

DEPLOYING PRIVACY AND DATA PROTECTION ARGUMENTS TO PROTECT REPUTATION

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Why bother?

DEPLOYING PRIVACY AND DATA PROTECTION ARGUMENTS TO PROTECT REPUTATION

- Evolved with freedom of expression/Art 10 at forefront
- Must be defamatory at common law
- s1 DA 2013 serious harm threshold
- Suite of statutory and common law defences
- s8 single publication rule
- s9 forum threshold for claims against foreign Ds
- s10 bar on actions against secondary publishers
- 1 year limitation period
- No prior restraint

MISUSE OF PRIVATE INFORMATION

- Prior restraint available
- 6-year limitation period
- Applies to information in respect of which C has a reasonable expectation of privacy
- Can be true or false information
- Previous publication of same/similar information not a bar
- Threshold of seriousness applies
- Subject to an Art 8/Art 10 balancing test – weighing relative importance of competing rights. No trump cards.

MPI: RECOVERABILITY FOR DAMAGE TO REPUTATION

- Court of Appeal in *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489 decided that any claim for harm to reputation had to be brought in defamation.
- *Khuja v Times Newspapers Ltd* [2019] AC 161. Lord Sumption at [21]: “The protection of reputation is the primary function of the law of defamation. But although the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available even when the matters published are true.”
- Added at [34] that a party was entitled to invoke the right of privacy to protect his reputation. But he did not say (because it was not in issue: the appeal was from refusal of an interim injunction) that a party could recover compensation for reputational harm (as opposed to distress) in a privacy claim.

MPI: RECOVERABILITY FOR DAMAGE TO REPUTATION

Richard v BBC [2019] Ch 169; [2018] EWHC 1837 Mann J allowed recovery of compensation for harm to reputation in a claim brought in misuse of private information. After considering *Khuja*, at [345]

“It is therefore quite plain that the protection of reputation is part of the function of the law of privacy as well the function of the law of defamation. That is entirely rational. As is obvious to anyone acquainted with the ways of the world, reputational harm can arise from matters of fact which are true but within the scope of a privacy right.”

MPI: RECOVERABILITY FOR DAMAGE TO REPUTATION

- *ZXC v Bloomberg LP* [2019] EMLR 20; [2019] EWHC 970 (QB) Nicklin J at [152]:

“ In this case, the Claimant made an express concession that the truth or falsity of the underlying information ... is not a relevant issue. In my judgment, the consequence of that is, whilst he can legitimately rely upon the distress and embarrassment that he has felt as a result of the publication of the Information, he cannot be awarded any element of purely reputational damages.”

- Upheld by the Court of Appeal [2021] QB 28 and Supreme Court [2022] AC 1158, although approach to question of recoverability of damages for harm to reputation was not directly in issue.

MPI: RECOVERABILITY FOR DAMAGE TO REPUTATION

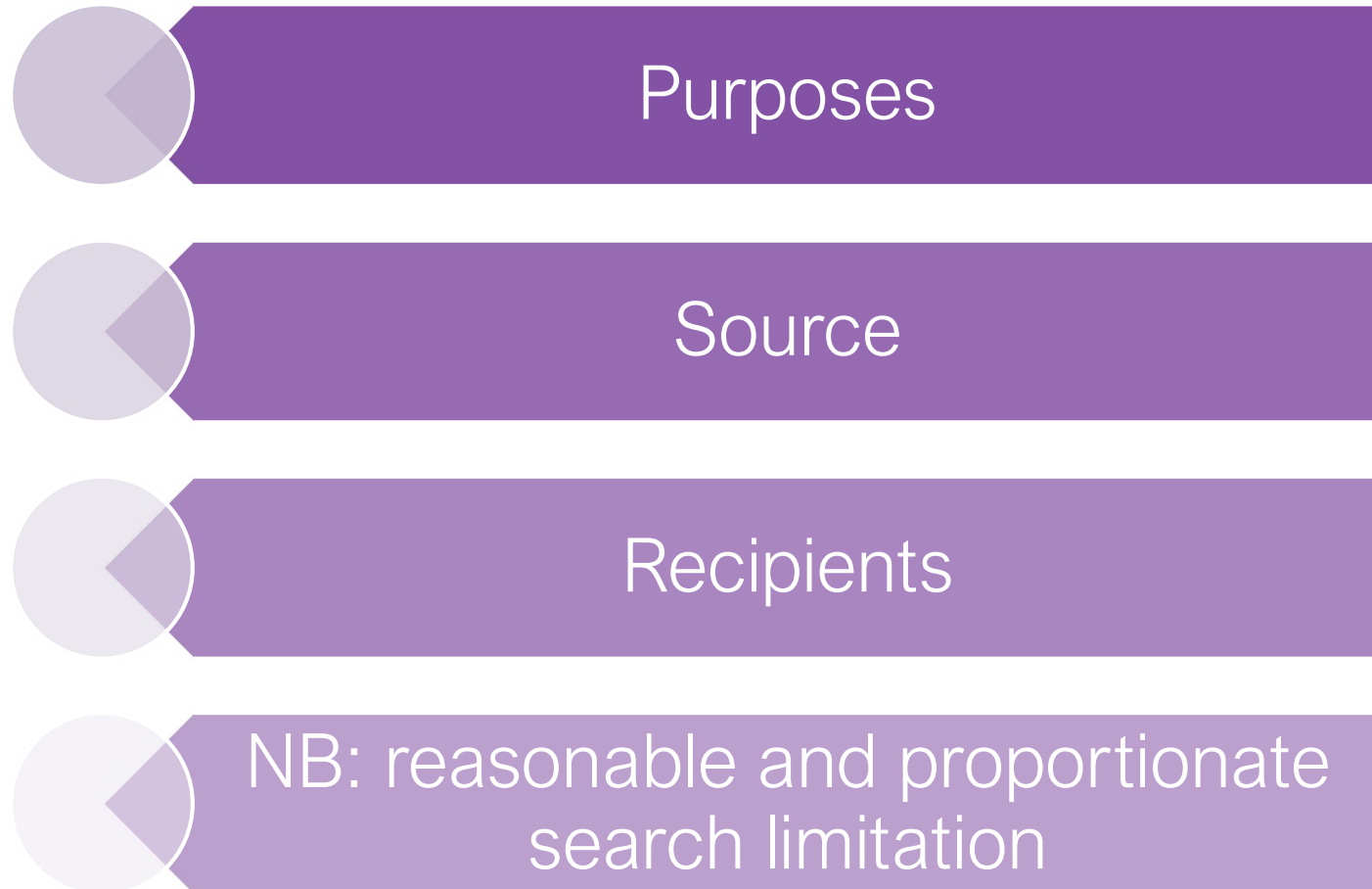
***Sicri v Associated Newspapers Ltd* [2021] 4 WLR 9**

Warby J at [154] concluded neither ***Richard*** nor any other authority enabled a claimant to recover in a privacy claim damages for injury to reputation caused by the publication of information that is defamatory but substantially true.

DATA PROTECTION: STEPS PRIOR TO CLAIM

Article 15

Not just a right of *access* to data:



DATA PROTECTION: STEPS PRIOR TO CLAIM

Art 16

- Right to rectification
- Right to completion of incomplete data by way of supplementary statement

Article 18 right to restriction

- Accuracy
- Lawfulness
- Objection Art 21

Article 19 notification obligation

- to recipients of data where Arts 16, 17, 18 applied.

Article 21 right to object

- legit interests processing (Art 6(1)(f))
- Not 'recognised legit interests' (2025 Act)

DATA PROTECTION: STEPS PRIOR TO CLAIM

Article 17 right to erasure: the right to be forgotten

- no longer necessary for purposes for which processed
- the data subject objects to the processing pursuant to Article 21(1)
- processing is unlawful

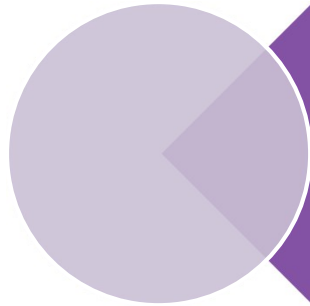
DATA PROTECTION: CLAIMS

No pre-publication injunction!

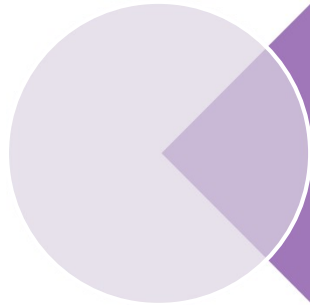
s176 Data Protection Act 2018:

- (1) In any special purposes proceedings before a court, if the controller or processor claims, or it appears to the court, that any personal data to which the proceedings relate—
 - (a) is being processed only for the special purposes,
 - (b) is being processed with a view to the publication by any person of journalistic, academic, artistic or literary material, and
 - (c) has not previously been published by the controller,the court must stay or, in Scotland, sist the proceedings.
- (2) In considering, for the purposes of subsection (1)(c), whether material has previously been published, publication in the immediately preceding 24 hours is to be ignored.

DATA PROTECTION: CLAIMS



Breach of Art 5 principles
(inaccuracy – burden on C)



Breach lawfulness Art 6



Breach of any other rights
under the UK GDPR/DPA 2018
inc Arts 15, 16, 17, 18, 19, 21

DATA PROTECTION: CLAIMS

- **Data Protection Act 2018**
 - S167 compliance order
 - S168 compensation
- **UK GDPR**
 - Article 82 compensation (note provisions re joint and several liability of Ds)

DATA PROTECTION: CLAIMS

Location of Parties – Article 3

- Controller/processor establishment in UK regardless of whether processing takes place here; or
- Not established here, but data subjects here and offering goods or services to them; or
- Not established here, but monitoring behaviour of data subjects here (*Information Commissioner v Clearview AI Inc* [2025] UKUT 319)

No threshold of seriousness test: *Farley & others v Paymaster (1836) Ltd* [2025] EWCA Civ 1117 at [6(2)(a)] and [54] to [76]

DATA PROTECTION: CLAIMS

Application to oral disclosures?

- ***Scott v LGBT Foundation Ltd* [2020] 4 WLR 62**
Saini J held no
- ***Endemol Shine Finland OY* C-740/22 CJEU** held yes
- ***Hemming v Poulton* [2021] EWHC 3863** at [88]-[90] (refusal to strike out) and
- ***Raine and JD Wetherspoon* [2025] EWHC 1593** at [48]-[50] (held yes, ***Scott*** distinguished)

DATA PROTECTION: CLAIMS

RTBF:

Hurbain v Belgium (2023) 77 EHRR 34 :

- Grand Chamber of European Court of Human Rights
- No violation of Art 10 in an order to anonymise a newspaper website article about a doctor whose conviction for causing death by driving was spent
- Court referred to the ‘right to be forgotten’ as having been specially enacted under Art17 GDPR to take account of the decision of the CJEU in *Google Spain v AEPD* [2014] QB 1022

DATA PROTECTION: CLAIMS

Held, that in the Art 8/10 balancing test in respect of journalistic content archived online, the following criteria should be taken into account:

- (i) the nature of the archived information
- (ii) the time that had elapsed since the events and since the initial and online publication
- (iii) the contemporary interest of the information
- (iv) whether the person claiming entitlement to be forgotten was well known and his or her conduct since the events
- (v) the negative repercussions of the continued availability of the information online
- (vi) the degree of accessibility of the information in the digital archives
- (vii) the impact of the measure on freedom of expression and more specifically on freedom of the press. The principle of preservation of the integrity of press archives must be upheld, which implies ensuring that the alteration and, a fortiori, the removal of archived content is limited to what is strictly necessary

DATA PROTECTION: DAMAGES

Distress/psychological harm

Farley & others v Paymaster (1836) Ltd (CA)

- C can recover compensation for fear of the consequences of an infringement if the alleged fear is objectively well-founded but not if the fear is (for instance) purely hypothetical or speculative: [75].
- If the fears of what might happen are objectively well-founded, compensation for any consequential impact on mental health is in principle recoverable: [92]

DATA PROTECTION: DAMAGES

“Mere loss of control”?

- ***Lloyd v Google LLC* [2022] AC 1217; [2021] UKSC 50.** No damages for “mere loss of control” decided under the DPA 1998 (the predecessor to the DPA 2018) and expressly left open the position in relation to it.
- ***SMO (A Child) v TikTok Inc & Ors (Rev 1)* [2022] EWHC 489.** Nicklin J considered it arguable (service out) that loss of control damages were available under the DPA 2018.
- ***Beko v Islington BC* [2023] EWHC 1668.** Loss of control damages awarded
- ***Farley*** appeal withdrawn

DATA PROTECTION: DAMAGES

Reputation?

Pacini v Dow Jones & Co Inc [2024] EWHC 1709
(KB)

HHJ Richard Parkes KC declined to strike out as an abuse of process a data protection claim in respect of two online articles that were alleged to have been defamatory and to have caused the claimants reputational damage. The law on the recoverability of damages for injury to reputation in non-defamation claims was uncertain.

DATA PROTECTION CLAIMS: FUNDING OPTIONS

- Claims against the media
- S175 DPA 2018 provides for provision of assistance from ICO in special purposes proceedings including:
 - Paying costs of the proceedings
 - indemnifying the applicant in respect of liability to pay costs, expenses or damages in connection with the proceedings.
 - “we believe the case involves a matter of substantial public importance. This is likely to be where there has been, or there could be, a serious infringement causing substantial damage or distress to an individual, or where the outcome of the case might significantly affect the interpretation of data protection law or other laws.”
- Claims against public authorities
- Legal aid, including for claims for Art 8 breach made under the HRA 1998

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Thank you for listening.

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