



Neutral Citation Number: [2020] EWHC 374 (QB)

Case No: QB-2019-004013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2020

Before :

MR JUSTICE SAINI

Between :

DR EVELYNE GODFREY **Claimant**
- and -
THE INSTITUTE OF CONSERVATION **Defendant**

The Claimant in person
David Glen (instructed by **Pinsent Masons**) for the **Defendant**

Hearing dates: 18 February 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE SAINI

MR JUSTICE SAINI :

This judgment is divided into 5 parts as follows:

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- III. Meaning: the law and conclusions - paras 13-20
- IV. Fact or opinion? - paras 21-44
- V. Conclusion: paras 44-45

I. Overview: the parties

1. This is the trial of preliminary issues as to the meaning of certain publications, and as to whether those publications were statements of fact or opinion. The claim in defamation is brought by the Claimant (“Dr. Godfrey”) against the Defendant, the Institute of Conservation (“Icon”) in respect of two statements which were published on Icon’s website (<https://icon.org.uk>).
2. The statements, dated 20 November 2018 and 1 January 2019, respectively, concerned the outcome of disciplinary proceedings taken by Icon against Dr. Godfrey, and were published within the public “News” section of Icon’s website.
3. Icon took such proceedings following complaints against Dr. Godfrey and invited her to participate in the disciplinary process under its rules. I understand that Dr. Godfrey declined to participate in the proceedings because she considered the complaints, and indeed the process itself, to be vexatious. Dr. Godfrey was in due course expelled from membership of Icon on 14 December 2018, and began this libel action on 11 November 2019.
4. Icon is a professional membership body and limited company whose aims are to raise awareness of the cultural, social and economic value of caring for heritage, and one of its objects is to champion high standards of conservation. It has around 2,500 members drawn from both UK and overseas professionals, and is registered with the Charity Commission.
5. Dr. Godfrey is a professionally accredited archaeological scientist and academic. She was for eleven years, from late 2007 to 2018, a fee-paying member of Icon. Dr. Godfrey was first a full member of Icon from 2007-2015, and then an Associate member from 2015-18, after Icon re-classified its membership and introduced new membership policies and procedures in 2015. Dr. Godfrey served as a voluntary elected member of the management committee of the Icon’s specialist interest Archaeology Group in a number of roles from 2010 to 2018, finally serving as the elected Chair of Icon’s Archaeology Group management committee from 2015-18. As I have mentioned above, Dr. Godfrey was expelled from membership of Icon at a meeting of its Board of Trustees on 14 December 2018.
6. One of my main tasks in the trial is to determine the single natural and ordinary meaning of the words complained of (set out fully below) and as is now common in the trial of such preliminary issues, I approached this task, in the first instance, by reading the statements without reference to the Particulars of Claim, the witness statements and skeleton arguments.

7. Having formed an initial view, I found the parties' submissions helpful as a cross-check of my initial views. My conclusions did not ultimately accord completely with the positions of either party and I will summarise their submissions in broad terms below. Although there were differences of emphasis, the parties were not in fact that far apart on the issue of meaning. When one considers the simple nature of the statements, to which I now turn, that is not surprising.

II. The publications and the rival meanings

8. The full terms of the 20 November 2018 statement were as follows:

“Icon member issued formal public reprimand

The Conduct Committee of Icon was convened on 20th September 2018 to hear an allegation that Icon member Dr Evelyne Godfrey had made remarks in email correspondence that could amount to a contravention of clause 4.19 of the Code of Conduct.

Having reviewed the decision of the Investigation Committee and having considered all the documentary and other evidence before it, the Conduct Committee found proved that Dr Godfrey had used language that was deplorable and unprofessional in email correspondence and thereby convened clause 4.19 of the Code of Conduct.

The Committee further determined that it was necessary to impose restrictive measures in the case and recommended to Icon that a reprimand is imposed. The Committee further stipulated that the reprimand be made public, due to the wide publication of the remarks, in order to maintain standards in the profession.”

(The underlined text above contained hyperlinks to the Complaints Procedure and to the Code of Conduct.)

9. As to meaning, in summary, Dr. Godfrey argued that the 20 November 2018 meant that it was “proved” that Dr. Godfrey had used language that was deplorable and unprofessional in email correspondence and had thereby contravened the Icon Code of Conduct. It was argued that this meant it had been conclusively demonstrated by evidence or argument that Dr. Godfrey was guilty of the alleged wrongdoing. Accordingly, Dr. Godfrey has asserted a Chase Level 1 meaning (and, indeed, this is not disputed by Icon).
10. Icon argued that the 20 November 2018 statement meant that Dr. Godfrey had used deplorable and unprofessional language in email correspondence and had thereby been found by Icon’s Conduct Committee to have contravened the standards expected of an Icon member under Paragraph 4.19 of its Code of Conduct.
11. The full terms of the 1 January 2019 statement were as follows:

“Icon member expelled

At a meeting on 14th December 2018, the Board of Trustees of the Institute of Conservation resolved to expel Dr Evelyne Godfrey from membership of the Institute of Conservation on the ground that her continued membership is harmful to or is likely to become harmful to the interests of the Charity.

This decision, which is in accordance with Article 30.2.7 of Icon’s Articles of Association, resulted from Evelyne Godfrey’s continuing behaviour towards other members, staff, external partners and other organisations despite the published reprimand that had been issued.”

12. Dr. Godfrey’s submission, in outline, was that the 1 January 2019 statement meant that the Board of Trustees decided to expel her because her membership was harmful (or likely to be harmful) to the organisation, and they had based their decision on her continuing behaviour towards other members, staff, external partners and other organisations, despite the published reprimand that had been issued. Again, Dr. Godfrey asserts a Chase Level 1 meaning (which was not in dispute).
13. Icon argued that the 1 January 2019 statement meant that Icon’s Board of Trustees had resolved to expel Dr. Godfrey from Icon on the ground that her continuing behaviour towards other members, staff, external partners and other organisations, meant that Dr. Godfrey’s continued membership was, or was likely to become, harmful to the interests of the Charity.

III. Meaning: the law and conclusions

14. There was no dispute as to the basic principles that govern the court's approach in relation to this exercise. I have had regard to Koutsogiannis v The Random House Group Ltd [2019] EWHC 48 (QB); [2020] 4 WLR 25 at [11-12] and there is no need reproduce Nicklin J’s helpful summary which can be consulted on the hyperlink.
15. In my judgment, this is a straightforward case and an over-elaborate analysis is apt to distract one from the basic task. Although I found the submissions of assistance, I ultimately found the final meaning of the statements to be that which had originally struck me as a matter of immediate impression (and which is not in fact that far from the rival meanings put forward).
16. As to the 20 November 2018 statement, it meant that Dr. Godfrey had been found by the Icon Conduct Committee to have used deplorable and unprofessional language in email correspondence and it decided that Dr. Godfrey had accordingly fallen below the standards expected of an Icon member under Paragraph 4.19 of its Code of Conduct.
17. As to the 1 January 2019 statement, it meant Icon’s Board of Trustees had decided, in accordance with Icon’s rules, to expel Dr. Godfrey from membership because of her behaviour towards other members, staff, external partners and other organisations; that this was behaviour which had carried on despite the earlier reprimand issued to

Dr. Godfrey, and that for these reasons Dr. Godfrey's continued membership was currently, or would be likely to become, harmful to the interests of the organisation.

18. For completeness, I should add that I have come to my conclusion as to the meaning of the 20 November 2018 statement without reference to the two hyperlinks it contained (see paragraph [8] above). I do not consider the reasonable reader would in the circumstances be concerned to consult the formal documents one is sent to by these hyperlinks. The statements are simple and clear and require no further explanation.
19. I originally understood Dr. Godfrey's position to be that the links do not assist in terms of context or meaning. That is certainly the impression I obtained from the written submissions, but my understanding may not be correct.
20. I have accordingly also considered whether the ordinary and reasonable reader would arrive at a different meaning if, in addition to reading the text, they also clicked on and consulted these hyperlinks. My conclusion as to meaning would have been the same in such circumstances.
21. Had the reader taken this step, at most, they might have looked at the detail of the Code of Conduct and discovered what acts amounts to a breach of rule 4.19. That rule provides as follows:

“You must treat colleagues, employees, interns, students and volunteers fairly and with dignity and respect in your professional practice and must not harass any such persons. For the purposes of this Code of Conduct, harassment means behaviour that is:

 - (a) oppressive, tormenting, intimidating and offensive in terms of actions or words;
 - (b) deliberately impugning someone's professional and/or personal integrity; or
 - (c) causing someone alarm or distress.”
22. I do not consider this takes matters any further in terms of meaning. Insofar as there was a submission that the reader would consider the reference above to “harassment” to be a reference to criminal conduct, I reject that interpretation. If (contrary to my view) the reasonable reader would click and read the terms of rule 4.19, they would understand that provision to set out a broad range of behaviour which Icon had decided might amount to inappropriate conduct and harassment. That reader would not consider harassment under the Code to be equated with some form of criminal offence.

IV. Fact or Opinion?

23. Icon argued before me that its meanings would be understood to be statements of opinion, rather than of fact. It submits that a defence of honest opinion under section 3 Defamation Act 2013 should be open to it as a consequence. Dr. Godfrey disputes this. I turn to consider the issue of fact/opinion against my own meanings (which are similar to those advanced by the parties). I will first set out the relevant legal principles.
24. Section 3 of the Defamation Act 2013 enables a defendant to rely on the defence of honest opinion if three conditions are satisfied:
 - i) The statement complained of was a statement of opinion – s.3(2);
 - ii) The statement complained of indicated, whether in general or specific terms, the basis of the opinion – s3(3); and
 - iii) An honest person could have held that opinion in light of any fact or privileged statement existing at the time – s.3(4).
25. The third condition (and the related issue of whether a claimant can show that the defendant did not honestly hold that opinion (s.3(5)) is fact-sensitive and I note that Dr. Godfrey has pleaded malice against Icon in her Particulars of Claim. That is a matter for further pleadings and a potential trial.
26. The first two conditions, however, are issues of legal interpretation which I can and must decide now. They mirror conditions found in the previous common law defence of fair comment, and the principles which the common law developed remain applicable to the statutory defence: Barron v Collins [2015] EWHC 1125 [13]-[15].
27. I turn to the first condition: fact or opinion? As identified in Koutsogiannis (cited above) the Court will be guided by the following principles in determining whether the words complained of should be regarded as containing allegations of fact or opinion:
 - (a) The statement must be recognisable as comment, as distinct from an imputation of fact.
 - (b) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, or observation.
 - (c) The ultimate question is how the word would strike the ordinary reasonable reader.
 - (d) The subject matter and context of the words may be an important indicator of whether they are fact or opinion.
 - (e) 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).
 - (f) 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.

- (g) In deciding whether the words complained of are comment, it is permissible to look only at the publication itself, although the context of the words complained of within the publication is to be taken into account.
28. I have also had regard to the recent and comprehensive review of the case law in this area (including the law in relation to the common law fair comment defence) by Sharp LJ in Butt v Secretary of State [2019] EWCA Civ 933; [2019] EMLR 23 at [25]-[50]. That case is particularly relevant given the arguments made by Dr. Godfrey as to the authoritative nature of the defendant body in this case. I return to Butt in more detail below.
29. In relation to the second question, the requirement in s.3(3) that the statement must indicate, in general or specific terms, the basis of the opinion also reflects the broadly comparable requirement in the common law defence. As such, the guidance provided by the Supreme Court in Joseph v Spiller [2011] 1 AC 852 remains relevant.
30. As Lord Phillips emphasised in Joseph, the purpose of this requirement is not to put the reader in a position to judge whether the comment was well founded, but simply to alert the reader to the general subject matter of the comment – see [101] and [103]:

“The underlying justification for the creation of the fair comment exception was the desirability that a person should be entitled to express his view freely about a matter of public interest. That remains a justification for the defence, albeit that the concept of public interest has been greatly widened. If the subject matter of the comment is not apparent from the comment this justification for the defence will be lacking. The defamatory comment will be wholly unfocussed...”

Accordingly:

“... even if it is not practicable to require that those reading the criticism should be able to evaluate the criticism, it may be thought desirable that the commentator should be required to identify at least the general nature of the facts that have led him to make the criticism. If he states that a barrister is "a disgrace to his profession" he should make it clear whether this is because he does not deal honestly with the court, or does not read his papers thoroughly, or refuses to accept legally aided work, or is constantly late for court, or wears dirty collars and bands.”

31. As the example given by Lord Phillips indicates, a reference to the ‘general nature’ of the underlying issue is usually sufficient. The requirement is that the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based: see Yeo v Times Newspapers [2014] EWHC 2853 (QB) at [90]-[91].

The first condition

32. Applying these principles to the meanings I have found, I consider that both the 20 November 2018 and 1 January 2019 statements would reasonably be understood to constitute statements of opinion on Icon's part and that the first condition of the section 3 defence is satisfied. I have been principally guided by how the words used would strike the ordinary reasonable reader and my more detailed reasons are as follows.
33. As to the 20 November 2018 statement, the central allegations contained in the 20 November 2018 statement are that the language used by Dr. Godfrey in the email correspondence was "deplorable" and "unprofessional" and "contravened the standards expected of an Icon member" under its Code of Conduct. These are in my judgment classic value judgements which required subjective assessments of Dr. Godfrey's behaviour by the Conduct Committee, in light of its consideration of the evidence and its understanding of that organisation's standards and expectations.
34. As to the 1 January 2019 statement, the central allegation is that Dr. Godfrey's continued membership of Icon "is harmful or is likely to become harmful to the interests of the Charity". This is also in my judgment an evaluation on the part of the Board of Trustees, based on their personal opinions as to the seriousness of the behaviour and their perception of what is or "is likely to become" (the latter being a necessarily speculative assessment) harmful to that body's interests.
35. In both instances, the subjective nature of the criticism levelled against Dr. Godfrey would be immediately recognisable by the reader, who would also appreciate the value judgment underlying both decisions. I am reinforced in this view by the wider context of the statements: these are judgments reached by Icon's Conduct Committee and Board of Trustees about the compatibility of Dr. Godfrey's behaviour with that organisation's own rules and interests.
36. I reject Dr. Godfrey's argument that the characterisation of her conduct in the statements was transformed into an assertion of fact because the relevant assessment was undertaken by formally convened panels applying defined criteria. That fact (in and of itself) does not transform what to my mind are opinions into statements of fact. The reader would readily identify that Icon had come to its conclusions based on its evaluation of facts (the emails and continuing behaviour) applying the Code of Conduct.
37. I draw assistance in this regard from Nicol J's observations in Butt v Secretary of State for the Home Department [2017] EWHC 2619 (QB) at [36], that the fact that an assessment of an individual's conduct would be understood to represent the definitive determination of an official body does not make that determination any less evaluative.
38. Nicol J's decision was upheld by the Court of Appeal [2019] EWCA Civ 933 where the importance of evaluative value-laden judgments within the context of the opinion defence was analysed: see para 49 of the judgment of Sharp LJ.
39. Further, I do not accept the submission of Dr. Godfrey that the fact that the 20 November 2018 statement recorded the Conduct Committee as having "found

proved” that Dr. Godfrey had used deplorable and unprofessional language contradicted the ultimately subjective nature of that view. All that was found “proved” was that the emails merited the description of being “deplorable and unprofessional” as a matter of assessment and therefore in violation of the Code of Conduct, rule 4.19.

40. This may have had serious potential personal and professional consequences for Dr. Godfrey, but those consequences do not turn the opinion of a professional body into a statement of fact. Indeed, the consequences for Dr. Butt of what the Secretary of State had said, as a matter of opinion, about him were probably far more serious. Although each case depends on its own facts, it will be recalled that the meaning of the Press Release in issue in Dr Butt’s case was that he was an extremist hate speaker who legitimised terrorism and that he was a person from whose pernicious and poisonous influence students needed protection.
41. As also explained by Sharp LJ earlier at para. 44 of her judgment in Butt, whether a piece of writing or speech expresses views that conform to a given set of values is something that is obviously incapable of objective proof. It is a classic value judgment and would be seen as such by the reader. It is plainly a “deduction, inference, conclusion, criticism, remark or observation”. Those observations apply in my judgment with substantial force in the case before me and support the conclusion I have set out at paragraphs [33] and [34] above.
42. I should also record that Dr. Godfrey argued that the subject-matter of the statements was not a matter of public interest (or public debate), as in the Butt case. It does not seem to me that this point is relevant. There is no requirement of “public interest” (or public debate) under section 3 of the Act.
43. Further, I have not overlooked the case of Greenstein v Campaign Against Anti-Semitism [2019] 281 (QB), upon which substantial reliance was placed by Dr. Godfrey. The general principles in that case are reflected in the overall summary I have drawn from Koutsogiannis above and Nicklin J at [30] of Greenstein was just applying those general principles in the context of the publications in issue in that case.
44. I was pressed by Dr. Godfrey with the point that neither party had identified a case where the honest opinion defence had been applied to the published outcome of proceedings by a professional membership organisation. Dr. Godfrey argued that this was significant and pointed to the unfairness of such a body benefitting from such a defence. I do not see anything special in a publication of an opinion by such a body and why (if in fact it has expressed what, in context, is an opinion) it should not be entitled to the defence.
45. I strongly suspect that the lack of case law showing professional membership organisations using the defence is because members do not usually use libel proceedings to complain about public statements concerning the circumstances and facts surrounding their expulsion. Members, by subscribing to such organisations, typically agree to be bound in contract by the membership rules which will include submission to rules of discipline, and the publication by the body of the outcome of disciplinary processes. These organisations generally provide a process for the members to participate in the procedure and, on occasion, those who are not content

with the outcome take ordinary civil proceedings (in, for example, contract) as opposed to attacking the publication of the outcome in defamation proceedings.

The second condition

46. As to the second condition, in my judgment the factual basis of the opinions of the Conduct Committee and Board of Trustees was sufficiently indicated in the statements so as to satisfy section 3(3). The test in the case law is easily met as I set out below.
47. So, as the 20 November 2018 statement makes clear, the Conduct Committee's decision was based on "language" and "remarks in email correspondence" which Dr. Godfrey was alleged to have made. The statement goes on to note that the conclusion that Dr. Godfrey had contravened clause 4.19 of the Code of Conduct was reached following consideration of "all the documentary and other evidence" before the Conduct Committee.
48. To the same effect, the 1 January 2019 statement was explicit in identifying the basis for the Trustees' conclusion that Dr. Godfrey's continued membership is or is likely to become harmful to the interests of the organisation ("her continuing behaviour towards other members, staff, external partners and other organisations despite the published reprimand that had been issued").

V. Conclusion

49. The meanings of the statements are those set out in paragraphs [16] and [17] above, and I hold that these are statements of opinion.
50. I have directed a further hearing in relation to costs and case management directions.