obligations.