EMI Records Limited v News of the World

Clauses noted: 1

EMI Records Limited complained to the Press Complaints Commission through solicitors that an article in the RAV column headlined "Kylie to sign for £35M" published in the News of the World on 1st June 2003 was based on inaccurate material – which had not then been corrected promptly – in breach of Clause 1 (Accuracy) of the Code.

In light of remedial action offered by the newspaper, there were no further issues to pursue under the Code. An adjudication was sent to the parties on 9th December 2003 but has been amended following representations made to the Commission by the complainant's solicitors. Summaries of the complaint and the Commission's decision appear below.

Summary of Complaint

The article reported that the pop star Kylie Minogue was on the verge of signing a recording contract worth £35 million. According to the complainant no such deal had ever been discussed or contemplated between Ms Minogue and her record company. In fact, her current contract (which the complainant said was also inaccurately described) was not due for renewal for some time. The solicitors said that their client did not believe that the newspaper had taken any reasonable steps to check the accuracy of the article prior to publication, nor had it offered to publish a correction with the sufficient promptness required by the Code when contacted on two occasions within ten days of publication. During the course of the PCC investigation, the solicitors provided signed statements by their client's Business Affairs Director and from Ms Minogue's managers which said that no £35 million deal, or anything like it, had ever been contemplated or taken place.

The newspaper told the Commission that the background to the item was supplied by a 'highly credible' source inside EMI, to the effect that an announcement would be made later in the year that Kylie Minogue would be given £35 million for her own record label. Significant parts of the contract had been read out to the newspaper. As it did not have a copy of the contract, and in light of the submissions made by the complainant, it offered to publish a clarification which would make clear the complainant's denial and the newspaper's acceptance of it. This was to be published on a page no later than where the original article had appeared.

The complainant's solicitors rejected the offer, saying that it did not follow a proposed wording for an apology originally suggested by EMI, had not been made promptly and gave no indication as to the proposed size of the text. Nor did it include confirmation that publication would take place in the same column, and of the same size, as the original article. They also noted that the newspaper had not conceded that the story was untrue and asked for the Commission to adjudicate the matter.

When the Commission – which is at heart a dispute resolution service – considered the matter it took the view that the newspaper should be asked to improve its offer to include an apology in the same column as the original article. Although the newspaper agreed to do this, the proposal was rejected by the solicitors on behalf of the complainant, who considered that the Commission should have upheld the complaint in the first instance. They said that the delay attendant upon further attempted negotiations was unacceptable. They suggested that the Commission would be wrong to conclude that the newspaper's offer was sufficient. In part they claimed that this was because comments made by Sir Christopher Meyer to the Culture, Media and Sport Select Committee indicated that their client should be entitled to a more prominent apology than the one on offer.

Adjudication

Following the submission of evidence from the interested parties, it became clear to the Commission that the article was inaccurate. It was therefore incumbent upon the newspaper, which

had apparently based the article on a confidential source, to offer to publish an appropriate correction and apology making clear its acceptance of the fact that the story had been refuted. The Commission was pleased that the newspaper had undertaken to publish this on the same page as the original article. It believed that the terms of the final offer constituted an adequate remedy under the Code for the original inaccuracy and was satisfied that no further action from the newspaper would be required.

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Further issues

When the Commission issued its adjudication to the effect that the newspaper's final offer was an adequate remedy to the complaint – as outlined above – the complainant's solicitors replied asking for a large number of changes to the text. The Commission is always willing to amend its adjudications more accurately to reflect the parties' own summary of its arguments or to review its findings when sufficient reasons are provided. The complainant has indicated that it may take legal action in respect of the adjudication and it has therefore become necessary to deal with matter in a fuller way as set out below.

It remains the Commission's view that this complaint was of a type which should have been dealt with in a short time by an appropriate correction or apology. Instead, it has taken seven months so far to produce a result involving a large volume of correspondence, in part repetitive and out of all proportion to the issues involved.

The Commission's approach to dispute resolution

The modern approach to litigation, as exemplified by Lord Woolf's Report on Civil Justice, is that efforts should be made to encourage the parties to come to an agreed solution if possible, and to penalise those who refuse to engage in such a process without good reason. The Commission is designed to operate as a fast, free and fair process to resolve problems in an efficient and amicable manner when possible. Its role as a dispute resolution mechanism is largely dependent upon its ability to seek to negotiate the appropriate remedial action in response to complaints. The process attendant upon this is necessarily non-legalistic and non-confrontational and any attempt to treat it otherwise will inevitably produce antagonism and delay. It is accepted that some complaints cannot be dealt with in this way and must go to adjudication. Nevertheless, it is for the Commission to decide when the process of conciliation has been exhausted, so as to be able so as to judge the sufficiency of any offer.

There is good reason for this. In the absence of an agreement the Commission can only make an adjudication for or against the complainant. If the decision is made in favour of the complainant it is only the adjudication (or an edited version as approved by the Commission) which needs to be published with due prominence. The complainant is not then also entitled an apology or correction which he or she may have previously offered and rejected. Similarly, the Commission may decide that the newspaper had made a reasonable offer, or already taken satisfactory remedial action under the terms of the Code.

Legal and other advisers have an important role to play here. The Commission entirely understands that in spite of its efforts to make the process as simple as possible there will be those who will need help in putting their case, and that there are others who can afford to be represented. It is also right that the Commission's decisions be challenged where it is necessary and appropriate. The Commission recognises that in the last resort advisers must act on the instructions received which may not be clear or prompt. But they have an obligation to give their client realistic advice and not to engage with the Commission as if involved in litigation against it. The latest Commission statistics show that complainants on average have their complaints disposed of within 32 days, in respect of

cases where solicitors are employed it is 71 days. The difference between this last group and the others may be in part due to the issues and the degree of difficulty in the cases concerned.

The Chairman's evidence

On 21 May 2003, the new Chairman of the Commission, Sir Christopher Meyer, gave evidence to the Commons Committee on Culture, Media and Sport.

In challenging the Commission's decision that the newspaper's final offer was an adequate remedy to the complaint, the complainant's solicitors argued that Sir Christopher's comments to the Select Committee entitled their client to a far more prominent apology. They suggested that Sir Christopher had stated that it would be 'ridiculous' if corrections and apologies were not the same size as the offending article. They argued that, "in their context, the meaning of Sir Christopher's words could not be clearer. It is in the very context of Sir Christopher Meyer saying that each case is decided on its own merits (and indeed it is in the same paragraph) that he says that apologies should be "at least as prominent as the original transgression"." As Sir Christopher's says ".....otherwise it would be ridiculous".

It was clear from a number of letters that the solicitors believed that the word "transgression" referred only to the physical area of the article concerned and the Commission was presented with repeated mathematical calculations of its size. The solicitors also said that it was not necessary for them to define the word "due" in the "due prominence" provision of the Code because it had not been used by Sir Christopher in his evidence, but that in any event it supported their view. They also later claimed that the entire basis of their client's rejection of the second offer from the newspaper was in express reliance on Sir Christopher's statements, which they described as "unequivocal."

The Commission found it difficult to follow these arguments. Sir Christopher's answers to the Select Committee are directed at the need for proportionality in judging the appropriate correction or apology, either in a settlement or as a result of an adjudication. He gave examples of various means that might be employed, but stressed that each case must be dealt with on its own merits. In saying that any response should be as prominent as the original transgression and in giving some examples, he made it clear that he was not simply talking about the physical size of the article about which complaint had been made, but also about all the relevant circumstances surrounding a breach of the Code. This correctly sets out the Commission's view on the "due prominence" provision of the Code.

As appears from the transcript, the use of the word "ridiculous" has been misstated by the solicitors. If their contentions were correct it would mean that a small factual error in a multi-page article would require a multi-page correction. The Commission did not consider that the solicitors were right in their interpretation of Sir Christopher's comments, and did not consider that the complainant was entitled to claim reliance on them in support of its rejection of the offer approved by the Commission.

The Seriousness of the Breach

The complainant's first letter to the newspaper was sent on 5 June 2003, some four days after publication. It claimed that the article had made allegations of profligacy, irresponsibility and negligent financial management which were highly damaging to its reputation. As a publicly quoted company its perceived performance was subject to constant financial analysis. The solicitors' first letter some five days later made the same complaints and claimed that the error had caused damage to the company's reputation, making further publication of the misinformation contained in the article likely. The solicitors said that it was necessary for their client to take a firm line because the article amounted to an allegation that their client had spent approximately 14% of its operating profit on an asset which it already owned. This was entirely unacceptable, they said.

The Commission found it difficult to accept these arguments. The short piece was a typical tabloid diary item which contained only two facts about the alleged contract, namely that it involved the payment of £35 million over five years – hardly enough information for somebody to come to conclusions about the wisdom of entering into the agreement. Nor is it clear why the profit figure for the last year was relevant to gross payments over the following five years. No information was given for anticipated receipts or recoupment provisions. And the Commission bore in mind that it is not uncommon for successful artistes to renegotiate their current contracts before the end of its term.

Although the complaint was dealt with over a period of nearly six months, no information was supplied by the solicitors about the actual damage alleged to have been done by the article – other than the fact that Gay.com had mentioned the story and had called the proposed deal "staggering". The Commission was not provided with, for example, any press statement issued by the complainant, any movement of share prices, relevant press cuttings or evidence of anybody taking up the story in a negative way. The Commission did not therefore find that the complainant had produced evidence to substantiate its claims in this regard.

The Settlement Discussions

The original letter of complaint to the newspaper, written by the Business Affairs Director of EMI, suggested the wording of a headline and six line correction, to be published in the next edition of the newspaper in the same column and of the same size as the original. The Commission considered that this provided a basis for sensible negotiations which could have dealt with the matter in a simple and straightforward way. Although the Commission appreciates that the newspaper's position at that stage might have been that the story was true, it should nonetheless have responded to the direct complaint as soon as possible.

The newspaper might have been entitled to rely on its protection of its anonymous source until early September when a statement from Ms Minogue's managers was received which clearly established that the story was untrue. The newspaper then made an offer of a correction. This was another opportunity to settle the matter. However, the solicitors replied rejecting the offer on the grounds that it did not conform to their client's original proposal. They said that the proposed correction did not concede that the original article was untrue and that the newspaper had provided no undertaking that it would appear in the RAV column. The matter of promptness also needed to be addressed. Because of the time and trouble expended they demanded that the matter go to adjudication. The matter was considered at the Commission's October 2003 meeting, at which it was decided that the newspaper should be asked to improve its offer to ensure that it contained an apology and was placed in the same column as the original piece had been. Subject to any questions of due prominence, this would have the same effect as the correction requested by the complainant at the beginning of June.

The newspaper accepted this suggestion but the solicitors acting for the complainants did not. In a number of letters they accused the Commission of delay, said that it had failed in its duty to adjudicate and insisted that it did so. They claimed that negotiations had ended and the matter of promptness had not yet been decided. Notwithstanding that the Commission had expressed a view, they asserted that the Code demanded that any correction should be no less in size, visibility and position as the original article

Due Prominence

The Commission has also already pointed out that the complainant's solicitors were mistaken in their view of the evidence given by Sir Christopher Meyer. In letters to the Commission they asserted that in order to comply with the Code, the retraction and apology in this case must be no less in size, visibility and position than the original article. Further, they wanted it to be accompanied by a large colour picture of Ms Minogue with a banner headline – meaning that the whole piece

would take up 30% of the news space on the page. The Commission has already pointed out the fallacy in this approach. It should perhaps also be noted that only part of the article dealt with the proposed deal.

The Commission has carefully considered all the factors involved. These include the nature of the breach of the Code, the circumstances concerning this particular article, the original demand for a correction, the settlement process and the arguments put forward by the complainant. The Commission found that in the light of the remedial action offered by the newspaper there were no further issues to pursue under the Code. It was pleased that the newspaper published the apology, in the form last offered, on December 28th 2003.

Delay

The solicitors consistently urged the Commission to make a finding against the newspaper because it had not corrected a significant inaccuracy promptly once it recognised that one had been published. They said that they were primarily concerned with the newspaper's failure to reply to the two complaint letters in June. They also complained of delays which had contributed to the matter taking some seven months, something they blamed on the Commission and the newspaper.

The Commission regretted that the newspaper had failed directly to deal with the June complaints, especially as it would have provided the most sensible way of dealing with the matter in the first instance. But the newspaper's position, until the article was shown to be inaccurate through the Commission's process of investigation, was that the story was based on a credible source and was true. The Code only calls for a prompt correction after an inaccuracy has been recognized. The Commission was satisfied that the newspaper had co-operated in full with the investigation and had taken steps to provide an appropriate remedy once the inaccuracy had been established. There was therefore no breach of the Code in this respect.

This adjudication has already drawn attention to the unusual features of this complaint. It spite of these the complaint was dealt with by the Commission over the period 20 June to 3 December, a period of five and a half months. Included in that is a period from June to August when witnesses were on holiday. A further two months has been spent on this review. During that period the parties agreed that the apology should be published in the newspaper's edition of 28 December 2003 without prejudice to the complainant's rights. The Commission did not accept that it is responsible for any delay in this matter. The main difficulty arose from a refusal to engage in a settlement process based on an inaccurate view of the Commission's approach.

Relevant rulings
De Silva/Wijeyesinghe v Sunday Times, 2001
Clarke MP v The Times, 2002

Adjudication issued 2004