



IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CH 1997 B No 400

B E F O R E: THE HON MR JUSTICE LIGHTMAN

B E T W E E N:

FRANÇOIS-MARIE BANIER

Plaintiff

-and-

NEWS GROUP NEWSPAPERS LIMITED

Defendant

-and-

CH 1997 B NO 535

B E T W E E N

FRANÇOIS-MARIE BANIER

Plaintiff

-and-

TIMES NEWSPAPERS LIMITED

Defendant

JUDGMENT

Mr Nicholas Gardner Solicitor Advocate of Herbert Smith for the Plaintiff
Ms Denise McFarland instructed by the Legal Adviser and Solicitor of the Defendants

Hearing: 19th June 1997
Judgment: 19th June 1997

Pursuant to Order 68 rule (1) of the Rules of the Supreme Court 1965 and all other powers hereunto enabling I certify that the attached text records my Judgment in this matter and direct that no further record or transcript of this Judgment need be made.

Gavin Lightman
THE HON MR JUSTICE LIGHTMAN

I. INTRODUCTION

2 Mr Banier is a photographer of international repute. He has
brought two actions for infringement of copyright in a distinctive
4 photograph of the head and shoulders of Princess Caroline of Monaco
("the Photograph"). The first is against Times Newspapers Limited
6 ("TN"), the publishers of the Times. The second is against News Group
Newspapers Limited ("NGN") the publishers of the Sun.

8
I have before me three applications. The first and second are by
10 TN and NGN for consolidation of the two actions and their transfer to
the County Court. The third is by Mr Banier for summary judgment
12 against NGN. Since if I hold that Mr Banier is entitled to summary
judgment, the occasion for consolidation cannot arise, I shall deal with
14 the application for summary judgment first.

16 II. FACTS

Princess Caroline is reported to have suffered from alopecia. In
18 September 1996, apparently having come to terms with this condition
courageously she posed for the Photograph and it is included in a
20 collection of Mr Banier's photographs entitled "Past Present".

2 TN applied to Mr Banier's agent for a licence to publish the
3 Photograph in the Times. There is an issue in the action against TN
4 whether such a licence was granted: TN contend that Mr Banier's agent
5 granted a licence on terms that no fee need be paid but TN should
6 acknowledge Mr Banier as the photographer and refer to the collection.
7 The Times thereafter published the Photograph.

8 NGN decided that it wished to publish the Photograph in the Sun.
9 NGN tried to obtain the necessary licence from the agent, but the agent
10 could not be contacted in time. Having regard to the terms on which TN
11 obtained its licence and the practice of newspapers to publish copyright
12 photographs ahead of obtaining the necessary licence from the copyright
13 owner once another newspaper has published it, NGN went ahead and
14 published the Photograph with an article underneath headed "The courage
15 of Caroline - royal bald for photos". The article reads as follows:-

16
17 *"Tragic Princess Caroline of Monaco faces up the world and bravely shows how she
18 is now totally bald.*

19 *The 39-year-old suffers alopecia brought on by stress and has only appeared
20 in public in hats and scarves.*

21 *Now she has come to terms with her illness and allowed French
22 photographer Francois-Marie Banier to use her as a model. She is included in a
23 collection of his photos in a stunning pose.*

24 *Caroline has had her fair share of pain. She and first husband Phillippe
25 Junot parted after a year. Her second husband died in a boat accident and last
26 year she was dumped by lover Vincent Lindon."*

28

2 The two publications of the Photograph gave rise to the
commencement of two sets of proceedings. Mr Banier's case (supported
4 by his evidence) is very simple. He is the creator and author of the
Photograph which is an original artistic work within the meaning of
section 4(a) of the Copyright Designs and Patents Act 1988 ("the 1988
6 Act"); he was and is a French citizen and domiciliary and accordingly a
qualifying person within section 154 of the 1988 Act; and accordingly
8 copyright subsists in the Photograph and he is the owner. NGN
published the Photograph without his licence or consent and accordingly
10 thereby infringed his copyright. He accordingly seeks a declaration of
his entitlement to the copyright, an injunction to restrain infringement and
12 an inquiry as to damages. On this application for summary judgment he
does not seek additional "flagrancy" damages under section 97(2) of the
14 1988 Act, though these are claimed in the writ.

16 **III. ISSUES**

18 NGN's defence makes no admission as to the subsistence of
copyright or Mr Banier's ownership of copyright in the Photograph, and
Mr Banier is put to proof of both. No positive averment is made and no
20 evidence adduced to the contrary by NGN. Mr Banier's evidence in
respect of the subsistence of copyright and his ownership of it is

unchallenged and to be accepted. There is clearly no real issue on this
2 question.

4 NGN cannot and does not dispute that it reproduced the Photograph
in the Sun. There is no evidence to support any contention that Mr
6 Banier granted any licence to NGN and there is accordingly no arguable
case of the existence of such a licence. But NGN maintain that there are
8 arguable defences of fair dealing and estoppel. I shall consider each of
these in turn. But before I do so, I should deal with one general
10 contention on behalf of NGN.

12 NGN contend that it is common press practice, after one newspaper
has published a copyright photograph, that other newspapers without
14 waiting for the grant of a licence by the copyright owner themselves
publish copies of the photograph. The relevant evidence is contained in
16 paragraph 4 of the affidavit of Mr Lennox, the Picture Editor for the
Sun. It reads as follows:

18
20 *"In my experience it is common practice when one paper publishes a picture first*
22 *for another newspaper to contact it with regard to the circumstances of the*
24 *permission the first paper was given to publish the picture. While the paper will*
always then try to obtain its own specific licence, if for any reason it is not possible
(within the often very tight time table of a daily newspaper) it will often publish
without permission, with the confidence of the knowledge of what they have learnt
about the circumstances of the first publication and in keeping with that knowledge.

2 *It will also, where appropriate, expect to pay retrospectively, an appropriate licence*
4 *fee. I would say that this happens several times a day almost every day, in every*
newspaper."

6 This may ~~make~~^{be} common newspaper practice and one with which
8 newspapers normally get away with. The risk of infringement
10 proceedings may from a business and circulation point of view be worth
12 taking: it may be economic to "publish and be damned". But it is plainly
unjustified and unlawful and the sooner this is recognised the better for
all concerned. The adoption of this practice is not a passport to infringe
copyright.

14 **(a) Fair dealing**

16 Section 30(1) of the 1988 Act provides that fair dealing with a
18 work for the purpose of criticism or review does not infringe any
20 copyright in the work or another work provided that it is accompanied by
22 a sufficient acknowledgement. This defence is available in the case
where the copyright work is a photograph. By way of contrast, section
30(2) provides that (subject to certain conditions) fair dealing with a work
(other than a photograph) for the purpose of reporting current events does
not infringe copyright. This latter provision cannot apply in this case as
the work in question is a photograph. To invoke the defence of fair

dealing in this case, NGN must establish that the article of which the
2 photograph was part was a fair dealing for the purposes of criticism or
review.

4
What amounts to fair dealing must depend on the facts of the
6 particular case and must to a degree be a matter of impression. What is
of prime importance is to consider the real objective of the party using
8 the copyright work. Section 30 is designed to protect a critic or reviewer
who may *bona fide* wish to use the copyright material to illustrate his
10 review or criticism. To ascertain the objective in the present case it is
necessary to examine the article as a whole.

12
It is in my view totally unreal to suggest in this case that the
14 objective in the publication of the Photograph in the Sun was to illustrate
any review or criticism of any copyright work, whether the Photograph
16 or the collection. The article is a news story namely that Princess
Caroline after a period of stress and pain has bravely posed for the
18 Photograph. The Photograph has a prominent place above the article to
make the news story come to life. It is true that reference is made to her
20 stunning pose, but that is merely an aspect of the news story. The

heading to the article highlights the real point of the article, namely the
2 courage of a princess.

4 (b) **Estoppel**

NGN contend that the grant of the licence by Mr Banier's agent to
6 TN free of charge on terms that reference was made to Mr Banier as
photographer and the collection led NGN to believe that Mr Banier did
8 or would not object to publication of the Photograph by NGN. This
contention is imaginative but totally lacking in any other quality. Neither
10 Mr Banier nor his agent made any representation or gave any reason for
NGN believing any such thing. NGN knew it needed a licence: it knew
12 it could not get it in time: and (in accordance with the practice of
newspapers to which I have referred) with its eyes wide open to the risk
14 of proceedings for infringement it decided to publish and be damned. In
the circumstances it can have no basis for complaint that it is now
16 damned.

18 **IV. CONCLUSION**

I accordingly hold that there is no conceivable defence to this
20 action for infringement of copyright in the Photograph. Mr Banier is
prima facie entitled to a declaration of his ownership of the copyright in

1 the Photograph, an injunction to restrain infringement and an inquiry as
2 to damages. The only area of dispute has been the entitlement to an
injunction. In a letter prior to the commencement of this action from
4 NGN's legal manager to Mr Banier's solicitors NGN offered an
undertaking, and in view of this undertaking NGN says that no injunction
6 should be granted. But the letter is highly objectionable: it contains a
totally false justification (no longer maintained) of the infringement
8 complained of. NGN continued until after the hearing began to put in
issue Mr Banier's entitlement to copyright and has throughout sought to
10 maintain a quite hopeless justification of its reprehensible conduct. In the
circumstances I consider that Mr Banier is in justice entitled to the
12 protection of an injunction.

14 In the light of this decision, the summons for consolidation falls
away, and since both parties have agreed before me at my instigation that
16 the action against TN should continue in the High Court, the summons
for transfer also is no longer alive.

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