Case No: QB-2022-002352

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand,
London,
WC2A 2LL

Date: 24 April 2023

Before:

MR JUSTICE LINDEN

- -

Between:

PROFESSOR NEIL WYN EVANS

Claimant

- and -

PROFESSOR RICHARD McMAHON

Defendant

- -
- -

MR JONATHAN SCHERBEL-BALL (instructed by **Brett Wilson LLP**) for the **Claimant**
MS VICTORIA JOLIFFE (instructed by **DWF Law**) for the **Defendant**

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APPROVED JUDGMENT

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MR JUSTICE LINDEN:

Introduction

1. This is a trial of preliminary issues in a claim for libel and malicious falsehood which was issued on a protective basis on 26 July 2022. Proceedings were served on 22 November 2022 after correspondence between the parties pursuant to the pre-action protocol, and an Acknowledgment of Service was served on 1 December 2022.

2. On 26 January 2023 the parties applied by consent for a preliminary hearing, and an order for such a hearing was made by Master Giddens on 9 March 2023. In the usual way, Master Giddens' order was for the determination of the following preliminary issues:

   i) the natural and ordinary meaning of the statement complained of;

   ii) whether the statement complained of in any meaning found is defamatory of the Claimant at common law; and

   iii) whether the statement complained of is (or includes) a statement of fact or opinion.

Background.

3. The Claimant and the Defendant are both Professors of Astrophysics at the Institute of Astronomy which is part of the University of Cambridge. Both have held their positions for a number of years. At the time of the publication on which the Claim is founded the Defendant was the Director and Head of Department of the Institute.

4. The Claim relates to an e-mail dated 29 July 2021 which was sent by the Defendant to Professor Nigel Peake, the Head of the School of Physical Sciences, and therefore the person with responsibility for the management of the Institute. The e-mail set out grievances against Professor Gerry Gilmore and against Professor Martin Haenhelt and the Claimant which were submitted pursuant to the Dignity at Work policy applicable to the Institute. It is set out in full at Annexe 1 to this Judgment with its paragraphs numbered for ease of reference and the allegedly defamatory passages emboldened.

The parties' pleaded positions on meaning

5. The imputations which are said by the Claimant to be defamatory at common law are contained in paragraphs 8 and 9 of the 29 July e-mail, albeit these passages require to be read in the context of the e-mail as a whole. The meanings contended for by the Claimant are pleaded at paragraph 4 of the Particulars of Claim as follows:

   4.1 "The Claimant was a bully who harassed the Defendant, as part of a joint campaign with Professor Gilmore and Professor Haehnelt by making

knowingly false allegations against the Defendant in respect of the Opticon-Radionet Pilot grant; and

4.2 "The Claimant had committed a serious breach of his professional duties by failing to request that the department underwrite Dr Pebody's employment contract and had instead intentionally used the significant stress which he had caused to Dr Pebody to further his campaign of bullying against the Defendant."

6. The Defendant has not filed a Defence. His pleaded position as to the natural and ordinary meaning of the imputations is set out at paragraphs 2(1) and (2) of his Notice of Case as follows:

(1) There were grounds to investigate whether the Claimant had, with Professor Haehnelt, and probably Professor Gilmore, behaved in a bullying manner towards the Defendant by proposing to share with all members of the academic staff, false and unsubstantiated allegations against the Defendant in respect of the acceptance of the Opticon-Radionet-Pilot grant.

(2) There were grounds to investigate whether the Claimant had, instead of requesting that the Department underwrite Dr Pebody's contract, used the stress and anxiety that had been caused to Dr Pebody as a basis for claiming the Defendant had behaved inappropriately."

7. At paragraph 3 of the Notice, the Defendant pleads that these are statements of fact, save for the words which are underlined, which is a statement of opinion as to Professor Gilmore's involvement.

8. At paragraph 4, the Defendant admits that the meaning at paragraph 2(1) of the Notice is defamatory at common law but he denies that the meaning at paragraph 2(2) is defamatory and that the words bear any meaning in this category which is defamatory at common law.

9. The key issues for determination are therefore, broadly, whether these are Chase level 1 meanings – the e-mail was asserting that the conduct actually occurred – or Chase level 3 meanings – it was asserting that there were grounds to investigate whether the conduct occurred (see *Chase v News Group Newspapers Ltd* [2002] EWCA (Civ) 1772, [2003] EMLR 11 at [45]). There are then various issues between the parties as to what precisely the relevant passages would mean to the hypothetical reasonable reader.

Issue 1: meaning

10. In accordance with standard practice I read the 29 July e-mail before considering the competing positions of the parties in order to form a provisional view as to the meaning of the relevant parts (see *Millett v Corbyn* [2021] EWCA

(Civ) 567, [2021] EMLR 19 at [8]). These positions were set out in helpful skeleton arguments which counsel then developed orally at this hearing. I was also referred to the well known and very helpful summary of the principles to be applied by the court when determining meaning which is provided by Nicklin J, at [11] and [12] of his Judgment in *Koutsogiannis v Random House Group Ltd* [2019] EWHC 48 (QB), [2020] 4 WLR 25:

> "11. The court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways….
>
> 12. "The following key principles can be distilled from the authorities…."
>
> (i) "The governing principle is reasonableness.
>
> (ii) The intention of the publisher is irrelevant.
>
> (iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is no avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.
>
> (iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.
>
> (v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.
>
> (vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.
>
> (vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.
>
> (viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes the context will clothe the words in a more serious defamatory meaning (for example the classic 'rogues' gallery' case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (eg bane and antidote cases).

(ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains it is necessary to take into account the context in which it appeared and the mode of publication.

(x) No evidence beyond publication complained of is admissible in determining the natural and ordinary meaning.

(xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

(xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

(xiii) In determining the single meaning the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning)."

11. Taking into account the arguments of counsel, I have concluded that the meaning of the two imputations is that:

i) The Claimant and Professor Haehnelt had engaged in bullying behaviour towards the Defendant by proposing to share, with all academic staff, allegations against the Claimant in relation to the acceptance of the Opticon-Radionet Pilot grant which the Claimant and Professor Haehnelt knew to be false. As part of this behaviour they had already shared the allegations with Angela Macharia, Professor Reynolds and Professor Challinor. The Claimant and Professor Haenhelt had acted together and Professor Gilmore had collaborated with them for these purposes;

ii) The Claimant and Professor Haehnelt had chosen not to request that the contract of Dr Gudrun Pebody be underwritten when they could have done so and, instead, chose to use the stress and anxiety which her situation caused her for their own purposes by claiming that the Defendant had behaved inappropriately.

12. By way of explanation of these meanings, first, I reject Ms Joliffe's argument that these were two Chase 3 level imputations. Her key points in support of this contention were that:

i) it is inherent in the submitting of a grievance that there is a call for the matter to be investigated;

ii) in relation to the grievance against Professor Gilmore, at paragraph 3 of the 29 July e-mail the Defendant recognised this when he said, "The

evidence and impact of this bullying behaviour on myself and others in the department in more junior positions needs to be investigated";

iii) the reasonable reader would understand that there is always another side to the story and that the purpose of lodging a grievance is to initiate a process of investigation before findings are made and conclusions reached;

iv) the nature of the process was, therefore, an implied antidote and only a reader who is avid for scandal would lead to a Chase level 1 meaning.

13. In my view, the mere facts that allegations are made as part of a grievance submitted pursuant to a grievance procedure and that the matter will then be investigated under that procedure do not mean that the author of the grievance is merely saying that the conduct may have occurred, or that there are grounds for thinking that it may have occurred, and is asking for this question to be investigated. It depends on how the matter is expressed but commonly the position will be that the person submitting the grievance is saying, in effect, "I am unhappy because this has happened to me. I want something to be done about it."

14. In this case the Defendant unequivocally asserted that the relevant treatment of him had occurred. He also set out the consequences of that conduct for him on the basis that it had actually occurred. He did not indicate any doubt or reason for uncertainty as to whether he had been treated in the manner alleged. I agree with Mr Scherbel-Ball that where an allegation is made, the mere fact that the consequence of making it is that the matter will be investigated does not change the nature or meaning of what is said. The Defendant's reference to matters needing to be investigated was essentially a call for action rather than a suggestion that the conduct towards the Defendant may not have occurred or may not have had the impact alleged. The furthest the Defendant could reasonably take this point was that arguably he was calling for the impact on others to be investigated as well, but that does not affect the meaning of the imputations in this case.

15. Second, I did not accept the Claimant's case that the 29 July e-mail alleged harassment against him. Mr Scherbel-Ball argued that a concerted campaign was alleged rather than a one off. He emphasised that the words "and other false, unsubstantiated allegations" in paragraph 8 of the e-mail, and the statement that the allegations had already been shared with three individuals and were proposed to be circulated more widely. He also emphasised the statement that the Defendant found the conduct "extremely stressful", and the reference in paragraph 13 to the UKRI "Bullying and Harassment condition".

16. In my view, the allegation made by the Defendant was expressly and repeatedly one of bullying. "Harassment" is a related but different concept and there is nothing in the text of the 29 July e-mail to suggest that the Defendant was asserting that he had been harassed. Although the reader might think that his allegations, if true, could also be capable of amounting to harassment, there is no reason for the reader to think that this is what was actually being alleged by the Defendant. The allegation against the Claimant in particular was not so

clearly one of repeated conduct over a period of time that the reasonable reader would conclude that an allegation of harassment was implicit.

17. Moreover, the fact that the Defendant referred to the "Bullying and Harassment condition" in paragraph 13 of his e-mail does not mean that he was making an allegation of both bullying and harassment. The reasonable reader would understand the use of the capital letters to indicate that he was referring to the title of a condition for grants which deals with both types of behaviour but would not think that both types of behaviour were alleged. On the contrary - the reasonable reader would think that, given that the Defendant was clearly aware of the possibility of alleging harassment as well as bullying, the repeated references to bullying and the lack of any other reference to harassment strongly indicate that he was not alleging harassment.

18. Third, I accept that the 29 July e-mail would be understood by the reasonable reader to be stating that the Claimant had circulated, and proposed to circulate more widely, allegations against the Defendant which he knew to be false. Ms Joliffe relied on the contrast between the specific allegation of dishonesty in relation to Professor Gilmore at paragraph 5 of the e-mail when referring to the alleged submission of "unconfirmed draft minutes" and the lack of an equivalent allegation when it came to paragraphs 8 to 13. She also submitted, correctly, that an allegation can be both false and unsubstantiated but made honestly. In effect, she submitted that, if the Defendant was alleging dishonesty, he would have said so.

19. I accept that the 29 July e-mail did not say explicitly that the Claimant and Professor Haehnelt knew the allegations to be false but it is clear that the Defendant was saying that they were acting deliberately and in bad faith. This is strongly indicated by the statements that the allegations are both false and unsubstantiated, i.e. not supported by evidence (paragraph 8), that what they did was "in an attempt to bully and humiliate me", i.e. deliberate or intentional bullying and humiliation (see paragraph 8) and that the false allegations appear to have been "orchestrated" by them in collaboration with Professor Gilmore. Bad faith is also indicated by the allegation that they manipulated the situation in relation to Dr Pebody for their own ends and (at paragraph 9) the Defendant also said in effect that they had reheated old unfounded allegations which had been made against him in the past. In my view, the reasonable reader would understand that it was implicit that the Defendant was saying that they were circulating allegations which they knew to be unfounded.

20. Fourth, I accept that the Defendant was alleging that the Claimant and Professor Haehnelt acted together and in bad faith but not, in terms, that they were part of a "joint conspiracy" as the Claimant contends. Mr Scherbel-Ball relied on the fact that it was clearly alleged that they were acting together and he emphasised the references to orchestration and collaboration, i.e. that it was being said that they acted improperly. I do not see that the word "joint" adds anything to the word "conspiracy". The effect of what the Defendant wrote may well be that there was a conspiracy but I do not accept that he was asserting that technically this amounted to a conspiracy. In my view, that is very much a lawyer's reading of the e-mail rather than the reading which it would be given by the notional reasonable reader.

21. Fifth, as far as the reference to Professor Gilmore is concerned, in my view, the e-mail would be understood as saying that the Defendant believed that he had assisted the Claimant and Professor Haehnelt in orchestrating the allegation. What appeared to be the case was the collaboration with Professor Gilmore rather than the orchestration by the Claimant and Professor Haehnelt. It was being said that the evidence for this was that the allegation circulated and proposed to be circulated by them related to previous unfounded allegations against the Defendant which had been made by Professor Gilmore.

22. Sixth, as far as the second imputation is concerned, I do not accept that the reader would conclude that the Defendant was alleging that the Claimant and Professor Haehnelt had acted in breach of professional duty by failing to request that Dr Pebody's contract be underwritten. Mr Scherbel-Ball emphasised that the second imputation was said in the email to be "just as serious" as the first and that the word "failed" was used in relation to the lack of a request, implying that they had failed to discharge a duty to make a request. He also submitted in writing that, if there had been no professional obligation to make the request, it would not have been relevant or have supported the Defendant's demand for intervention. The allegation was of manipulation of the situation for their own ends which caused distress and anxiety to Dr Pebody and it was being said in the e-mail that the conduct had serious consequences.

23. In my view, the meaning which the reasonable reader would receive from the e-mail would be that the Claimant and Professor Haehnelt chose not to make the request and chose, instead, to use the distress which this would cause Dr Pebody for their own ends. This is what the phrase "instead use" in paragraph 8 conveys when it is read in the context of the e-mail as a whole, including the references in paragraph 9 to the Defendant being "mobbed" rather than the request being made and this continuing to be pursued even though the Defendant had paused the contract process.

24. I saw some force in Mr Scherbel-Ball's argument based upon the use of the word "failed" in paragraph 8. But I consider that, when paragraphs 8 and 9 are read together, the meaning is that this would have been the obvious thing to do but they chose not to rather than that it was they who had a or the specific obligation to make the request in the normal course. On Mr Scherbel-Ball's argument at least three members of staff had the obligation to make the request.

25. In my view, the sting in the second imputation did not depend on the Claimant or Professor Haehnelt being professionally obliged to make the request and nor did the demand for action. It depended on them choosing not to make the request in order to exploit the effect of this when they could have chosen to do otherwise.

Issue 2: fact or opinion?

26. I was referred to [16] of *Koutsogiannis* where Nicklin J, said:

> (i) The statement must be recognisable as comment, as distinct from an imputation of fact.

> (ii) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.
>
> (iii) The ultimate question is how the word would strike the ordinary reasonable reader. The subject matter and context of the words may be an important indicator of whether they are fact or opinion.
>
> (iv) Some statements which are, by their nature and appearance opinion, are nevertheless treated as statements of fact where, for instance, the opinion implies that a claimant has done something but does not indicate what that something is, ie the statement is a bare comment.
>
> (v) Whether an allegation that someone has acted 'dishonestly' or 'criminally' is an allegation of fact or expression of opinion will very much depend upon context. There is no fixed rule that a statement that someone has been dishonest must be treated as an allegation of fact."

27. I was also referred to *Millett* at paragraph 24 where Warby LJ said:

> "… the question is: would the words used strike the ordinary viewer as a statement of fact or opinion. The answer does not turn on whether any given word is an adjective, noun or verb or some other part of speech. This is a matter of substance, not a formal analytical matter of grammar or linguistics…."

28. I concluded that the meanings which I have found were all statements of fact save for the statement that it appeared that Professor Gilmore had collaborated with the Claimant and Professor Haehnelt. In this regard the Defendant was stating what he had deduced from the fact that the allegations included unfounded allegations previously made by Professor Gilmore, i.e. he was stating his opinion based on the evidence of which he was aware.

Issue 3: defamatory?

29. I was referred to paragraph 9 of *Millett* where Warby LJ, said:

> "At common law, a meaning is defamatory and therefore actionable if it satisfies two requirements. The first, known as 'the consensus requirement', is that the meaning must be one that 'tends to lower the claimant in the estimation of right-thinking people generally'. The judge has to determine 'whether the behaviour or views that the offending statement attributes to a claimant are, contrary to common, shared values of our society'…. The second requirement is known as the 'threshold of seriousness. To be defamatory, the imputation must be one that would tend to have a 'substantially adverse effect' on the way that people would treat the claimant….."

30. It is conceded that the first of the two imputations is defamatory.

31. As regards the second imputation, fundamentally this is an allegation of failing to act with integrity and, instead, cynically causing or permitting a more junior

colleague to be distressed in order to exploit her suffering for the Claimant's own ends. This statement would clearly tend to lower the Claimant in the estimation of right-thinking people generally. In my view, it also crosses the threshold of seriousness. In this connection I note that the Defendant presented the second imputation as being "just as serious" as the first imputation which he accepts was defamatory. In his e-mail he also pointed to serious consequences for Dr Pebody and potentially serious consequences for himself, and he did so in the context of a formal procedure which concluded with his suggesting that there could be consequences for the funding of the department. Clearly, if this second allegation were upheld it would amount to serious misconduct and potentially have disciplinary consequences for the Claimant.

32. I am, therefore, satisfied that the second imputation is defamatory.

Annex 1

"1.Revised sentence about inappropriate document proposed to be tabled at Staff Committee meeting.

Dear Nigel,

2. I am emailing you in your capacity as Head of School concerning a serious matter of concern affecting myself and, just as importantly, other members of the Department. Sadly, I felt that I could lead by example in this area, but I have to accept that there are some areas of culture and behaviour that I am not capable of improving in the Institute without more serious intervention. E.g. I am very proud of the Culture and Communication work that I have led with the support of my Departmental Administrator and two Deputy Directors.

3. I hereby submit a Grievance under the Dignity and Work policy against Professor Gerry Gilmore due to the impact of his unprofessional, bullying and undermining behaviour towards me since I have become Head of Department. The evidence and impact of his bullying behaviour on myself and others in the Department in more junior positions needs to be investigated. I also realise that more junior members may not want to be named or even provide evidence against Gilmore due to the power imbalance. It is also possible that witnesses outside the University may need to be interviewed.

4. Some evidence for his disrespectful and undermining behaviour is contained in the Investigation Report and Witness Statements that was commissioned due to his Grievance against me.

5. Another serious issue is that in his capacity as the Chair of the Faculty Board of Physics and Chemistry, he falsified draft unconfirmed minutes of the 23 October 2020 meeting of the Faculty Board of Physics and Chemistry in an attempt to undermine my reputation as part of a grievance against me. Gilmore submitted these false unconfirmed draft minutes as

evidence in an attempt to substantiate part of a grievance claim against me. This action is in breach of many of the Nolan principles, particularly honesty and integrity.

6. Another example is that he has forwarded email to one of his team, Gudrun Pebody, with the result that this person has subsequently verbally criticised me. He has also encouraged her to challenge or ignore Departmental policy on recovery of IT staff costs on grants. She acts with impunity since other members of the PSS staff are afraid to challenge her since she is viewed as being sponsored by a senior member of the Academic Staff who treats staff with disrespect, and this goes unchallenged. The negative effects of his line management of Gudrun Pebody is a serious concern in two areas:

(i)the negative impact on Pebody's mental health

(ii) Pebody exhibits unprofessional conduct and undermines the head of Department and Departmental Administrator to other members of the Academic staff.

7. There is some evidence of (i) and (ii) in the Investigation Report I refer to above and the witness statements.

8. I also want to submit a Grievance against Professor Martin Haehnelt and Professor Wyn Evans concerning their bullying behaviour towards me over the acceptance of the Opticon-Radionet Pilot grant and other false, unsubstantiated accusations which they proposed to share with all members of the academic staff in an attempt to bully and humiliate ,me. They have already shared this with Angela Macharia, Prof Chris Reynolds and Prof Anthony Challinor. Just as serious, Haehnelt and Evans also failed to request that the Department underwrite Pebody's contract and instead used the stress and anxiety caused to Pebody to claim that I had behaved inappropriately.

9. This false allegation appears to have been orchestrated in collaboration with Gilmore since some of the allegations by Haehnelt and Evans pertain to previous unfounded allegations against me by Gilmore. The impact of Gudrun Pebody of this has been significant, and these members of staff seem to have mobbed me rather than make a request to myself or via by Deputy Directors that her role underwritten until the uncertainty of the grant was resolved. I had already paused the end of contract process and yet they continued to pursue this issue and sent an appropriate document to my DA and two Deputies about my alleged conduct to be tabled at a Staff Committee meeting. The action would have caused immense damage to the Department since it would have normalised inappropriate behaviour and I could have been forced to resign as a result of this bullying.

10. Previous incidents of professional misconduct, undermining or bullying by Haehnelt have been associated with my proposal to expand the membership of the Academic Staff Committee to include senior research

fellows and his actions as a member of a Departmental Lectureship Appointments Committee.

11. In the case of Evans, I am aware that he has sent disrespectful emails to the support team for the Faculty of Physics and Chemistry Degree Committee as witnessed by myself and reported to me by another senior academic colleague.

12. I have found the situation that I have been working under extremely stressful, and after a bullying episode by Gilmore in 2019 I suffered an episode of post-traumatic stress disorder (PTSD). I have been treated with EMDR for this condition. I find that, especially when under stress, I tend to avoid confrontation, which results in feelings of guilt and shame since I have high expectations of how I should lead and support staff and research students in the Department.

13. I, therefore, want to make it clear that I am submitting this Grievance just as much because of the direct effects on myself and how it affects my ability to lead the Department but also because of the impact of the behaviour of the three individuals, Gilmore, Haehnelt and Evans, on other members of staff including Gudrun Pebody. I would also draw your attention to the fact that UKRI now has a Bullying and Harassment condition in the terms and conditions of its grants.

Yours respectfully, Richard."

(This Judgment has been approved by Mr Justice Linden.)