IN THE HIGH COURT OF JUSTICE CLAIM NO. QB-2019-000898
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
BETWEEN:

ANDREW PECK

Claimant

-and-

(1) WILLIAMS TRADE SUPPLIES LIMITED
(2) MIQUEL GODDARD (ALSO KNOWN AS MICKY GODDARD)

Defendants

CLAIMANT'S WRITTEN SUBMISSIONS

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*References are to **[tab/page]** of the hearing bundle. Page numbers are at the top of each page in red.*

Key documents for the purposes of the Court's determination are:

- *The email complained of **[A/1]**.*
- *Particulars of Claim at:*
  - *[5]-[7] (background to publication) **[B/5]**; and*
  - *[8]-[11] (particulars of publication and C's case on meaning) **[B/5-6]**.*
- *Defence at [15] and [16.1] (Ds' case on meaning) **[B/29]** and **[B/35]**.*

INTRODUCTION

1. C has commenced a claim in defamation, malicious falsehood, breach of the Data Protection Act 1998, and negligent misstatement, arising out of an email (the "Email") sent by D2 on 16.3.18. The background to, and details of, the publication complained of may be found in the POC at [5]-[10] **[B/5-6]** and [31.1] **[B/15]**. In summary:

1.1. In early 2018, C, an Area Sales Manager for Ideal Boilers Limited ("Ideal"), applied for a job as Area Sales Manager for Grant Engineering (UK) Limited ("Grant"). C's application was successful and on 15.3.18, Grant offered C the job.

1.2. On 16.3.18, D2, acting pursuant to an instruction from D1's Managing Director, sent the Email to Andy Smith, Grant's National Sales Manager, who would have been C's line manager in his new role. The Email concerned, in broad terms, C's fitness for the role that Grant had just offered C.

1.3. Following receipt of the Email, Grant withdrew the job offer from C.

2. This is a trial of the following preliminary issues:

For the purposes of the defamation claim:

- The meaning(s) of the words complained of in the Email;
- Whether those words, in the meaning(s) found, are defamatory of C at common law;
- Whether those words are statements of fact or opinion;
- If opinion, whether the Email indicated in general or specific terms the basis of the opinion; and

For the purposes of the malicious falsehood claim:

- Whether C's pleaded meanings are reasonably available meanings of the words complained of.

3. It is suggested that the Court deal first with the preliminary issues in the defamation claim in the order set out above,[1] and then with the preliminary issue in the malicious falsehood claim.

[1] The Court is of course well aware of, and able to keep in mind, the Court of Appeal's comments in ***British Chiropractic Association v Singh*** *[2011] 1 W.L.R. 133* when considering issues of meaning and fact / opinion at the same time: see [34] below.

(A) PRELIMINARY ISSUES – DEFAMATION

First issue: the meaning of the words complained of

4. It is now well-established that the Judge will consider first what overall impression the publication complained of made on him, and then check that against the detailed textual arguments put forward by the parties: see *Gatley on Libel and Slander*, 12th ed. (2013), [3.14].

5. It is also well-established that the Court is not confined to the precise meanings advanced by the parties. However, the Court should not normally make a finding of any meaning which is not either advanced to some extent in the statement of case or submissions of one or other party, or within the same class or range as a meaning so advanced: *Yeo v Times Newspapers Limited [2015] 1 W.L.R. 971* at [82].

(i) Applicable principles

6. As the Court is well aware, the principles governing the determination of meaning in a defamation claim are uncontroversial. They were recently distilled in *Koutsogiannis v The Random House Group Ltd [2020] 4 W.L.R. 25* at [11]-[12].

7. In many defamation cases (most obviously, cases involving publication by the media), complaint is made of statements published to a large and diverse audience. Where a case concerns a more targeted publication, two of the *Koutsogiannis* principles become of particular importance:

   7.1. First, "*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.*"

   7.2. Second, "*The hypothetical reader is taken to be representative of those who would read the publication in question.*" While the Court should "*beware of reliance on impressionistic assessments of the characteristics of a publication's readership,*" [2] the

[2] *Koutsogiannis*, [12](xi).

more homogenous the group to whom publication occurs, the more readily definable the characteristics of the representative hypothetical reader.

8. This approach is borne out in the cases where the Courts have made determinations on meaning (or capable meaning) where publication has taken place in a professional or business context, to one or relatively few publishees. In *Lewis v Commissioner of Police of The Metropolis [2011] EWHC 781 (QB)*, a defamation claim also involving publication to one individual, Tugendhat J at [49] explained that:

> *In a case where there is a very limited readership, such as the publication here to Mr Toulmin, the focus is on the hypothetical reader in the position of Mr Toulmin. The qualities of the hypothetical reader are more readily definable than is the case with a very wide readership, such as a newspaper, which is read by many different types of people in many different circumstances.*
>
> (Emphasis added).

9. In *Lewis*, the positions of the publisher and publishee (a lawyer within the MPS and Director of the Press Complaints Commission, respectively) were of particular importance (also at [49]):

> *A person holding office with the PCC could be expected to read with more than usual care an e-mail from the MPS which relates to a matter on which the PCC has issued a report. This is the more so because the e-mail in question was a response to a request for clarification of an earlier communication. It is common ground that the immediately preceding exchange of communications (starting on 30 September) is a particularly relevant part of the context, as is pleaded in the Particulars of Claim. And the writer is described as a lawyer, and so a person who can be expected to use words with care and precision. In these circumstances it seems to me that there is room for allowing for a greater degree of analysis on the part of the hypothetical reader than would be allowable in relation to a publication in different circumstances.*

10. The same approach to the hypothetical reasonable reader was taken in *Theedom v Nourish Training (t/a CSP Recruitment) [2016] E.M.L.R. 10*, a case where the extent of publication was numerically greater[3] but, like the present case, confined to business contacts (at [9]-[10], per HHJ Moloney QC):

[3] The words complained of were sent to 124 email addresses.

> *It appears to me that the key to resolving this dispute between the parties is to be found in the Master of the Rolls' sixth factor,*[4] *cited above. It is necessary to take into account the characteristics of the typical reader of this particular type of publication and, I might add, the circumstances in which he is likely to read it. In the case of (for example) an item in a Sunday newspaper, of no direct relevance or concern to the typical reader, it is, of course, appropriate to interpret the words as such a person would, "sitting in his armchair," as is commonly said, and to accept that the meaning they would convey to him may well be a broad brush impression rather than anything more detailed or specific.*
>
> *Here, however, the emails are of a different character from a newspaper article, and the readers are correspondingly different. The salient characteristics common to the readers of this email, in reference to its contents, are in my assessment as follows:*
>
> *(a) The readers are all business people, reading a business email from the managing partner of a firm known to them, either as an actual provider of their staff or at least as offering them that service.*
>
> *(b) Specifically, the readers are employers, reading a message from a fellow employer about the gross misconduct of an employee in his employment.*
>
> *(c) Further, the readers are being told that that employee has betrayed not only his own employer's confidences, but also those of the employer's clients, that is the confidences either of the recipients themselves or people in a similar position to themselves.*
>
> *(d) Finally, the readers are being told that they, themselves, may be approached by the disloyal employee's associates, to whom he has given that confidential information.*

11. The hypothetical reader with these characteristics would, according to HHJ Moloney (at [11]):

> *...be likely to read* [the emails] *with some care and to give some weight to the details. Specifically, they would be likely to take account of the allegation that the misconduct was not isolated but regular and, in the case of the majority version of the email, to note that criminal action was being considered.*
>
> (Emphasis added).

[4] *Jeynes v News Magazines Ltd [2008] EWCA Civ 130* at [14]: "*(6) The hypothetical reader is taken to be representative of those who would read the publication in question.*"

(ii) Application of principles to the present case

12. The Email is short and to the point. It contains a number of discrete allegations about C and the actions that Ds have had to take because of him. Those allegations are stated expressly and are easy for a reader to pick out:

    12.1. C was "*not well received in our branches in Kent*";

    12.2. C was "*officially named the worst rep of all time*";

    12.3. Ds "*put an official request in with Ideal boilers for him to no longer visit any of our branches*"; and

    12.4. D2 had "*huge reservations against him dealing with any of our Williams branches*," and, when she heard that Grant were taking C on, she "*felt only right that I speak to you immediately and request very strongly that he does not look after Williams & co as a company if you do decide to take him on*."

13. Each of these allegations is tracked in C's pleaded meanings: see [11](i)-(iv) POC **[B/6]**. At its simplest, C's position is that the words complained of mean what they say.

14. Accordingly, *any* reasonable reader would have understood the words complained of to bear C's pleaded meanings. However, a reasonable reader in the position of Mr Smith would be even more likely to do so. As in *Lewis* and *Theedom*, a reader in Mr Smith's position would have read the Email with particular care, and would have given careful weight to each of the allegations D2 made in it. This is for the following reasons:

    14.1. The Email was not a casual or personal communication but arose in the context of the business relationship between D1 and Grant. D2 was a business contact of Mr Smith. By Ds' own admission,[5] D2 had close working relationships with senior individuals at Grant and was a natural conduit for D1's communications with that company. As in *Theedom* and *Lewis*, the publisher was an individual whose position meant her communications merited close attention.

    14.2. The purpose of the Email was clear from its timing and its contents: this was a last-ditch effort from D2 to prevent C from being offered the job as a sales

[5] See Defence [5.2] **[B/22]**.

representative for Grant. In *Berkoff v Burchill [1997] E.M.L.R. 139* at 151, Neill LJ stated that: "*It is trite law that the meaning of words in a libel action is determined by the reaction of the ordinary reader and not by the intention of the publisher, but the perceived intention of the publisher may colour the meaning*." Here, a reasonable reader in Mr Smith's position would have been left in no doubt as to the intention behind the Email: it was an urgent warning against hiring C, precipitated by news that Grant was about to offer C the job. As Ds fully admit at [27.7] Defence **[B/45]**: "*the paramount consideration and primary aim of the Second Defendant in sending the Email, as is self-evident from the final sentence of the Email, was to ensure that the Claimant was not employed by Grant to act as sales representative covering the First Defendant's Kent branches*" (emphasis added).

14.3. A reasonable reader in the position of Mr Smith would be well aware that such allegations, being made at the eleventh hour and with the purpose of warning Grant against employing C, would not have been made lightly. It is plain that retracting a job offer at such a late stage would have significant repercussions for any prospective employee, and would be certain to lead to after-the-event scrutiny of the propriety of Grant's and Ds' actions. A reader in Mr Smith's position would therefore expect that Ds had themselves considered carefully each of the allegations before committing them to writing.

(iii) Ds' pleaded meanings

15. In contrast to C's pleaded meanings, Ds' pleaded meanings resile from the words actually used, replacing them with generic statements that C "performed poorly," "was unpopular," or "failed to meet the standards" expected. A number of criticisms may be made of these meanings.

16. First, they fail to take account of the context of the publication and the characteristics of the hypothetical reasonable reader. As set out at [14] above, it is C's primary position that *any* reasonable reader would have understood the words complained of to mean what they say. However, even *if* an "armchair reader" of the kind envisaged by HHJ Moloney QC in *Theedom* might have glossed over the specific allegations in the way suggested by Ds, a reader in the position of Mr Smith would certainly not have done so.

17. Second, they fail to take account of material statements in the Email (namely, the "official request" and "worst rep of all time" allegations). This criticism relates to Ds' treatment of the specific allegations made by D2 in the Email, set out at [12.2] and [12.3] above.

18. As to the "official request" allegation, this has been omitted entirely from Ds' pleaded meanings. Yet it would have been particularly alarming to a reader in Mr Smith's position. C's ability to perform the role that Grant had just offered him would be fatally compromised if C could not even visit a key business partner's branches. Accordingly, this forms an essential part of the sting of the defamatory allegations, materially elevating the seriousness from what is pleaded by Ds. It cannot be ignored.

19. As to the "worst rep of all time" allegation, the criticism here is straightforward. On a plain reading of the words complained of, C was not merely said to be a representative who performed poorly, as Ds suggest: he had *officially* been named by one of Grant's key business partners as *the worst of all time*. To any reasonable reader (but particularly one in the position of C's soon-to-be line manager), there is a world of difference between these statements.

20. In correspondence, Ds have previously attempted to justify their failure to take account of the "official" nature of the allegations at [12.2] and [12.3] above. By letter dated 11.10.19,[6] they stated:

> (With respect to the "worst rep of all time" allegation) *...the reasonable reader could not discern who had the authority to 'officially name' your client as such. Even if the reasonable reader understood that it was individuals within Williams & Co who had so named your client, it is again somewhat nonsensical to suggest that it was understood that this description had any official status. Clearly the reasonable reader would have understood the phrase to be a form of colloquial expression used to emphasise the point that your client was considered to perform poorly as a sales representative…*
>
> (With respect to the "official request" allegation) *...our clients dispute the emphasis which you place on the word 'official'. We do not perceive there to be any real distinction between a request being made by the First Defendant that your client no longer visit its branches and an 'official request' to the same effect.*

[6] This letter is not in the Hearing Bundle but can be provided to the Court on request.

21. This is misconceived. A reasonable reader in the position of Mr Smith would have understood that D1 had taken official action against C, because that is what the words complained of say. Ds have not pleaded any innuendo meaning on the basis of Mr Smith's knowledge of what "official" action taken by D1 might or might not mean. If no such "official" action as alleged was taken or was even possible, then that is a problem for Ds at the stage of making good a truth defence. It is not relevant to the natural and ordinary meaning of the words complained of.

22. Indeed, given that Ds have already admitted that no "official" request as alleged in [12.3] above *was* ever made,[7] their wish now to resile from the express words used in the Email is perhaps telling. However, while Ds' pleaded meanings may reflect what they feel able to prove, they fail to reflect the specific and serious allegations *actually made*.

(iv) The repetition rule

23. Ds have also previously argued in correspondence that C's pleaded meanings fall foul of the well-known "repetition rule." As its name indicates, the rule "*reflects a fundamental canon of legal policy in the law of defamation dating back nearly 170 years, that words must be interpreted, and the imputations they contain justified, by reference to the underlying allegations of fact and not merely by reliance upon some second-hand report or assertion of them*": *Shah v Standard Chartered Bank [1999] Q.B. 241* at 263 (per Hirst LJ). A recent comprehensive summary of the rule and its origins can be found in the judgment of Nicklin J in *Brown v Bower and Faber & Faber Ltd [2017] 4 W.L.R. 197* at [19]-[25].

24. This case does not engage the repetition rule.

25. In their letter dated 11.10.19, Ds stated that C's pleaded meanings:

> *…constitute reports of the opinions of third parties: the sales team who are said to universally dislike your client, the First Defendant who considers your client to underperform, the sales team who are seriously concerned about the conduct of your client and the negative views of Ms Goddard concerning your client*.

26. Leaving to one side the obvious error in this passage – D1 and D2 (Ms Goddard) are, of course, not third parties – there is still no identification of the "*second-hand report or*

[7] See Defence [25] **[B/41]**.

assertion" contained in C's pleaded meanings. All of the allegations are D2's own, made first-hand by her, and presented as such.

27. If Ds are suggesting that the repetition rule operates to excise *any* reference to third parties in pleaded meanings, then that is to misunderstand the operation of the rule and its purpose. As explained by May LJ in *Shah* at 266:

> *The repetition rule in its simplest application is that, if you publish a statement that Y said that X is guilty, it is not a defence to an action for defamation to establish the literal truth of the publication, i.e. that it is indeed true that Y said that X is guilty. You are repeating and endorsing Y's publication and your justification must address the substance of what Y said, not the fact that he said it. The obvious underlying reason for this is that statements of this kind in substance restate the original publication.*
>
> (Emphasis added).

28. In this case, on C's pleaded meaning, Ds must indeed prove the truth of *the substance* of the allegations. The repetition rule is not engaged simply because the pleaded meaning *identifies* third parties (from whom evidence will be required to prove the truth of that substance). Were it otherwise, the repetition rule would apply in a huge number of cases.[8]

Second issue: whether defamatory of C

29. Again, the applicable principles are uncontroversial. They were summarised by Warby J in *Allen v Times Newspapers Limited [2019] EWHC 1235 (QB)* as follows (at [19]):

> *(1) At common law, a statement is defamatory of the claimant if, but only if, (a) it imputes conduct which would tend to lower the claimant in the estimation of right-thinking people generally, and (b) the imputation crosses the common law threshold of seriousness, which is that it "[substantially] affects in an adverse manner the attitude of other people towards him or has a tendency so to do": Thornton v Telegraph Media Group Ltd [2010] EWHC 1414 (QB) [2011] 1 WLR 1985 [96] (Tugendhat J).*
>
> *(2) "Although the word 'affects' in this formulation might suggest otherwise, it is not necessary to establish that the attitude of any individual person towards the claimant has in fact been adversely affected to a substantial extent, or at all. It is only necessary to prove that the meaning conveyed by the words has a tendency to cause such a*

[8] To take a recent example, in *Tinkler v Thomas [2018] EWHC 3563 (QB)* at [39](a), Nicklin J ruled that one meaning of the words complained of was that: "*The Claimant had presented a series of challenges to the Board of Stobart which included those set out in [39] to [43], the most recent of which was his opposition to the re-election of Iain Ferguson as Chairman of Stobart*." On Ds' approach, the reference to the Board of Stobart in this meaning would seem to fall foul of the repetition rule.

consequence.": Lachaux v Independent Print Ltd [2015] EWHC 2242 (QB) [2016] QB 402 [15(5)].

30. The Court is not being asked to determine as a preliminary issue whether publication of the words complained of has caused or is likely to cause serious harm to C's reputation: s.1(1) DA 2013.

31. As explained above ([18]-[19]), the allegations made by D2 are alarming ones, seriously calling into question C's fitness for the role he had been offered. There are many examples in the case law confirming that allegations of this nature are defamatory of Claimants at common law:

    31.1. In *Drummond-Jackson v British Medical Association and Others [1970] 1 W.L.R. 688*, at 698-699, Lord Pearson explained that: "*In any case, words may be defamatory of a trader or business man or professional man, though they do not impute any moral fault or defect of personal character. They can be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity*."

    31.2. In *Skuse v Granada Television Limited [1996] E.M.L.R. 278*, the Court of Appeal held that it was defamatory to say of the Claimant, a Home Office forensic scientist investigating the Birmingham bombings and giving evidence for the Crown at the trial, that he "*failed to show the skill, knowledge, care and thoroughness to be expected of him in that role*" (at 288, per Sir Thomas Bingham MR).

    31.3. In *Dee v Telegraph Media Group Limited [2010] E.M.L.R. 20,* Sharp J explained that: "*Incompetence or 'want of skill' by those who hire out their professional or personal skills for a living often involves as I have said, consequences for those who hire them and/or pay for their services — and who get less than they might be entitled to expect. In addition, the tendency of such words might be to suggest a claimant's fitness or competence falls below the standard generally required for his business or profession*" (at [48]).[9]

[9] In the case before her, in which the Claimant – a professional tennis player – sued in respect of an article describing him as the world's worst, she acknowledged that it was "*not easy*" to translate this principle to the sporting arena (at [49]). Even then, albeit with some reservations, she held that "*it is arguable in my view that the*

31.4. More recently, in *Morgan v Times Newspapers Limited [2019] EWHC 1525 (QB)*, Soole J held that it was "*obvious*" that it was defamatory to say of the Claimant, a barrister, that she was reasonably suspected of having been professionally negligent in her prosecutorial decisions in a particular case: (at [62]). He held that such an imputation "*meets any of the tests for what is defamatory in cases concerning professional reputation; and for that purpose undoubtedly crosses the common law threshold of seriousness*" (ibid).

31.5. See also *Gatley* at [2.38] (footnote references omitted): "*It is defamatory to impute that a person is unfit for his profession or calling owing to want of ability, mental stability, learning or some other necessary qualification, or that he has been guilty of any dishonest or disreputable conduct or any other misconduct or inefficiency therein*."

32. Likewise, D2's allegations, which cast similar aspersions on C's professional reputation, comfortably fulfil the criteria set out in *Allen*.

Third issue: whether fact or opinion

33. As the Court is well aware, this issue arises from the requirement of an honest opinion defence, at s.3(2) DA 2013, that "*the statement complained of was a statement of opinion*." The relevant principles were summarised by Nicklin J in *Koutsogiannis* at [16]:

> *...when determining whether the words complained of contain allegations of fact or opinion, the Court will be guided by the following points:*
>
> *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, 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.*

words in issue are defamatory of the Claimant on the grounds they are capable of suggesting "want of skill", incompetence and/or on the ground that he is ridiculed by the suggestion he is absurdly bad at tennis" (at [57]).

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, i.e. 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.

34. The Court is also well able to bear in mind the warning of the Court of Appeal in *British Chiropractic Association v Singh [2011] 1 W.L.R. 133*, at [32], that determining the issue of meaning before the fact / opinion issue may risk impairing the correct determination of the latter. Although in the present case, that risk is reduced on C's pleaded meaning, given that it adheres closely to the words that D2 actually used.

35. In this case, the context in which the words complained of were published is important. As explained at [14.2] above, this was a last-ditch effort from D2 to prevent C from being offered the job as a sales representative for Grant. If acted on by Mr Smith, it would certainly lead to after-the-event scrutiny of the propriety of the actions of all involved. Accordingly, an ordinary reader would expect the Email to contain specific factual grounds, underpinning D2's concerns, that would stand up to such scrutiny. Those grounds are clearly set out (and are listed at [12] above) and are tracked in C's pleaded meanings at [11](i)-(iv) POC **[B/6]**. They form the essential sting of the Email. They concern C's conduct; his relationships with others; and the measures that D1 and D2 were forced to take as a result. They would plainly strike the ordinary reader as factual in nature.

Fourth issue: if opinion, whether basis indicated

36. This issue only arises for determination if and to the extent that the Court determines that the words complained of in the Email were a statement of opinion for the purposes of s.3(2) DA 2013.

37. As with the third issue, this issue arises out of the statutory requirements of the honest opinion defence. In this case, s.3(3) requires that: "*the statement complained of indicated, whether in general or specific terms, the basis of the opinion*."

38. As explained by Saini J in the recent case of Godfrey v The Institute of Conservation *[2020] EWHC 374 (QB)* at [30] (referring to the Supreme Court's decision in Joseph v Spiller *[2011] 1 A.C. 852*), "*the purpose of this requirement is not to put the reader in a position to judge whether the comment was well-founded, but simply to alert the reader to the general subject matter of the comment*." Accordingly, "*a reference to the 'general nature' of the underlying issue is usually sufficient*": Godfrey at [31].

39. C's position is that the words complained of constitute statements of fact. However, it is accepted that, if and to the extent that the Court determines that the words complained of consist of a statement of opinion on C's behaviour set out in the Email, this issue will be determined in Ds' favour.

(B) PRELIMINARY ISSUE – MALICIOUS FALSEHOOD

"Reasonably available" meaning

40. Unlike in defamation, a preliminary meaning determination in the context of a malicious falsehood claim appears to have arisen only very rarely: see Tinkler v Thomas *[2018] EWHC 3563 (QB)* at [51].[10] Accordingly, it is necessary to consider in a little more detail the applicable legal principles.

41. The single preliminary issue to be determined in this malicious falsehood claim is whether C's pleaded meanings are "reasonably available" meanings of the words complained of.

42. In Cruddas v Calvert *[2014] E.M.L.R. 5*, Longmore LJ formulated the Court's task as follows (at [30]):

> *Here the duty of the judge at trial is to indicate the reasonably available meanings, decide if a substantial number of persons would reasonably have understood the words to have such a meaning and then decide, in respect of a meaning which is in fact false and damaging, whether the author was actuated by malice.*

[10] See also [47] below.

43. In *Tinkler*, [11] Nicklin J explained the approach that the Court must adopt in determining whether a meaning is reasonably available (at [49]):

> *The test is effectively very similar to the old 'capable' test in defamation claims before jury trial was abolished: see, for example, the approach of Tugendhat J in the first instance decision of Cruddas -v- Calvert [2014] EMLR 4 [63]–[66], [91] and [99]. There, the court was tasked with " delimiting the range of permissible [defamatory] meanings ... " A meaning that the Court found that the words were incapable of bearing was to be excluded, leaving only therefore the range of capable meanings. As the assessment is of the meaning the notional ordinary reasonable reader would understand the words to bear " it is not enough to say that by some person or another the words might have been understood in a defamatory sense ": Jeynes [14(8)].*

44. Applying this approach, a meaning which is found to be the natural and ordinary meaning of the words complained of for the purposes of a defamation claim will also be a reasonably available meaning for the purposes of a malicious falsehood claim. However, a pleaded meaning may be a reasonably available meaning for the purposes of a malicious falsehood claim, notwithstanding that it is not the natural and ordinary meaning for the purposes of a defamation claim: *Cruddas* at [31]. As Longmore LJ explained at [32]:

> *It might appear that there is a tension, even an incompatibility, between the proposition that a particular meaning is plainly wrong and the proposition that it is nevertheless a possible meaning. The reason why it is not necessarily so lies in the difference between libel and malicious falsehood. In malicious falsehood every reasonably available meaning, damaging or not, has to be considered. In libel, the artifice of a putative single meaning requires the court to find an approximate centre-point in the range of possible meanings.*

45. Turning to the present case, C's position is that the meanings pleaded at [11] POC are reasonably available meanings for the purposes of the malicious falsehood claim, as for the reasons set out at [12]-[14] above they are the natural and ordinary meanings of the words complained of. However, even if the Court does not accept that the meanings at [11] POC are natural and ordinary meanings, on an application of the *Koutsogiannis* principles distilled by Nicklin J those meanings fall within the range of reasonably available meanings.[12]

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[11] A decision which was upheld by the Court of Appeal: *[2019] EWCA Civ 819.*

[12] If and to the extent that the Court determines that the words complained of are statements of opinion, C's position in summary is that they are nonetheless verifiable and therefore capable of founding an action in malicious falsehood: see *Tinkler* at [16].

If the Court does not agree that C's pleaded meaning is reasonably available

46. If the Court does not agree that C's pleaded meaning is a reasonably available one, the question then arises as to what consequences follow: *Tinkler* at [50].

47. As Nicklin J noted (at [51]), this does not appear to be an issue that has received any judicial consideration. Meaning in the context of a malicious falsehood claim has only been determined as a preliminary issue in very few cases. In *Ajinomoto Sweeteners Europe SAS v ASDA Stores Limited [2011] Q.B. 497*, the Court of Appeal, holding that the single meaning rule did not apply, did not itself come to a decision on the preliminary issue of whether the Claimant's or Defendant's pleaded meanings were reasonably available meanings. In *Cruddas*, Tugendhat J held that the meanings pleaded by the Claimant (and, subject to one caveat, the meanings pleaded by the Defendant), were all reasonably available meanings (*[2014] E.M.L.R. 4* at [112]-[113]), and the Court of Appeal agreed (*[2014] E.M.L.R. 5* at [31]-[33]). Accordingly, in both cases, the issue of whether and how the Claimants might amend their pleaded meaning did not arise.

48. In line with Nicklin J's comments at [55], C will provide further submissions on this issue, if any are required, following the Court's judgment. However, it is submitted for present purposes that Nicklin J's observations in *Tinkler* at [53]-[54] are correct, namely that:

    48.1. It would not be right for the Court simply to adjust the Claimant's meaning into a 'capable' meaning by adding words or changing its substance or effect. The Court would not know whether the Claimant wishes (or is able) to demonstrate that the adjusted meaning is false and was published maliciously.

    48.2. If the Court holds that the Claimant's pleaded meaning is not a reasonably available meaning, it would be open to the Claimant to amend to remove words from the pleaded meaning to align with the meaning that the Court has held to be a reasonably capable one (as the greater includes the latter).

CONCLUSIONS

49. In light of the above submissions, C invites the Court to determine that the words complained of:

49.1. Bear the natural and ordinary meanings pleaded at [11] POC;

49.2. Are defamatory of C at common law; and

49.3. Are statements of fact.

50. C also invites the Court to determine that the meanings pleaded at [11] POC are reasonably available meanings for the purposes of C's malicious falsehood claim.

51. C will provide further written submissions on costs, at the Court's direction, following judgment hand-down.

CLAIRE OVERMAN

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2nd April 2020