IN THE HIGH COURT OF JUSTICE **CLAIM NO: QB-2019-000898**

QUEEN'S BENCH DIVISION

MEDIA AND COMMUNICATIONS LIST

BEFORE THE HONOURABLE MR JUSTICE NICKLIN

B E T W E E N:

ANDREW PECK

CLAIMANT

-AND-

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

DEFENDANTS

SUBMISSIONS OF THE DEFENDANTS ON THE TRIAL OF PRELIMINARY ISSUES

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1. References in this Skeleton Argument are to the electronic Hearing Bundle (**Tab/Page**).

A. INTRODUCTION

2. This is the trial of the following preliminary issues in respect of a claim for, *inter alia,* libel and malicious falsehood:
   2.1. The natural and ordinary meaning of the words complained of;
   2.2. Whether the words complained of in the meaning(s) found, are defamatory of the Claimant at common law;
   2.3. Whether the words complained of or any of them were a statement of opinion.
   2.4. If all or any of the words complained of were statements of opinion, whether the words complained of indicated, in general or specific terms, the basis of the opinion(s) stated;

2.5. Whether, for the purposes of the Claimant's malicious falsehood claim, the meanings pleaded at paragraph 11 of the Particulars of Claim are **(B/5)** reasonably available meanings of the words complained of.

(i) PARTIES

3. The Claimant has worked in sales roles within the plumbing and heating industry in south London and the south-east of London for several years.

4. The First Defendant is a company that sells hardware, plumbing and heating equipment and supplies to trade clients. It is a wholesale supplier of gas- and oil-fired boilers, manufactured by several companies, one of which is Ideal Boilers Limited ("Ideal"), another of which is Grant Engineering (UK) Ltd ("Grant"). The First Defendant has a longstanding and mutually supportive relationship with Grant.

5. The Second Defendant is and was at all material times Bathroom Category Manager of the First Defendant, the First Defendant's specialist on oil-fired boilers, the manager of the First Defendant's Oil Boiler category and, having close working relationships with senior individuals at Grant, the First Defendant's natural conduit for its communications with Grant.

(ii) BACKGROUND

6. The factual background is set out in detail at paragraphs 4, 5, 7 and 14 of the Defence **(B/21-23 and B24-28)**. In brief summary, in or around July 2016 the Claimant started working as an Area Sales Manager for Ideal. In that role, the Claimant was generally required to liaise and work with suppliers, including the First Defendant, in order to promote the sale of Ideal's products by those suppliers. The Defendants' case on the scope of this role is pleaded at paragraphs 7.3 – 7.6 of the Defence **(B/22-23**)

7. The Claimant was well known to the First Defendant's commercial team as Ideal's Area Sales Manager with responsibility for covering the First Defendant's Kent area branches ("the Kent branches"). It is the Defendants' case that numerous managers of those branches had encountered difficulties with the way in which the Claimant was carrying out his role.

8. Those managers who encountered difficulties with the Claimant made complaints internally about his poor professional attitude and conduct. In April 2017, the First Defendant's Commercial Director

escalated those complaints to the Commercial Director of Ideal. Issues regarding the Claimant's conduct continued to be discussed at quarterly meetings of the First Defendant's Kent branch managers over 2017 and 2018.

9. On 13 March 2018, the First Defendant's Managing Director, Mr Ramon Stafford, learned of industry rumours that Grant was about to or had offered the Claimant a job as Area Sales Manager for the south-east, a region in which the First Defendant operates many of its branches. Given the First Defendant's strong commercial relationship with Grant, Mr Stafford was concerned that if the Claimant was, in his new role, assigned by Grant to cover the Kent branches, this would, among other things, negatively impact upon the First Defendant's business. The move by the Claimant from Ideal to Grant mattered for the reasons pleaded at paragraphs 14.8 and 14.9 of the Defence **(B/26-27)**.

10. Consequently, Mr Stafford instructed the Second Defendant to convey these concerns to Grant. The Second Defendant did so on 16 March 2018, by email to Andy Smith, a senior management team member at Grant with responsibility for sales. The Email constitutes the words complained of by the Claimant.

(iii) PROCEEDINGS

11. The Claimant took some 11 months to issue an application for Norwich Pharmacal relief against Grant to identify the sender of the Email. The Defendants first became aware of the existence of any potential complaint from the Claimant long after the event, on 7 March 2019, the morning of the Norwich Pharmacal application hearing. Grant had not previously raised the Claimant's complaint with the Defendants until then, at which point Mr Smith asked Mr Stafford whether he was prepared for Grant to provide the name of the Second Defendant voluntarily. Since Mr Stafford had no proper opportunity to speak to the Second Defendant or take legal advice on the ramifications prior to that hearing, he declined to consent to the Second Defendant being named by Grant.

12. The Defendants received notice of the threatened claim from the Claimant's solicitors by way of letter dated 8 March 2019. This was followed by a letter before action dated 11 March 2019. The Claimant issued proceedings against the Defendants on 15 March 2019, a day before the expiry of the limitation period in defamation. The Claimant sought remedies in libel, malicious falsehood, negligent misstatement and data protection.

13. The Claim Form and the Particulars of Claim were served on 8 July 2019. A Defence was served on the Claimant on 6 August 2019. Though there were disputed issues as to meanings in the libel and malicious falsehood claims, the Claimant's solicitors had indicated that they were not prepared to consider mediation of the claim until such a time as the Claimant understood the Defendants case in full. Given the parties stated intentions to mediate and since the alternative claims under data protection law and the law of negligent misstatement would be largely unaffected by the preliminary determination of issues pertaining to the libel and malicious falsehood claims, and further aiming to avoid unnecessary duplication of cost, the Defendants considered it appropriate to plead a Defence at that point in time prior to a preliminary determination by the Court on the issue of meaning.

14. In respect of the substantive defences relied upon by the Defendants, in the libel claim, the Defendants primarily rely on a defence of qualified privilege (paras. 14 – 14.12 **(B/24-28)**), with defences under ss.2 and 3 Defamation Act 2013 pleaded in the respective alternatives (paras. 15 – 17 **(B/28 – 35)**). In respect of the malicious falsehood claim, the Defendants largely deny the particulars of falsity (paras. 23-26 **(B/33 – 41**)), deny the plea of malice and contend that it does not disclose a properly arguable plea of malice (paras. 27-28 **(B/40 – 48)**).

15. On 25 October 2019, the Defendant applied for an order that a trial of preliminary issues take place. By order sealed on 4 November 2019, and with the consent of all parties, Master Davison ordered that a trial of the issues set out at paragraph 1 above take place **(C/64-65).**

16. In addition to those issues, and at the request of the parties, the order of Master Davison ordered that the trial should determine whether, for the purposes of the Claimant's malicious falsehood claim, the meanings pleaded at paragraph 11 of the Particulars of Claim are meanings which Mr Smith would reasonably have understood the words complained of to bear.

17. On 26 March 2020, Nicklin J indicated that his provisional view was that this issue was not a relevant issue in the proceedings, and should not be determined. The parties agree, and this issue is therefore no longer for determination on the application.

18. Following the Lord Chief Justice's Message of 19 March 2020 to judges in the Civil and Family Courts in the wake of the Coronavirus pandemic, it became apparent that the listed hearing could not take

place in the usual fashion. The parties therefore wrote a joint letter proposing alternative arrangements for the disposal of the application. Ultimately the Judge agreed to the determination of the application being conducted on paper, in line with the growing trend for such issues to be determined without a hearing, where appropriate, by judges in the Media and Communications List.

SUGGESTED READING

19. It is suggested that the Court reads the following documents in this order:

19.1. The copy email written by the Second Defendant on 16 March 2018 sent to Andy Smith of Grant "the Email" **(A/1)**;

19.2. Claimants' Claim Form and Particulars of Claim **(B/2-3)** and **(B/4-20)**;

19.3. Defence **(B/21-59)**;

19.4. Order of Master Davison dated 4 November 2019 **(C/64-65)**; and

19.5. The parties' written submissions.

B. OPINION AND DEFAMATORY MEANING

(1) INTRODUCTION

20. It is increasingly the practice that where the Court is determining meaning, the Court will also rule at the same time as to whether any meaning found is defamatory at common law and whether it is factual or in the nature of an opinion: see ***Yeo v Times Newspapers Limited*** [2014] EWHC 2853 (QB), ***Koutsogiannis v The Random House Group Ltd*** [2019] EWHC 48 (QB) and the recent example of the practice in ***Triplark Ltd v Borthwood Hall (Freehold) Ltd*** [2019] EWHC 3494 (QB).

21. When considering the order in which to determine the issues of whether a statement is defamatory and whether it is a statement of fact or an expression of opinion, the warnings by the Court of Appeal in ***British Chiropractic Association v Singh*** [2011] 1 W.L.R 133 at [16] and [32], and by Warby J in ***Sube v News Group Newspapers*** [2018] EWHC 1234, are apposite. As Warby J explained, at [33]:

> *Singh's case (**British Chiropractic Association v Singh** [2010] EWCA Civ 350 [2011] 1 WLR 133) also highlights the dangers of drawing too rigorous a distinction between the question of whether words are defamatory and the question of whether they are fact or comment. To ask the questions separately, in that order, "may not always be the best approach, because the answer to the first question may stifle the answer to the second": [32]. Put another way, words*

that are recognisably a statement of opinion may not be harmful enough to reputation to cross the threshold of seriousness, and be defamatory.

22. In ***Zarb-Cousin v Association of British Bookmakers*** [2018] EWHC 2240 (QB) at [38] Nicklin J determined the issue whether the statement complained of was fact or opinion before finding the single meaning. In ***Triaster Limited v Dun & Bradstreet Limited*** [2019] EWHC 3433 (QB) at [22] Jay J considered that the particular facts of that case required a holistic or global approach rather than the putting of one question before another.

23. The Defendants submit that the issues of meaning, whether the statement was fact or opinion and the issue of whether the words were defamatory at common law are particularly interdependent in the present case, where the words complained of conveyed the views of numerous individuals in a somewhat oblique and shorthand fashion. The Court is invited to adopt the approach of Jay J on this occasion, and approach a holistic or global approach to the issues for determination in relation to the libel claim. It is proper to take the questions in this order in order not to stifle the assessment of meaning and whether the words were defamatory of the Claimant. The answer to whether the words are an expression of opinion determines whether there is any profit to be gained in agonising over the precise meaning of the words.

(2) ARE THE WORDS AN EXPRESSION OF OPINION?

24. The words complained of by the Claimant are as follows:

> "A bit of an awkward one here and one completely off the record…
>
> I have heard on the grapevine that you may be close to appointing Andy Peck as your new rep to cover Kent (and I'm not sure what other areas) I would like to add my huge reservations against him dealing with any of our Williams branches. He is not well received in our branches in Kent and has been officially named the worst rep of all time, to the point that we put an official request in with Ideal boilers for him to no longer visit any of our branches.
>
> I am not sure if you are taking him on or not, but as I had heard this I felt only right that I speak to you about it immediately and request very strongly that he does not look after Williams & Co as a company if you do decide to take him on."

25. The Defendants rely on the entirety of the Email for the purposes of the assessment of the issues under present determination, including the opening words which were omitted from the Particulars of Claim:

"Hi Andy,

I hope you are well!"

(i) THE LAW

26. The relevant parts of s.3, Defamation Act 2013 are:

> "(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
>
> (2) The first condition is that the statement complained of was a statement of opinion.
>
> (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion."

27. The test for the first condition, at s.3(2) of the 2013 Act, remains the same as under the common law. Nicklin J set out the key points by which the Court will be guided in ***Koutsogiannis***, above, at [16]:

> *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 words 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, 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.*

28. As for the second condition, at s.3(3), Defamation Act 2013, this too is meant to mirror the modern position at common law: see ***Yeo v Times Newspapers Ltd*** [2015] 1 WLR 971, [91]:

> *The rule that in order for a statement to be treated as comment it must identify the facts on which it is based is not, however, as exacting as at one stage it was thought to be. In* **Tse Wai Chun Paul v Cheng** *[2001] EMLR 777 it was held by the Hong Kong Court of Final Appeal that "the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded": Cheng, [19] per Lord Nicholls. This was reviewed in* **Joseph v Spiller** *[2011] 1 AC 852] where the issue before the Supreme Court was "the extent to which it is a proportionate element of the law of fair comment to require that a*

statement of defamatory opinion should include or identify the facts upon which the opinion is based": Lord Phillips, [79]. The Court concluded that it was not necessary to enable readers to assess the comment in the way described by Lord Nicholls. A proportionate balance was struck by a simple requirement that "...the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based": Lord Phillips, [105]. What is required is "that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did": ibid [104]."

(ii) SUBMISSIONS

Statement of Opinion

29. It is the Defendants' case that the words complained of, in the meaning pleaded at paragraph 15 of the Defence, or any other similar meaning, are plainly an expression of opinion, and would strike the ordinary reasonable reader as such.

30. The clear and sole focus and orientation of the Email is the expression of a view that the Claimant is not suitable to be a sales representative assigned to cover the branches of the First Defendant. The Email conveys not only the First Defendant's opinion ("my own huge reservations") but it implicitly conveys the views of numerous other people working within the First Defendant about the suitability of the Claimant to take on that role. Specifically, the Email reflects the views of certain staff members working in the Kent branches: the Claimant is not 'well-received' generally within those places of work. The use of the passive tense to state that the Claimant was "officially named the worst rep of all time" rather than "he is the worst rep of all time" makes it clear to the reasonable reader that it is not the Second Defendant herself who considers him thus. It is others who must necessarily hold the Claimant in such low regard and therefore it is also their opinion she is passing on to the reader.

31. The Email is not a factual account of the Claimant's history interacting with the staff of the First Defendant. It does not contain allegations of dishonesty or imputations of impropriety. The Second Defendant does not make specific allegations about Mr Peck's qualities; she does not make statements of verifiable fact about his conduct, skills or lack thereof. She conveys the conclusion that Mr Peck is persona non grata within Williams' branches but does not express detailed reasons as to the basis for that position.

32. The Second Defendant provides Grant with an overall comment on the suitability of the Claimant, by reference to the Kent branches' general impression of the Claimant, and implicitly based on his

(unspecified) attributes, actions and/or inactions. She expresses her "huge reservations" regarding the Claimant's potentially dealing with the First Defendant for Grant – in other words, her subjective conclusion as to the (un)desirability of such an arrangement. This value judgement is quintessential opinion.

Basis of the Opinion

33. The Email indicates, implicitly and in general terms, the facts on which it is based, such as to satisfy the second condition at s.3(3), Defamation Act 2013.

34. The basis of the opinion is clearly the Claimant's conduct: it is implicit in the obvious purpose of the Email – to share with Grant the Defendants' views (meaning the views of the Second Defendant and others who work for the First Defendant) about the suitability of the Claimant to interact with the First Defendant's staff – and it underpins the Second Defendant's "huge reservations" and "[very strong] request" that the Claimant, if hired, not be assigned to the First Defendant's branches.

35. It is also implicit in the Email that it is something about the manner in which the Claimant has presented or carried himself in his dealing with Kent staff which has led to his having been "not well received" in those branches and described as "the worst rep of all time", and to the First Defendant having made an official request to Ideal boilers. The fact that that conduct is unparticularised in the Email does not prevent the reader from understanding what the comment is about: see Warby J's explanation in ***Yeo v Times Newspapers Ltd***, at paragraph 28 above.

36. The Court should uphold the Defendants' submission that the words complained of contain only an expression of opinion and not defamatory allegations of fact.

(3) THE PROPER APPROACH: NATURAL AND ORDINARY MEANING

37. If the Court determines the issue of opinion in the Defendants' favour, it may not be necessary to consider the issue of meaning (as was the course adopted by the Court of Appeal in ***Singh***). What follows is subject to this caveat.

(1) Stage 1: What is the meaning of the words complained of?

38. The legal principles that apply when determining the meaning of words for the purposes of a defamation claim are well-established and are very familiar to the Court. Nicklin J helpfully summarized the applicable key principles that should govern a court's approach in relation to this task in ***Koutsogiannis***, above**,** at [12]. The points of particular note in respect of meaning in this case are the following:

(i) The fact that the hypothetical reasonable reader is neither naïve nor unduly suspicious, and must be treated as being a man who is not avid for scandal;

(ii) The need to avoid over-elaborate analysis, and not take too literal an approach to the task;

(iii) The fact that the hypothetical reader is taken to be representative of those who would read the publication in question;

(iv) The requirement to reject any meaning which emerges as the produce of some strained or forced or utterly unreasonable interpretation. As Nicklin J said in ***Tinkler v Ferguson*** [2018] EWHC 3563 (QB), quoted in **Koutsogiannis**, above, at [17], this includes the need for the court to be on guard "*where a number of adjectives and adverbs have been inserted into the Claimant's meaning which are not part of the natural and ordinary meaning of the words*".

(v) 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).

39. An important feature in the present case is the approach a Court must adopt when interpreting reports of views held by third parties. In that context, Nicklin J explained in ***Brown v Bower*** [2017] 4 W.L.R. 197 (at [19]-[32])) the principles relating to the 'repetition rule', which apply to meaning as well as the defence of Truth. The Court will need no reminder that the repetition rule is the fundamental cannon of legal policy in the law of defamation that where an allegation by a third party is repeated by the defendant, the words must be interpreted by reference to the underlying allegations of fact.

40. Warby J also made the following points on the repetition rule in ***Price v MGN*** [2018] 4 WLR 150 (at [57]):

> "*…Both formulations include assertions that others had accused the claimant of wrongdoing, which is not an acceptable method of pleading. For a defendant to assert the truth of a defamatory publication by saying, for instance, that the claimant has "been branded … a bully" is to violate the "repetition rule". That rule holds that the meaning of a reported allegation is normally the same as the meaning of a direct allegation; and a defendant cannot establish the truth of such a publication by proving merely that the allegation was indeed made."*

(ii) Stage 2: Is the Meaning found by the Court Defamatory of the Claimant?

41. On the question of whether a statement is defamatory of a person at common law, the relevant principles were recently summarised by Warby J in ***Allen v Times Newspapers Limited*** [2019] EWHC 1235 (QB) at para 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 consequence.": ***Lachaux v Independent Print Ltd*** [2015] EWHC 2242 (QB) [2016] QB 402 [15(5)]."

42. As to defamatory imputations in a business context, *Gatley on Libel and Slander,* 12th ed. summarises the law as follows (§2.35):

> *"To be actionable, words must impute to the claimant some quality which would be detrimental, or the absence of some quality which is essential, to the successful carrying on of his office, profession or trade. The mere fact that the words tend to injure the claimant in the way of his office, profession or trade is insufficient. If they do not involve any reflection on the personal character or the official, personal or trading reputation of the claimant, they are not defamatory."*

43. In order for an imputation to be defamatory of him, the Claimant must show more than it might deter people from trading with him. The law – again set out clearly in *Gatley* (§2.36) – is plain:

43.1. To be defamatory, the imputation must be one that conveys a "*personal imputation upon them, either upon their character or upon the mode in which their business is carried on*" (***Griffiths –v- Benn*** (1911) 27 TLR 346, 350, *per* Cozens-Hardy MR).

43.2. Words may be defamatory of a trader, without imputing any known fault or defect of personal character, but **only** if they impute lack of qualifications, knowledge, skill, capability, judgment or efficiency in the conduct of its trade or business (***Drummond-Jackson –v- BMA*** [1970] 1 WLR 688, 698-699 *per* Lord Pearson).

43.3. It is insufficient to show only that the statement causes damage to the company or, in this case, the tradesperson. Such a statement (which is not defamatory) may be actionable as a malicious falsehood, but only on proof that it was published maliciously (*Gatley* (§2.36)).

(4) MEANING: SUBMISSIONS

Claimant's meaning

44. The meaning advanced by the Claimant as being the natural and ordinary meaning is:

"The Claimant is thoroughly unfit to be a sales representative at Grant as he:

(i) Is universally disliked by the sales team at the First Defendant's Kent branches;

(ii) Has been named by the First Defendant as the worst sales representative of all time;

(iii) Has, by his conduct at the First Defendant's Kent branches, caused those sales teams such serious concern that the First Defendant was forced to put in an official request to Ideal that he no longer visit any of its branches; and

(iv) Has, by reason of all these matters, caused the Second Defendant such serious concern that she felt compelled to contract Grant to request that he not deal with the First Defendant in his new role."

45. The Claimant's meaning is simply untenable and the Court can reject it as the "natural and ordinary" meaning of the words since it does not conform to the repetition rule. A meaning cannot be pleaded that merely sets out the Second Defendant's report of what others are alleged to have said – or thought - about the Claimant. The authorities require the Court to look to the underlying allegations of fact as they relate to the Claimant when interpreting the words complained of "*and not merely by reliance upon some*

second-hand report or assertion of them": ***Shah v Standard Chartered Bank*** [1999] Q.B. 241 CA at 263.The Claimant has been too literal in his approach to interpretation and has failed to distil the meaning to its core and thereby identify the (allegedly) defamatory sting of the words complained of. The Defendants submit that the reason the Claimant has resorted to pleading meanings in such a fashion is that the Email does not reasonably bear any meaning that was defamatory of the Claimant. This submission is expanded upon at paragraphs 56 – 59 below.

46. Furthermore, the Claimant's pleaded meaning is not a meaning that is even capable of being derived from the words complained of taken as a whole. It is the product of a strained, forced and unreasonable interpretation.

47. First, the opening sentence of the Claimant's meaning, "[t]he Claimant is thoroughly unfit to be a sales representative at Grant", unjustifiably elevates what is in reality a narrow criticism of the Claimant in his capacity as a sales representative at Ideal in relation to the First Defendant's Kent branches, to a wider comment on the Claimant's general fitness to work in his chosen sector.

48. The Second Defendant makes clear from the off that her email concerns the potential appointment of the Claimant as Grant's "new rep to cover Kent" (and potentially other areas) specifically in regard to "him dealing with any of our Williams branches". The Email then provides an evaluation of how the Claimant was perceived by those within the First Defendant while he was assigned by Ideal to work with the Kent branches, before "request[ing] very strongly that he does not look after Williams & co as a company if you do decide to take him on".

49. In other words, nowhere does the Email suggest, explicitly or implicitly, that the Claimant is "unfit" to "work at Grant" – "thoroughly" or otherwise. Rather, it conveys to the reader that the Defendants consider the Claimant's interactions as a sales representative for Ideal when dealing with the Kent branches to have been poor, and that that those interactions meant that the Claimant was unpopular within the First Defendant's sales teams. The Claimant's use of the word "thoroughly" is an example of the unwelcome practice highlighted by Nicklin J in ***Tinkler v Ferguson***, and quoted in ***Koutsogiannis***: the insertion of an adjective into the Claimant's meaning which is not part of the natural and ordinary meaning of the words.

50. Second, the Claimant's contention that the ordinary reasonable reader would construe the email as meaning that the Claimant "is universally disliked by the sales teams at the First Defendant's Kent branches" is at once too high and too wide. There is no suggestion in the Email that any member of the sales teams of the Kent branches – let alone, as the Claimant's meaning ("universally") would have it, all of the members of all of the sales teams of the Kent branches – "disliked" the Claimant. The Email simply states that the Claimant was "not well received" in the Kent branches.

51. Third, the inclusion in the Claimant's pleaded meaning of his having "been officially named by the First Defendant as the worst sales representative of all time" is too literal, and obfuscates the obviously hyperbolic and conversational nature of the Second Defendant's remark.

52. "Official" typically connotes authority, and/or a formality of process: as would be obvious to any reasonable reader, no such authority or formality underpins, or could underpin, the Second Defendant's comment. It is, moreover, an expression or turn of phrase, par excellence, that is entirely unverifiable by any metric available to the reader or the Court. The Claimant has simply alighted on an (admittedly unflattering) aside about himself in the Email, discounted its rhetorical and colloquial nature, and given it an unwarranted emphasis in his pleaded meaning.

53. Fourth, the Claimant's assertion that the Email suggests he caused the Kent sales teams "such serious concern" that an official request had to be made once again (whatever 'an official request' may mean), in common with the two preceding meanings, sins against the repetition rule. The words complained of should be examined from the perspective of the underlying conduct of the Claimant, and not what steps the First Defendant took in relation to that conduct. The steps taken by the First Defendant are irrelevant to and have no bearing on the determination of meaning.

54. Fifth, the same assertion exaggerates the Email's characterisation of the First Defendant's attitude towards him. The expression "serious concern" suggests that the First Defendant feared dire consequences unless the Claimant ceased dealing with its Kent branches. This is too strained a meaning to derive from the Email. It is a commercial communication from one business to another. Businesses are concerned with efficiency and profit. As noted above at paragraphs 47-48, the Second Defendant makes plain that her email relates to the Claimant's poor reception in his role at Ideal in respect of the Kent branches. Absent any language or context warning of consequences so serious as to give rise to "serious concern", the ordinary reasonable reader, being neither unduly suspicious nor

avid for scandal, would construe the reference to an official request being made simply as a signal that the First Defendant did not consider the Claimant's continuing interaction with its branches to be conducive to efficiency and profit.

55. Finally, the motivation of the Second Defendant in contacting Grant, as pleaded by the Claimant at paragraph 10(iv) of the Particulars of Claim, is an inference which a reader could draw, and might well draw, from reading the Email. But that is a different question from whether that motivation forms part of the meaning of the Email. Again, as noted above at paragraphs 47-48, the Email clearly relates to the Claimant's poor reception by the First Defendant's employees while he was assigned by Ideal to work with the Kent branches. An interpretation of the Email which incorporates the motivation of the Second Defendant in writing and sending the Email is, in this case, too strained and too artificial: it is simply not part of the impression which the Email, read as a whole, would make on the ordinary, reasonable reader.

Defendants' meaning (1)

56. It is the Defendants' primary contention that the words complained of do not bear a meaning that is defamatory of the Claimant at common law. The words written by the Second Defendant did not involve an allegation of culpable behaviour or negligence against the Claimant. There is no imputation of any detrimental quality, or of the absence of any essential quality, to the Claimant: there is, for instance, no reference, either explicit or implicit, in the Defendant's primary meaning – or indeed in the actual Email itself – to lack of integrity, mental stability, judgement, learning or some other necessary qualification, or any assertion that he has been guilty of any dishonest or disreputable conduct or any other misconduct or inefficiency therein.

57. Rather, the standard of the Claimant's performance is asserted and assessed by reference to the Defendants' (unspecified) standards, rather than to any prevailing or absent quality. Such a generalised comment should not be taken to be defamatory of an individual at common law. Without details specifying the context, the reasonable reader has little to understand the seriousness of the Second Defendant's statements. The reasonable reader is left wondering why the Claimant did not endear himself to the staff within the Kent branches.

58. Indeed,

59. Conversely, what must have been entirely apparent to the reasonable reader was the clarity of the request made by the Second Defendant, on behalf of the First Defendant, that the First Defendant did not want the Claimant to be assigned to work as a sales representative covering its branches. In the case of the hypothetical reasonable reader working for a company who sold its products through the First Defendant, the words did not have to convey a defamatory meaning about the Claimant to have an impact on their decision to employ him as a sales representative covering the Kent branches. It was sufficient to know that head office staff and the sales teams within the Kent branches of the First Defendant did not want the Claimant to act as sales representative at their branches.

Defendants' meaning (2)

60. In the eventuality that the Court rules that the words did convey a meaning defamatory at common law, the Defendants' fallback position is that the statements are plainly an expression of opinion. The Defendants pleaded meaning in relation to the s.3 defence, at paragraph 15 of the Defence, is:

> 'The Claimant performed poorly in his duties as sales representative for Ideal when dealing with the First Defendant's Kent branches and, as a consequence, was unpopular within the sales team of the First Defendant.'

61. On reflection, the unpopularity of the Claimant, it is conceded, is not an issue which could be said to be defamatory of the Claimant. It is plainly not defamatory to say of an individual that another person does not like him, without any further explanation. The Court may consider that a more suitable formulation of any defamatory comment is that the Claimant was unsuitable to be assigned to the role of sales representative covering the First Defendant's branches because the Claimant had behaved in such a way when performing that role when employed by Ideal to erode the level of necessary trust between he and the First Defendant's branch staff.

Defendants' meaning (3)

62. If, contrary to the Defendants' primary contention that the words are not defamatory of the Claimant or the secondary contention that the words complained of are an expression of opinion, the Court finds that the words amount to a defamatory imputation of fact, the Defendants' case is that the words bear the following imputation (pleaded on that basis at 16.1 of the Defence):

'The Claimant was unfit to perform the role of sales representative of Grant covering the First Defendant's Kent branches because he had failed to meet the standards to be expected of a competent and diligent sales representative in his interactions with the First Defendant's sales team in those branches and their customers.'

63. The Email is not concerned with the Claimant's fitness to perform the role of sales representative at Grant in general: rather, it is concerned narrowly with the Claimant performing that role at Grant covering the Kent branches.

64. If, contrary to the Defendant's primary case that there is insufficient detail within the Email for the words to convey a meaning defamatory of the Claimant, the Court determines that an inference would be drawn by the hypothetical boiler manufacturer's senior manager, with responsibility for sales, it is submitted that such a niche reader would be effected by being intimately familiar with the roles and responsibilities of a sales representative. It is submitted therefore that the implied basis of the Defendants' disappointment at the Claimant's performance, as expressed in the Email, would be understood to be the Claimant's failure to meet the standards typically expected of such a representative in their interactions with their typical interlocutors: the sales teams and customers in suppliers' branches.

C. MALICIOUS FALSEHOOD

65. In ***Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd*** [2011] Q.B. 497, the Court of Appeal clarified that the single meaning rule does not apply in relation to the tort of malicious falsehood. Rather, in relation to the Claimant's pleaded meaning(s), the Court of Appeal explained in ***Cruddas v Calvert*** *[*2014] E.M.L.R. 5, [30] that:

"… the duty of the judge at trial is to indicate the reasonably available meanings, [and] decide if a substantial number of persons would reasonably have understood the words to have such a meaning…"

66. In determining whether the meaning for which the Claimant contends falls within the range of meanings which a substantial number of persons could reasonably attach to it, the court is guided by the same principles summarised by Sir Anthony Clarke M.R. in ***Jeynes v News Magazines Ltd*** [2008] EWCA Civ 130 at [14]–[15]. The ***Jeynes*** principles, which are very familiar to the Court, are those that governed the approach when delimiting a range of possible defamatory meanings under PD 53 para.4, prior to

the introduction of the Defamation Act 2013: ***Cruddas v Calvert*** [2014] E.M.L.R. 4, [64] (reversed in part on appeal on a different point).

67. The question is whether the words complained of are capable of the meaning or meanings complained of. Put another way, the question is whether it would be perverse to conclude that the words bear the alleged meaning or meanings: ***Jeynes***, above, [15]. The caveat that must apply when conducting the capability exercise in respect of an alleged malicious falsehood is that principle (8) ("It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense") derived from Lord Halsbury LC in ***Neville v Fine Arts Company*** [1897] AC 68 at [73], must be excluded from that assessment.

68. For the reasons set out in detail at paragraphs 44-55 above, the meaning pleaded at paragraph 11 of the Particulars of Claim is not a reasonably available meaning of the words complained of for the purposes of the Claimant's malicious falsehood action.

69. In summary, the Claimant's meaning is the produce of strained, forced and unreasonable interpretation. It elevates the Email's specific criticism of the Claimant's performance as an Ideal sales representative vis-a-vis the Kent branches to a broader comment on his fitness to work as a sales representative with Grant. It employs an adjective which is not part of the natural and ordinary meaning of the words. It mischaracterises a professional criticism of the Claimant in some quarters of the First Defendant as an outright, "universal" dislike of the Claimant as an individual by the entirety of its sales force in the county of Kent. It is too literal in its inclusion of the Second Defendant's hyperbolic remark as to his being 'officially named the worst rep of all time'. It exaggerates and inflates the Defendants' doubts as to the strength of his professional performance, through the phrase "such serious concern". Finally, it forces an inference as to the Second Defendant's motivation in writing the Email into the meaning of the Email itself, at odds with the impression that the message would, in reality, make on any ordinary reasonable reader.

D. CONCLUSION

70. For the reasons set out above, the Court is invited to find that the words complained of are not defamatory of the Claimant at common law, or if the Court so finds that the words did bear a meaning defamatory at common law, that the statements constituted an expression of opinion; sufficiently indicated the basis of that opinion and bore the meaning pleaded at paragraph 15 of the Defence.

71. If, on the contrary, the Court finds that the words complained of are a statement of fact, the Court is invited to hold that they bear the meaning pleaded at paragraph 16.1 of the Defence.

72. In any event, the Court is invited to conclude that the words complained of do not bear the meaning pleaded at paragraph 11 of the Particulars of Claim, and that that meaning is not, for the purposes of the Claimant's malicious falsehood claim, a reasonably available meaning of those words.

22 APRIL 2020

VICTORIA SIMON-SHORE
5RB
5 GRAY'S INN SQUARE

CLAIM NO: QB-2019-000898

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

B E T W E E N :

ANDREW PECK

CLAIMANT

-AND-

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

DEFENDANTS

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APRIL 22, 2020