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

No. HQ18M01704

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 July 2019

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Queen's Bench Division)

B E T W E E N :

SYED CEMILE YAVUZ

Claimant

- and -

(1) TESCO STORES LIMITED
(2) TESCO PLC

Defendants

The Claimant appeared in person.

Mr Thomas Banks (instructed by Plexus Law LLP) appeared on behalf of the Defendants.

Hearing dates: 15, 16, and 17 July 2019

J U D G M E N T

RICHARD SPEARMAN Q.C.:

The dispute in outline

Parties and representation

1. This is the trial of a claim for slander and trespass to the person, brought by Syed Cemile Yavuz. Ms Yavuz has a BA in Law, Accounting, Finance and Management, and also a Post Graduate Diploma in Legal Practice. She argued her case with conviction, although she plainly found the trial process distressing, not only in consequence of the pressures of representing herself but also as a result of the experience of giving evidence and having her account challenged in cross-examination and submissions.

2. The matters complained of took place at a Tesco store in Lewisham on the evening of 6 September 2017 and involved Mr A.K.M. Abdullah, who has been employed as a Customer Assistant at that store since 2007. Mr Abdullah is employed by the First Defendant ("Tesco"), which is accordingly the only appropriate Defendant to the claim. Mr Banks appeared for Tesco, and argued Tesco's case with economy and moderation.

Core evidence

3. The claim for slander is based on the allegation that there came a time on that evening, while Ms Yavuz was speaking to Mr Abdullah about obtaining a receipt for some shopping (which, in fact, had a total value of £15.20), when Mr Abdullah said: "You haven't paid have you; you are a thief, you don't want to pay". Ms Yavuz alleges that Mr Abdullah spoke these words in the vicinity of the self-service check outs at the Lewisham store, when approximately 7-8 other customers were using those check outs.

4. Ms Yavuz says that events then unfolded as follows (among other things, giving rise to her claim for trespass to the person): (1) Ms Yavuz said: "What are you talking about, if I didn't want to pay why would I return back to the store for my receipt". (2) Mr Abdullah said: "No you haven't paid, you don't want to pay, you can't go anywhere, you have to pay this". (3) Mr Abdullah was very aggressive, held Ms Yavuz by the arm, and threatened her to force her to make a payment for the goods in question. (4) Ms Yavuz pulled her arm away from his hand, and shouted at Mr Abdullah "What are you doing. I have paid, stop calling me a thief. If I hadn't paid why would I come back and look for my receipt". (5) One of the other customers said: "Don't mind him, he is always like that towards customers, he is rude". (6) In order to avoid further disturbance and embarrassment, Ms Yavuz made a contactless payment (comprising, on her case, a second payment for those goods, made under pressure from Mr Abdullah). (7) In response to her question as to what was going to happen if she had paid twice, Mr Abdullah said "That's your problem, nothing to do with me, you haven't paid anyway, you didn't want to pay". (8) Ms Yavuz was upset, insulted, started to cry, and was taken out of the store by her two shopping companions (see further below), saying to Mr Abdullah as she walked out: "I am going to complain about you to the manager".

5. These claims are defended by Tesco on the grounds that, first, Mr Abdullah did not say the words complained of, and, second, he did not grab hold of Ms Yavuz's arm.

6. Mr Abdullah contends that when Ms Yavuz came up to him and asked for her receipt, he asked her which machine she had been using, and matters then unfolded as follows: (1) He saw that the machine in question was still active, and was showing that the transaction was not complete and that payment was required. (2) He explained to Ms Yavuz that this was why the receipt was not coming out, and that to produce the receipt she would need to complete the payment for the shopping. (3) Ms Yavuz said that she had already paid for the shopping, but he explained that the transaction was not showing as paid and that he could not obtain a receipt for her until payment had been completed. (4) Ms Yavuz then said "I am not a thief". (5) He then: "responded advising her that I had not called her a thief; I had simply explained that I could not give her a receipt if the self-service checkout was showing that the payment had not been completed." (6) Ms Yavuz asked what would happen if she paid "again", and he explained that if she had paid twice then customer services would provide her with a refund. (7) He then: "also explained that the transaction was not complete and the shopping was still showing on the checkout so payment would need to be made before a receipt could be produced". (8) Ms Yavuz then paid for the shopping and a receipt was produced. (9) Ms Yavuz then turned to him and said "I'm a lawyer; I will cause you a problem". (10) He did not call Ms Yavuz a thief or put his hand on her at any time.

Core issues

7. With regard to the claim for slander, the Particulars of Claim rely upon, first, section 2 of the Defamation Act 1952 ("Slander affecting official, professional or business reputation") and, second, the proposition that the words complained of are actionable *per se* (i.e. without proof of special damage) as they impute the commission of a crime which is punishable by imprisonment. Mr Banks accepted that the second way of putting the claim is a tenable way of framing this cause of action. Although the meaning of the words complained of was not pleaded, or at least not pleaded clearly, as a separate issue, it is inherent in Tesco's stance that there is no dispute that the natural and ordinary meaning of the words complained of is that Ms Yavuz was guilty of theft. In these circumstances, I consider that the first way of putting the claim adds nothing to Ms Yavuz's case, and I see no useful purpose in exploring whether it is tenable as well.

8. Tesco did not raise any defence to the claim for defamation, such as truth or qualified privilege, and it should be clearly spelled out from the outset that there is no suggestion that Ms Yavuz was guilty of theft, or making off without payment, or attempting to avoid payment, or any actual or attempted wrongdoing of any sort. On the contrary, Tesco does not dispute Ms Yavuz's case that, having taken the shopping to or to the vicinity of the exit to the Lewisham store, Ms Yavuz discovered that she had not picked up a receipt, and therefore went back in to the store in order to obtain a receipt. Those are not the actions of a person who is dishonest, or who is stealing or attempting to steal. Nor does Tesco allege this is a fabricated claim. Tesco's case is that Ms Yavuz misinterpreted what Mr Abdullah said to her, and is wrong to say he grabbed her arm.

9. However, Tesco does contend that, even if (contrary to its primary case) the words complained of were spoken as Ms Yavuz alleges, they were not defamatory because their publication did not cause "serious harm" to her reputation: see section 1 of the Defamation Act 2013 ("section 1"). The meaning and effect of section 1 were considered by the Supreme Court in *Lachaux v Independent Print Ltd* [2019] 3 WLR 18, in which Lord Sumption JSC, giving the judgment of the Court, said at [14], [16]:

> "… section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it "has caused or is likely to cause" harm which is "serious". The reference to a situation where the statement "has caused" serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated …
>
> … Suppose that the words amount to a grave allegation against the claimant, but they are published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed. The law's traditional answer is that these matters may mitigate damages but do not affect the defamatory character of the words. Yet it is plain that section 1 was intended to make them part of the test of the defamatory character of the statement."

10. Accordingly, the central live issues are as follows: (1) Did Mr Abdullah say the words complained of? (2) If so, did they cause serious harm to the reputation of Ms Yavuz? (3) Did Mr Abdullah grab Ms Yavuz's arm? (4) If both of the claims succeed, or if one of them succeeds, what is the appropriate measure of damages?

The witnesses

Who were the witnesses

11. Ms Yavuz was previously married, and was known as Mrs Ali. On 6 September 2017, Ms Yavuz visited the Lewisham store in the company of two other adults: her son, Syed Kibra Ali, and her cousin, Ahmet Ozyilmaz. All three are of Turkish descent. Although English is not her first language, Ms Yavuz speaks good English, and she served a witness statement and gave evidence before me without any difficulties of language.

12. Although Ms Yavuz served a witness statement of Mr Ozyilmaz in English, he is unable to understand or speak English to any significant extent. It emerged at trial that this witness statement had been prepared by Ms Yavuz translating his account from

Turkish into English, and that Mr Ozyilmaz had then checked the accuracy of the English version by using a Google programme to translate the text back in to Turkish before he signed the witness statement. Mr Ozyilmaz gave oral evidence with the assistance of a lady known to Ms Yavuz and who acted as interpreter, having sworn the appropriate oath, although she had no previous court room experience as an interpreter.

13. Ms Yavuz had also served a witness statement of her son, who was plainly available to be called as a witness because he works as a court officer at the Royal Courts of Justice. Indeed, he made a brief appearance in the courtroom, standing beside Ms Yavuz, on the afternoon of the second day of the trial. Prior to the trial and in its initial stages Ms Yavuz indicated an intention to call her son as a witness. However, on the morning of the second day of the trial she said that he would not be giving evidence on her behalf because his father (and her former husband) had raised an objection to him doing so.

14. On the occasion of the visit to the Lewisham store, the shopping that was purchased by Ms Yavuz and her companions was paid for using the Tesco Clubcard and the debit card of her father, Yuksel Ragip. Ms Yavuz served a witness statement of Mr Ragip in English, but stated in her Listing Questionnaire of 17 June 2019 that "having provided his witness statement [he has] been diagnosed with dementia", and did not call him on that basis. Indeed, it emerged during the course of the trial that Ms Yavuz is currently acting as a full time carer for her father, which undoubtedly increased the stresses on her arising from this claim coming to trial. Mr Ragip was not a witness to the events in the Lewisham store which are at the heart this claim, and in accordance with Ms Yavuz's Directions Questionnaire dated 3 October 2018 the facts to which he bears witness are "Payment made to the Defendant". In these circumstances, Mr Banks very properly raised no objection to Mr Ragip's witness statement being adduced in evidence (although the fact that he could not be cross-examined on it might affect its weight).

15. The sole witness called on behalf of Tesco was Mr Abdullah. Tesco served a witness statement of Mr Abdullah in English, and he gave evidence before me without any significant difficulties of language. Nevertheless, although he has a good understanding of English, his use of English is imperfect, and I suspect that it is not his first language. When giving evidence he spoke rapidly, with a noticeable accent, and often quite softly.

Appraisal of the witnesses

16. The demeanour of witnesses can be of great importance when determining the facts. At the same time, demeanour is recognised as being an imperfect guide to the truth. Among other considerations, once a detailed witness statement has been prepared, maybe with the assistance of significant input from professional advisers, even for a witness who is familiar with the material events and who is conscientiously striving to recollect matters accurately, by the time a claim comes to trial it may well be difficult to separate original memories from the narrative contained in the witness statement, such

that if and to the extent that they differ (for whatever reason) that narrative becomes the "true" recollection of the witness. The issue may be further complicated by differences of nationality, culture, heritage and language. Sir Thomas Bingham states in *"The Judge as Juror: the Judicial Determination of Factual Issues*", (1985) 38 CLP 1, at 10-11:

> "Thirdly, however little insight a judge may gain from the demeanour of a witness of his own nationality when giving evidence, he must gain even less when… the witness belongs to some other nationality… If a Greek, [accused of lying], becomes rhetorical and voluble… what (if any) significance should be attached to that? … To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm."

17. In cases, like the present, in which feelings run high, and in which individuals may well have taken up entrenched positions in their written evidence by the time the case comes to trial, there are significant risks that witnesses may be honest but mistaken about what took place, and may give evidence about what they would like to think happened or are convinced must have happened rather than what they can truly recollect. These factors make the appraisal of their evidence more difficult. At the end of the day, the best guide to the truth is often to be found not so much in the demeanour of the protagonists, or even concessions made in cross-examination, but in an objective appraisal of the probabilities overall, and, in a case in which there are contemporary documents which help to shed light on the material events, on the contents of those documents.

18. These matters were discussed more fully in *Gestmin SGPS SA v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm), in which Leggatt J (as he then was) considered not only the fallibility of memory but also the difficulties to which the process of civil litigation gives rise. They are also reflected in the words of Tugendhat J in *Cambridge v Makin* [2011] EWHC 12 (QB) at [211]:

> "The most important tests of credibility are the consistency of a witness's evidence with what can be shown to have occurred, and with what he has said or done previously".

19. For these reasons, I have thought it right in the present case to place greater reliance on matters such as the probabilities overall and the extent to which the evidence of the witnesses is consistent with their previous words and actions rather than attempts to gain insight by evaluating the demeanour of Ms Yavuz, Mr Ozyilmaz and Mr Abdullah.

20. Nevertheless, it is right to observe that, at times, Ms Yavuz displayed a tendency not to answer the questions put to her by Mr Banks, but instead to argue her case and to deliver diatribe and invective. Further, she accepted that she was capable of losing her temper, and that when she did so she did so badly, and showed signs of this both when giving oral evidence and when cross-examining Mr Abdullah. While making due

allowance for the stress that Ms Yavuz was undoubtedly under from having to bring her case to trial and to represent herself, I am unable to regard her as an impressive witness.

21. In contrast, Mr Abdullah gave his evidence calmly and with restraint, was better at answering the questions that were put to him by Ms Yavuz, and remained dignified in the face of some of Ms Yavuz's less temperate accusations.

22. However, when assessing Mr Abdullah's demeanour, the fact that he was being cross-examined by Ms Yavuz is a complicating factor. On the one hand, this meant that he had to put up with a measure of confrontation and assertion that would otherwise not have applied. On the other hand, it meant that his evidence was not tested in the same way as it might have been if he had been cross-examined by a professional advocate.

23. I was also troubled by Mr Abdullah's evidence concerning a document dated 12 September 2018 which was disclosed by Tesco. This recorded an "informal conversation" between a manager and Mr Abdullah concerning his "behaviour on self-service" and the need for "issues … to be addressed in a non-threatening manner". It also recorded among the "outcomes" that Mr Abdullah "needs to be very careful in his interaction with customers and has to be polite and not aggressive at all times". Mr Banks submitted, understandably, that the apparently informal nature of this discussion might mean that it would not stick in Mr Abdullah's memory. As against that, this discussion occurred only a few months ago, and it was sufficiently significant to be recorded by Tesco in the manner that it was. On the one hand, Mr Abdullah might be expected to have some memory of this discussion if, as he claimed under cross-examination "I am one of the best employees. They rely on me … I am one of the best colleagues in the store", because, in those circumstances, the concerns recorded in this document would be very out of character. On the other hand, if those concerns were not memorable, that may tend to lend support to Ms Yavuz's case that he was rude and aggressive. Mr Abdullah's suggestion that this discussion may be unmemorable because it was part of a training exercise is not entirely implausible, but seems unlikely.

24. It was difficult to make an appraisal of Mr Ozyilmaz because he directed his answers to the interpreter. Further, while I do not doubt that she strove to perform her function conscientiously, at least on some occasions what he said in Turkish was plainly much more discursive than her answers suggested. Perhaps more significantly, as set out below, his witness statement contains detailed accounts of conversations between Ms Yavuz and others on the evening of 6 September 2017, in terms which suggest he understood what was being said when he was plainly unable to do so as he cannot speak English. These factors make it unsafe to place a great deal of reliance on his evidence.

Issue 1: Did Mr Abdullah say the words complained of?

The parties' rival contentions

25. It was an important part of Ms Yavuz's case that Mr Abdullah had a motive or reason for treating her in the manner that she alleges, namely that he was angry with her due to an earlier incident involving a plastic bin that she had taken to the self-service check out and had scanned in, but then decided that she did not wish to purchase. She says that she called Mr Abdullah over to remove the bin from her shopping list, which he duly did, but that he then told her, in a rude and shocking manner, "take it back where you got it from". She replied that she was still scanning her shopping, and pointed to her trolley. After that, Mr Abdullah "said nothing and departed". This, she says, prompted Mr Abdullah later on to act as she says he did. Ms Yavuz said in cross-examination:

> "I believe he was waiting to get his own back. He got me to pay twice and insult me as well … He used those exact words … He knew what was going on. It was his revenge for that bin. He insulted me and forced me to make a payment … He did take hold of my arm. In the same way as on the video he tried to touch me again."

26. This reference to "the video" is to a film that was taken on a subsequent occasion at the Lewisham store. On that occasion, Mr Abdullah was filling shelves together with another Tesco employee, when Ms Yavuz accosted him about the events of 6 September 2017. The incident was filmed on a mobile telephone by Mr Ozyilmaz, who was accompanying Ms Yavuz, and she relied on the film at trial. Mr Abdullah believes that the incident occurred a few days or maybe two weeks after 6 September 2017, but Ms Yavuz stated that she thought it happened later than that, and suggested it took place in January 2018. It seems that the film itself contains no data as to when it was made.

27. Mr Ozyilmaz supports Ms Yavuz's case with regard to the incident concerning the bin, but does not claim to have heard the words that were spoken by Mr Abdullah. In his witness statement, reflecting her evidence about the same matters, Mr Ozyilmaz states:

> "… She called out to a self-checkout assistant who I now know to be Abdullah. He touched the screen buttons and cancelled the bin from the shopping then he told my cousin to take the bin back to aisles where she got it from (he spoke in a harsh voice). My cousin told her (sic) that she was still scanning her shopping then he took the toilet bin and left …
>
> [Later on] We waited for her outside as she went in to get the receipt. Then we went in as well and saw that she was arguing with Abdullah who grabbed her by the arm and I saw her with a card in her hand and crying. Then she walked towards us. She was crying and saying that she had been insulted in front of the other customers. I did not realise what was going on at the time. Then my cousin began speaking to the security guard at the entrance and explained to him that she had to pay twice for the same shopping and that Abdullah accused her of theft. She had explained that [if] she had committed theft why would

she return back to the store if she had not paid for the goods. Had she left not paid (sic) for the goods the machine would have alerted all of us that the items been removed from the packing area which we would have realised that we did not paid (sic). That was not the case. We had paid for the goods and packed the shopping trolley.

My cousin said that she wanted to speak to a manager, the security guard pointed to a man who was also standing outside the store …

He told my cousin not to worry, if two payments were made then she will get a refund, and that she should [not] worry about Abdullah as there had been numerous complaints about him. He advised her to make a complaint to the day time manager as he could not do much since the store was closing at 12:00 midnight."

28. Mr Abdullah said that he had no recollection about the incident involving the bin. He also could not remember certain other details of this evening two years ago, as he deals with thousands of customers. Issues of the kind described by Ms Yavuz concerning retrieval of a forgotten receipt and so forth are part of his daily working experience, and the events of that evening would not have stuck in his mind save for the words that he says Ms Yavuz said to him at the end of their interaction: "I'm a lawyer; I will cause you a problem". Even then, he did not consider that there was any need to report anything to a manager at the time as: "I thought I had dealt with the incident nicely".

29. Ms Yavuz vehemently disputed Mr Abdullah's claim that she had said: "I'm a lawyer; I will cause you a problem". She argued that "lawyer" is not an expression that she would use, and indeed that, in this country, there are barristers, solicitors, para-legals and so forth, but the expression "lawyer" is not one that is in general use. I was not impressed with this argument. I consider that the word "lawyer" is in common usage. Further, as Ms Yavuz has some legal qualifications and is intending to qualify as a solicitor, it seems to me not unreasonable to describe her as a "lawyer". In addition, if Ms Yavuz did not say this, it is unclear how Mr Abdullah knew about her legal qualifications.

30. It was common ground between Ms Yavuz and Mr Abdullah that there are 11 self-service check outs at the Lewisham store, arranged in two rows of 5 and 6 respectively. According to Ms Yavuz, there were not many people doing their shopping at the time, and the shop was not as busy as usual. According to Mr Abdullah, it was busy: all 11 self-service check outs were open, there were people at all of them, and there were also people in the queue waiting to use them. On this topic, I consider that both witnesses were recounting their honest recollections, and it is difficult to know which to prefer.

31. Having said that, it was Mr Abdullah's evidence that there were usually two people working in the relevant area, but on that evening he was on his own. I therefore consider that he may well have been under some pressure, and that the store may have

appeared busier to him than it was. In addition, it appears to be common ground that when Ms Yavuz asked for assistance in retrieving the receipt there was no delay before she and Mr Abdullah were able to gain access to the self-service check out which she had been using, and this suggests that no one else was using it at the time. For these reasons, I am inclined to think that the store was not as busy as Mr Abdullah recollects.

32. The only receipt which exists from that evening, or at least which was produced in court, is one timed at 23.21, which contains no record of a bin being scanned and then removed. This leads on to another major part of Ms Yavuz's case, which concerns documents and the unavailability of expert evidence as to how Tesco's systems work.

33. The account to which this shopping was charged was that of Mr Ragip. Accordingly, Ms Yavuz was unable to access data concerning that account until she had returned home. Once she returned home, she logged in to Mr Ragip's online Barclays account, and she took a mobile telephone screenshot at 00.27 on the following morning which shows "debit card payments that have been approved and taken from your available balance … [and] will show in your account activity once they've been processed by us or the retailer". The screenshot shows three transactions on 6 September 2017: one for £3.90 at another Tesco store at 13.52 and two at the Lewisham store, each in the sum of £15.20, one of which is timed at 23.17 and the other of which is timed at 23.21.

34. It is Ms Yavuz's case that this document shows that she did, in fact, make two payments for the shopping at the Lewisham store on 6 September 2017, and this contradicts Mr Abdullah's evidence that when he and she revisited the material self-service check out the transaction was showing as not complete and that payment was required, and supports her case that he did something with the machine in order to support his demand that she had to make a second payment (which he knew to be unwarranted). Ms Yavuz accepts that the statement of Mr Ragip's account with Barclays Bank plc only shows one deduction of £15.20 in respect of "Card Payment Tesco Stores 2821 on 06 Sep", but she contends that this reflects what she was told on the night, to the effect that she would only be charged once even if she had paid twice.

35. Building on this foundation, Ms Yavuz contended that Mr Abdullah had deliberately doctored matters on the night by, in effect, deleting or concealing a transaction which had been fully completed at 23.17, and then creating or presenting to her a record for a new and uncompleted transaction which required her to make a second payment of £15.20 at 23.21 before she could obtain the receipt that she had gone back to collect. These matters are not necessary elements of her claims for slander or trespass to the person, but formed part and parcel of her case that Mr Abdullah was "out to get her".

36. Ms Yavuz further claimed that Tesco had produced documents which were "counterfeit" and had failed to provide disclosure of other material documents, in substance as part of a sustained and concerted effort to support Mr Abdullah and cover

up his wrongful actions. A printout produced by Tesco which showed (in addition to a transaction on 11 September 2017) a transaction for £15.20 at the Lewisham store at 23.21 on 6 September 2017 and a transaction at Tesco's store in Catford on 6 September 2017 was said to be "counterfeit" on the basis that (a) it does not show another transaction for £15.20 at the Lewisham store at 23.17 on 6 September 2017 and (b) the "other store" transaction that it does show is attributed to Catford, is timed at 19.08 and is for £3.91, whereas this does not accord with (i) the details of 13.52 and £3.90 shown on the mobile telephone screenshot and (ii) the details shown on the statement of Mr Ragip's account with Barclays Bank plc, which make reference to a transaction having a value of £3.90 at a Tesco store in Hammersmith. With regard to this last point, the Barclays statement makes no mention of Hammersmith, but it was Ms Yavuz's evidence that the earlier shopping on 6 September 2017 had taken place in Hammersmith, and, although there was no document before the court supporting this, that the Tesco store code number given on the Barclays statement was that of that store.

37. A longer printout showing transactions between 1 September 2017 and 11 September 2017 which was produced by Tesco at the hearing, in response to Ms Yavuz's complaints and some intervention from me, was said to be similarly suspect (a) because it showed the "other store" transaction as having taken place in Catford at 19.08 and (b) because it showed the "other store" transaction on 6 September 2017 as taking place on "Wednesday" and the Lewisham transaction on 6 September 2017 as taking place on "Thursday". Ms Yavuz pointed out, correctly, that the same date could not cover different weekdays. In support of her case that the correct timing and location of the "other store" transaction were 13.52 and Hammersmith respectively, during the course of her closing submissions Ms Yavuz produced an Oyster journey statement addressed to Mr Ozyilmaz which was created on 8 September 2017, which she said showed a No 10 bus journey being undertaken to Hammersmith at 13.22 on 6 September 2017.

38. A further complication arises because Ms Yavuz sought a direction for expert evidence relating to the operation of self-service check out machines, on the basis that such evidence was required as to such operation "and whether it allows twice payment for the same shopping". This was resisted by Tesco, and in the result no order for expert evidence was made. Mr Banks submitted that Tesco's stance was explicable on the basis that the significance of the points now raised by Ms Yavuz was not apparent from her pleaded case. Whatever the rights and wrongs of that debate, I have been left with the unenviable task of trying to make sense of these documents and the anomalies which they appear to contain, in the context of evaluating the validity of Ms Yavuz's assertions, without the assistance of expert evidence as to how the technology works, and in particular whether a completed transaction could be "wiped" by Mr Abdullah.

39. Confronted by allegations that he had called Ms Yavuz a thief and had grabbed her arm, Mr Abdullah gave the following answers:

> "I was not angry. I just do my job. If I am rude my job will be gone. My manager will sack me… If you shout you would be suspended immediately. It is a simple procedure. You would be suspended … It's false. It's not true at all. I did not grab her by the arm. I would be dismissed immediately."

40. The film that was taken on the subsequent occasion at the Lewisham store was played in court more than once. When asked about it in cross-examination Mr Abdullah said:

> "I first mentioned [the incident involving Ms Yavuz] to my manager a week later when I was filmed by the customer. A few weeks later I was doing normal work, filling the small drinks shelves. It was after 10pm. Customer service was closed. I was filling shelves with drinks. I turned round and saw a man filming me with a woman. I asked them "Excuse me, why do you film me". She said: "You take my money two times". I told her I did not. When she told me she would take me to court, I was crying. Then you [i.e. Ms Yavuz] spoke to my manager. She said I took the money two times. I was panicking and crying …
>
> My manner was to apologise. I did not remember the incident. So I did not know whether she had paid twice. I remembered it when it became an issue. For 13 years, no-one has ever said to me "I'm a lawyer"…
>
> I apologised. It was not a matter of being guilty. Saying "taking someone to court". This issue has never cropped up before. I was apologising to you".

Discussion

41. Ms Yavuz bears the burden of proving on the balance of probabilities that her version of events is correct. In my judgment, she has not discharged that burden. This is a recognised hazard of claims for slander. As Nicklin J said in *Dhir v Saddler* [2017] EWHC 3155 (QB), [2018] 4 WLR 1, at [1]:

> "Slander claims are rare. Those that make it to a full trial rarer still. This uncommonness is largely due to the difficulties that many claimants have in proving that particular words were spoken about them on a particular occasion."

42. I am prepared to accept that the incident involving the bin took place as Ms Yavuz contends, because it seems improbable that she would make that up and I consider that she is more likely to recollect an incident of that sort than Mr Abdullah, who deals, as he explained, with innumerable customers in the course of his work. Nevertheless, I am entirely unpersuaded that Mr Abdullah would have reacted to this incident as Ms Yavuz alleges, whether by calling her a thief or by grabbing her arm. This runs counter to the impression that he gave not only when giving evidence but also, and perhaps more tellingly, on the later occasion when Mr Ozyilmaz filmed Ms Yavuz confronting him about the events of 6 September 2017. While not everything that Mr Abdullah

recollects is recorded on that film, and while I am not satisfied that he is right in saying that there is another piece of film that Ms Yavuz has not produced, I agree with Mr Banks that, in the round, it shows Ms Yavuz as being both physically and verbally aggressive, and Mr Abdullah as being placatory, upset, and (in his words) "panicky".

43. In so far as Ms Yavuz relies on what was filmed as showing Mr Abdullah trying to touch her "in the same way" as he is alleged to have taken hold of her arm on 6 September 2017, I consider that the film undermines rather than supports her case.

44. I also accept Mr Abdullah's evidence that he would not have said or done what Ms Yavuz alleges having regard to the serious and obvious consequences that such conduct would be likely to have for him of losing his job. That is not only a job which he has being doing for many years, but of which he gave the appearance of being proud.

45. I consider it unlikely that Tesco's systems are set up in such a way that Mr Abdullah could have "wiped" the payment element of an earlier completed transaction even if he had been motivated to do so. I am also sceptical that it would have allowed him to "wipe" the entire transaction. However, that cannot have happened in any event, because, if it had, Ms Yavuz would have had to scan the shopping a second time before making payment of the only invoice that is known to exist, and she did not do so.

46. The suggestion that not only has Mr Abdullah acted in this way but also Tesco has doctored or suppressed documents in a deliberate and concerted effort to cover up his misconduct is far-fetched, and also undermines rather than supports Ms Yavuz's case.

47. Although I am unable to get to the bottom of all the issues involving the transactional documents, it seems to me that the most likely explanation is that for some reason the first transaction for £15.20 did not complete correctly. In consequence, while Ms Yavuz was able to remove the shopping without triggering any alarms, and while the Barclays system showed a debit for that sum at 23.17, no payment was logged by the Tesco system at that time, with the result that when Mr Abdullah went back in to that system it showed that payment was outstanding. In this regard, Ms Yavuz accepted in cross-examination that on the first occasion she had not scanned her father's Tesco Club card or used her father's debit card to make a contactless payment. These actions were done by Mr Ozyilmaz. Precisely what he did was not explored in oral evidence, and his witness statement is, in my view, of doubtful reliability, for reasons discussed above.

48. At the end of the day, I consider that what probably occurred is that (whether for good or bad reason does not matter) Ms Yavuz considered that Mr Abdullah's attitude was unsatisfactory and not what she expected of Tesco staff, and that, perhaps expecting the worst from him as a result of the earlier incident involving the bin, she mistakenly interpreted his words to the effect that she needed to pay for the shopping as an accusation that she was a thief, which was neither made nor intended by Mr Abdullah.

Issue 2: Did the words complained of cause serious harm to Ms Yavuz's reputation?

49. In light of my finding on the first issue, this issue does not arise. However, I will consider it any event because the application of section 1 may be of wider interest.

Material facts

50. As set out above, if (contrary to my primary finding) the words complained of were spoken by Mr Abdullah, they were spoken in the vicinity of the 11 self-service check outs at the Lewisham store, which are arranged in two rows of 5 and 6 respectively. Whether, as Ms Yavuz says, there were 7-8 customers using those check outs at the time, or whether, as Mr Abdullah says, there were customers at all 11 of those check outs, with others queuing to use them, it seems to me that no more than about 3 or 4 persons are likely to have heard what was said. The fewer the number of customers, the smaller the pool of potential hearers. The greater the number of customers, the greater the amount of noise and distraction that is likely to have been occurring, to say nothing of the fact that they would not all be within potential hearing distance in any event.

51. Many people using self-service check outs will be intensely preoccupied with their own business, not least because they experience difficulties in using the check outs, as is amply borne out by the evidence of Mr Abdullah and the extent to which he was kept busy. They are therefore less likely to pay attention to what is being said to and by other customers, including between a Customer Assistant like Mr Abdullah and a customer who was not known to them, as, on the evidence, is the case with regard to Ms Yavuz.

52. In addition, again in keeping with the evidence before me, there is likely to be a fair amount of ongoing noise in the self-service check out area of a store like the Lewisham store. This is partly because the machines themselves make noises as transactions are processed, and partly because customers are requiring assistance on a frequent basis. This, also, reduces the likelihood that customers will overhear nearby conversations.

53. Ms Yavuz contends that, following the important part of her verbal exchange with Mr Abdullah, one of the other customers said: “Don’t mind him, he is always like that towards customers, he is rude”. Two points arise from this. First, in my opinion, those words do not suggest that this individual heard Mr Abdullah accusing Ms Yavuz of being a thief. Such an accusation, in my view, goes well beyond what most people would describe as (merely) “rude”. Second, those words suggest that this particular individual did not hold what Mr Abdullah was saying and doing in high regard. Accordingly, this item of evidence suggests that not all those who witnessed the exchange heard all the words that were used, or would have believed them even if they did. These points are consistent with the general points made above, and both separately and cumulatively have the effect of weakening Ms Yavuz’s case on serious harm.

Legal principles

54. As Lord Sumption explained in *Lachaux v Independent Print Ltd* [2019] 3 WLR 18 at [14], whether a statement has caused “serious harm” falls to be established “by reference to the impact which the statement is shown actually to have had”, and that, in

turn, "depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated". Further, as appears from [16], in light of wording of section 1(1) ("A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant"), a statement may not be defamatory even if it amounts to "a grave allegation against the claimant" if (for example) it is "published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed". At the same time, the assessment of harm of a defamatory statement in not simply "a numbers game" (see *Mardas v New York Times Co* [2009] EMLR 8, Eady J at [15]). Indeed: "Reported cases have shown that very serious harm to a reputation can be caused by the publication of a defamatory statement to one person." (*Sobrinho v Impresa Publishing SA* [2016] EMLR 12, Dingemans J at [47]).

55. Other points that arise from the *Sobrinho* case include the following:

> "46 …. [F]irst … "Serious" is an ordinary word in common usage. Section 1 requires the claimant to prove as a fact, on the balance of probabilities, that the statement complained of has caused or will probably cause serious harm to the claimant's reputation …
>
> 47. Secondly, it is open to the claimant to call evidence in support of his case on serious harm and it is open to the defendant to call evidence to demonstrate that no serious harm has occurred or is likely to do so. However, a Court determining the issue of serious harm is, as in all cases, entitled to draw inferences based on the admitted evidence …
>
> 48. Thirdly, there are obvious difficulties in getting witnesses to say that they read the words and thought badly of the claimant, compare *Ames v The Spamhouse Project* [2015] EWHC 127 (QB) at [55]. This is because the claimant will have an understandable desire not to spread the contents of the article complained of by asking persons if they have read it and what they think of the claimant, and because persons who think badly of the claimant are not likely to co-operate in providing evidence."

56. In *Doyle v Smith* [2019] EMLR 15, Warby J cited these passages with approval at [116]. Warby J went on to emphasise the importance of the point about inference, and (among other things) approved at [117] the following words of HHJ Moloney QC in *Theedom v Nourish Training (trading as CSP Recruitment)* [2016] EMLR 10:

> "Depending on the circumstances of the case, the claimant may be able to satisfy section 1 without calling any evidence, by relying on the inferences of serious harm to reputation properly to be drawn from the level of the defamatory meaning of the words and the nature and extent of their publication."

57. Although the Supreme Court stated the law differently from the Court of Appeal in *Lachaux v Independent Print Ltd* [2018] QB 594, the following passages from the judgment of Davis LJ appear to me to be consonant with the correct legal analysis of section 1 as set out in the judgment of Lord Sumption:

> "72. ….serious reputational harm is capable of being proved by a process of inference from the seriousness of the defamatory meaning … there is no reason in libel cases for precluding or restricting the drawing of an inference of serious reputational harm derived from an (objective) appraisal of the seriousness of the imputation to be gathered from the words used.
>
> 73. … The seriousness of the reputational harm is … evaluated having regard to the seriousness of the imputation conveyed by the words used: coupled, where necessary or appropriate, with the context in which the words are used (for example, in a newspaper article or widely accessed blog).
>
> 79. There may, for instance, be cases where the evidence shows that no serious reputational harm has been caused or is likely for reasons unrelated to the meaning conveyed by the defamatory statement complained of. One example could, for instance, perhaps be where the defendant considers that he has irrefutable evidence that the number of publishees was very limited, that there has been no grapevine percolation and that there is firm evidence that no one thought any the less of the claimant by reason of the publication …"

58. Perhaps of most direct relevance and assistance in light of the facts of the present case, in *Dhir v Saddler* [2017] EWHC 3155 (QB), [2018] 4 WLR 1, Nicklin J said at [55]:

> "In my judgment, the authorities demonstrate that it is the *quality* of the publishees not their *quantity* that is likely to determine the issue of serious harm in cases involving relatively small-scale publication. What matters is not the extent of publication, but to whom the words are published. A significant factor is likely to be whether the claimant is identified in the minds of the publishee(s) so that the allegation "sticks" …
>
> (ii) A feature of the "sticking power" of a defamatory allegation that has potential relevance to the assessment of serious harm is the likelihood of percolation/repetition of the allegation beyond the original publishees ("the grapevine effect") (*Slipper v BBC* [1991] 1 QB 283, 300 *per* Bingham LJ). In *Sloutsker v Romanova* [2015] [2015] EWHC 545 (QB); [2015] 2 Costs LR 321, Warby J said at [69]:
>
> > "… It has to be borne in mind that the assessment of whether there is a real and substantial tort is not a mere numbers game, and also that the reach of a defamatory imputation is not limited to the immediate readership. The gravity of the imputations complained of… is a relevant consideration when assessing whether the tort, if that is what it is, is real and substantial enough to justify the invocation of the English court's jurisdiction. The graver the imputation the more likely it is to spread, and to cause serious harm. It is beyond dispute that the imputations complained of are all extremely serious."
>
> (iii) Perhaps of most significance to slander claims is whether the defamatory words really connect with the claimant in the mind of the publishee. In *Haji-Ioannou –v- Dixon & Others* [2009] EWHC 178 (QB), Sharp J said at [31]:

> "Publication of a libel or indeed a slander, to one person may be trivial in one context, but more serious than publication to many more in another. Much depends on the nature of the allegation, and the identity of the person about whom and the person or persons to whom it is made. To that extent, the decision in each case is 'fact sensitive'…".

It is one thing to be slandered (even seriously) in front of an unknown passer-by (e.g. in front of C, A says to B, "you stole that item from the shop"), it is quite another for a person to be slandered to his/her employer. In the first example, if the passer-by does not know the claimant, even though, in the circumstances, s/he has been sufficiently identified, then the harm caused to reputation will be limited because of the anonymity. Importantly, it would usually be impossible for there to be any grapevine effect, because the publishee cannot pass on the information in a way that has any damaging effect on the claimant.

(iv) But it has never been a requirement in the torts of either libel or slander for a publishee to *know* the claimant. At common law, the torts require publication of defamatory words that *refer* to the claimant. In the passer-by example, reference to the claimant is supplied by his/her presence and the fact that the remark is addressed to him/her by the defendant. If the claimant is identified by name in the publication, then (excluding very common names like 'John Smith' where more by way of identification might be needed) that will be sufficient reference to sustain a defamation claim …"

Discussion

59. Applying the guidance provided by these authorities to the facts of the present case:

(1) An allegation that someone is a thief is grave, and has an inherent tendency to cause serious harm.

(2) However, only a handful of customers are likely to have been close enough to hear whatever was being said between Mr Abdullah and Ms Yavuz.

(3) Further, even those who were close enough to hear are unlikely to have caught everything that was said, and may not have given it credence even if they did. Certainly, if the way in which Mr Abdullah gave evidence provides an indication of how he spoke to Ms Yavuz, it is likely at least some people overhearing their conversation would have had difficulty in hearing him and understanding him.

(4) Importantly, Ms Yavuz did not suggest that she knew any of the other customers who were in the Lewisham store on the evening of 6 September 2017, or that any of them knew her, and there is no evidence that she was known to any of them. The present case is therefore closely comparable to Nicklin J's example of being slandered in front of an unknown passer-by (and indeed the allegation in this case is in effect the same as his example of "you stole that item from the shop") and "the harm caused to [her] reputation will be limited because of the anonymity".

(5) For the same reason, Ms Yavuz is unable to establish a likely grapevine effect, because in a case like the present "the publishee[s] cannot pass on the information in a way that has any damaging effect on the claimant". Nor did she adduce any evidence that any damaging imputation against her had in fact been passed on.

(6) Although the imputation is grave, there is no basis for drawing an inference of serious harm, or of likelihood that it has spread and thereby caused serious harm.

60. For these reasons, I consider that Ms Yavuz is unable to establish the threshold requirement of serious harm on the facts even if the words complained of were spoken.

Issue 3: Did Mr Abdullah grab Ms Yavuz's arm?

61. This issue has substantially been covered by what is discussed above in relation to the issue of whether Mr Abdullah spoke the words complained of by Ms Yavuz. Indeed, the two issues are closely related. This is so in general terms, taking account of the credibility of the witnesses and the probabilities overall. It also true in more specific terms, because an incident of arm-grabbing might make sense in the context that Mr Abdullah was accusing Ms Yavuz of being a thief and was keen to restrain her to ensure that she paid for the shopping, but it is difficult if not impossible to reconcile with a scenario in which he was merely saying when asked for a receipt that he could not provide one because the machine showed that payment still required to be made.

62. For substantially the same reasons as are set out above, Ms Yavuz had failed to persuade me that Mr Abdullah committed a trespass to her person by grabbing her arm.

63. The only point that I would add in the context of this aspect of the claim is that Ms Yavuz included among her complaints about Tesco's conduct of the proceedings the fact that evidence of what occurred had been suppressed or withheld in that (a) the security guard who was present on 6 September 2017 no longer worked for Tesco and (b) Tesco had produced no CCTV footage of the incident. As to the first point, according to a Chronology of Events produced by Ms Yavuz the security guard "is from Total Security". I am not satisfied that his subsequent non-appearance at the Lewisham store is sinister or that Ms Yavuz was prevented by Tesco from finding him or serving a witness summons on him if she had been so minded. As to the second point, it has not been established that the incident was captured by CCTV, but, even if it was, Ms Yavuz's Pre-Action Protocol letter is dated 8 January 2018, and it has not been established that any CCTV film relating to 6 September 2017 was kept until that date.

Issue 4: the measure of damages

64. In light of my conclusions on the other issues, this issue does not arise.

65. It seems to me, however, that if quantum had fallen to be assessed the measure of damages would have been modest indeed.

66. Among a number of other cases, Mr Banks referred me to *Mohidin & Others v Commissioner of Police of Metropolis & Others* [2015] EWHC 2740 (QB) in which

Gilbart J, in accordance with the joint submissions of leading counsel for both sides, awarded Mr Mohidin the sum of £200 for false imprisonment consisting of being handcuffed by the police and made to stand up and sit down, causing him to feel "terrified … helpless, humiliated and drained of confidence and pride" (see [333] and [363(i)]). Mr Banks submitted that Ms Yavuz could expect no more and quite probably less by way of an award of general damages in the present case if, as she alleges, her arm was grabbed for a short period, causing no physical injury. He also submitted that if and in so far as aggravating circumstances may be relevant (a) they were worse in that case and (b) (in reliance on *Richardson v Howie* [2004] EWCA Civ 1127, Thomas LJ at [23]-[24]) the better view is that "except possibly in a wholly exceptional case" they should properly be brought into account as part of the award of general damages and should not be awarded as an additional and separate item of aggravated damages.

67. So far as damages for slander are concerned, I was not referred to any case involving publication to only a few people none of whom knew the claimant and where there is no suggestion of grapevine percolation. If the claim for slander had succeeded, Ms Yavuz's claim for injury to feelings would have been aggravated by the fact that Tesco defended the claim as it did. So far as concerns the other main elements of an award of damages for defamation to an individual, namely compensation for the harm to the claimant's reputation and the need to "vindicate" the claimant's reputation and "nail the lie", I consider these elements would be at the bottom end of any previous awards. Overall, I consider the likely level of potential compensation under this head points to the conclusion that it is unlikely to be a proportionate use of the resources of the court and the parties to engage in High Court litigation over a slander having these features.

Conclusion

68. Accordingly, this claim is dismissed, and there will be judgment for the Defendants.