Neutral Citation Number: [2020] EWHC 966 (QB)

Case No: QB-2019-000898

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

Date: 23 April 2020

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Andrew Peck	**Claimant**
- and -	
(1) Williams Trade Supplies Limited **(2) Miquel Goddard (known as Micky Goddard)**	**Defendants**

- -
- -

Claire Overman (instructed by **Ratcliffes Solicitors**) for the **Claimant**
Victoria Simon-Shore (instructed by **Biscoes Solicitors**) for the **Defendants**

Written submissions: 2 April 2020

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date of hand-down is deemed to be as shown above.

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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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THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. This is a claim for libel, malicious falsehood, negligent misstatement and alleged breach of the Data Protection Act 1998 arising from the sending of an email by the Second Defendant to a prospective employer of the Claimant on 16 March 2018 ("the Email"). The Second Defendant is a Commercial Manager of the First Defendant which, the Claimant contends, is liable for the actions of the Second Defendant.

2. The brief background to the dispute can be summarised as follows. In early 2018, the Claimant was an Area Sales Manager for Ideal Boilers Limited ("Ideal"). He successfully applied for the post of Area Sales Manager for Grant Engineering (UK) Limited ("Grant"). He was offered the job by Grant on 15 March 2018. The Second Defendant sent the Email to Andy Smith, who was Grant's National Sales Manager and would have become the Claimant's line manager at Grant. The Claimant contends that, as a result of the Email, Grant withdrew the job offer made to him.

3. The terms of the Email were as follows (with punctuation – or lack of it – as it appears in the original text):

> "Hi Andy
>
> I hope you are well!
>
> A bit of an awkward one here and one completely off the record…
>
> I have heard on the grape vine 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 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 …"

4. The Claim Form was issued on 15 March 2019. Particulars of Claim were dated 8 July 2019. For the purposes of the libel claim, the natural and ordinary meaning that the Claimant contended the words bore was:

> "The Claimant is thoroughly unfit to be a sales representative at Grant as he:
>
> (i) is universally disliked by the sales teams at the First Defendant's Kent branches;
>
> (ii) has been officially 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 contact Grant to request that he not deal with the First Defendant in his new role."

5. The same meaning ("the Claimant's Meaning") is relied upon by the Claimant for the purposes of his malicious falsehood claim. Particulars of the alleged falsity of this meaning and particulars of alleged malice are set out in the Particulars of Claim. They are not material for the issues that I have to decide, and I have not read them. The Claimant has pleaded a claim for special damages, which he contends were caused by the publication of the Email, but has also relied upon s.3 Defamation Act 1952 (set out in [14] below).

6. The Defendants filed a Defence on 6 August 2019. For the purposes of the libel claim, the Defendants denied that the Email was defamatory of the Claimant at all, but if it conveyed any defamatory meaning, substantive defences of qualified privilege, honest opinion and truth are relied upon. The meaning defended as honest opinion was:

> "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."

The meaning that the Defendants contended was substantially true was:

> "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."

I shall refer to these as "the Defendants' Meanings".

7. I have deliberately not read or considered the particulars relied upon to support the substantive defences advanced by the Defendants as they are not relevant to the issues that I have to determine.

8. By a consent order dated 4 November 2019, Master Davison directed the trial of the following preliminary issues:

i) whether, for the purposes of the Claimant's defamation claim, the Email bears the Claimant's Meaning or the Defendants' Meanings and, if not, what meaning(s) the Email bear(s);

ii) whether the meaning of the Email found by the Court is defamatory of the Claimant at common law;

iii) whether the Email, in the meaning(s) found, is a statement of fact or expression of opinion;

iv) whether, if the Email was an expression of opinion, the Email indicated, in general or specific terms, the basis of the opinion(s) stated; and

v) whether, for the purposes of the Claimant's malicious falsehood claim, the Claimant's Meaning is (a) a reasonably available meaning of the Email; and (b) a meaning that Mr Smith would reasonably have understood the words complained of to bear.

At this stage, I am not concerned with any issue as to serious harm under s.1 Defamation Act 2013.

9. With the consent of the parties, no hearing took place. Instead, I have considered the written submissions of the parties on the issues to be determined. In accordance with the practice I outlined in ***Hewson -v- Times Newspapers Ltd*** **[2019] EWHC 650 (QB)** [25], copies of the parties' written submissions will be made available with copies of this judgment.

10. Trials of preliminary issues (i) to (iv) have become commonplace in defamation actions. They are amenable to early determination because, as evidence beyond the words complained of is usually not admissible, it is simply a matter of the Court applying well-established legal principles to the publication sued upon. Issue (v) – concerning meaning for the purposes of malicious falsehood – raises much more complicated issues, and, for the reasons I explain below, is not one I think it is helpful or appropriate to determine (see further [12]-[18] below).

Defamation: the law

11. The principles to be applied in determining issues (i) to (iv) are not controversial.

i) For the determination of the natural and ordinary meaning, and whether the Email conveys an allegation of fact and/or an expression of opinion, the relevant principles are set out in ***Koutsogiannis -v- The Random House Group Limited*** **[2020] 4 WLR 25** [11]-[17].

ii) Ms Simon-Shore has rightly reminded me of the need for caution when the Court makes the assessment of whether the words complained of would be understood as an expression of opinion or an allegation of fact. The point was made by the Court of Appeal in ***British Chiropractic Association -v- Singh*** **[2011] 1 WLR 133** [16], [32] and further explained by Warby J in ***Sube -v- News Group Newspapers Ltd*** **[2018] EWHC 1234 (QB)** [33]:

> "***Singh***'s case 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]…"

Ms Simon-Shore points to the approach of the Court in ***Zarb-Cousin -v- Association of British Bookmakers*** **[2018] EWHC 2240 (QB)** [38] and ***Triaster -v- Dun & Bradstreet Limited*** **[2019] EWHC 3433 (QB)** [22] as examples of a flexible and holistic approach being adopted to the determination of the question of fact/opinion.

iii) Whilst the assessment of the natural and ordinary meaning remains wholly objective, where, as here, there is an identified and limited readership, the Court

can focus on the hypothetical reasonable reader in the position of the publishee(s) – see ***Koutsogiannis*** [12(xi)]. This permits a more evidence-based assessment of the qualities of the hypothetical reader than would be the case with a more widespread publication: ***Lewis -v- Commissioner of Police for the Metropolis*** **[2011] EWHC 781 (QB)** [49]; ***Theedom -v- Nourish Training Limited*** **[2016] EMLR 10** [9]-[11]. Nevertheless, the Court must remain wary of – and avoid – impressionistic assessments of the characteristics of the publishee(s) which are often little more than impermissible assertions by the opposing parties of how a particular reader would understand the words complained of: ***Koutsogiannis*** [12(xi)].

iv) As to whether a statement is defamatory at common law, the applicable principles are set out in ***Allen -v- Times Newspapers Ltd*** **[2019] EWHC 1235 (QB)** [19]. Ms Overman has relied upon several cases in which allegations calling into question a person's fitness for, or competence in, a role have been held to be defamatory: ***Drummond-Jackson -v- British Medical Association*** **[1970] 1 WLR 688, 698-699**; ***Skuse -v- Granada Television Ltd*** **[1996] EMLR 278, 288**; ***Dee -v- Telegraph Media Group Ltd*** **[2010] EMLR 20** [48]; and ***Morgan -v- Times Newspapers Ltd*** **[2019] EWHC 1525 (QB)** [62]. In her written submissions, she also quoted the following passage from §2.38 in *Gatley on Libel & Slander* (12th edition, 2013, Sweet & Maxwell) (with footnotes omitted):

> "It is defamatory to impute that a person is unfit for his profession or calling owing to want of ability, mental stability, learning or some other necessary qualification, or that he has been guilty of any dishonest or disreputable conduct or any other misconduct or inefficiency therein…"

v) Pursuant to s.3 Defamation Act 2013, a defence of honest opinion requires a defendant to demonstrate that the following three conditions are met:

a) first, that the statement complained of was a statement of opinion;

b) second, that the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and

c) third, that an honest person could have held the opinion on the basis of (1) any fact which existed at the time the statement complained of was published; and (2) anything asserted to be a fact in a privileged statement published before the statement complained of.

The determination of the preliminary issues requires me to resolve whether the first and second conditions are satisfied.

vi) Assessment of the first condition requires an application of the principles set out in ***Koutsogiannis*** [16]. In respect of the second condition, a defendant must show "*that the reader could 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*": ***Joseph -v- Spiller*** **[2011] 1 AC 852** [104]; ***Yeo -v- Times Newspapers Ltd*** **[2015] 1 WLR 971** [91]. These cases were dealing with the old common law defence of honest

comment/opinion, but it is clear both in the choice of wording of the new statutory defence under s.3 Defamation Act 2013, and from the Explanatory Notes (Paragraph 22), that Parliament intended that condition 2 should reflect the articulation of this principle by the Supreme Court in ***Spiller***.

Malicious Falsehood: the law

12. At common law, a claimant in a malicious falsehood claim must prove publication to a third party of words referring to him, his property or his business which (1) are false; (2) were published maliciously; and (3) have caused special damage: ***Ratcliffe -v- Evans* [1892] 2 QB 524, 527**. As Bowen LJ observed in ***Ratcliffe -v- Evans***, proof of damage was the "*very gist of the action*" (p.532). Malicious falsehood has been long recognised as one of the economic torts.

13. In most malicious falsehood cases, the issue of falsity requires a determination of the meaning of the published statement. Although the Court's task when assessing meaning for the purposes of malicious falsehood claims has many similarities to the exercise that has to be performed in defamation claims, there are material differences. Most importantly, the single-meaning rule – a cardinal principle in defamation – does not apply to malicious falsehood: ***Ajinomoto Sweeteners SAS -v- Asda Stores Limited* [2011] QB 497** [35]. Once the single-meaning rule has been despatched, with it goes the objective assessment of the meaning that the notional ordinary reasonable reader would understand the words to bear. In consequence, whereas in defamation, inquiry into what individual publishees understood the words to mean is (with limited exception in some cases on the issues of harm and damage) irrelevant, in a malicious falsehood claim, the subjective understanding of the individual publishees (if they can be identified) is likely to be an essential element of establishing causation of damage. Relying on the authority of ***Ajello -v- Worsley* [1898] 1 Ch 274**, the authors of *Clerk & Lindsell* summarise the principle as follows (22nd Edition, Sweet & Maxwell, 2019, §23-20):

> "In order to succeed the claimant must be able to show that the damage suffered by him flowed directly from the untruth of the statements of which he complains. The damage complained of must be attributable to the falsehood. This may depend on how the falsehood is interpreted."

14. A claimant can be relieved of the obligation to prove that special damage was caused by the publication of the falsehood if s/he can rely upon s.3(1) Defamation Act 1952, which provides:

> "In an action for … malicious falsehood, it shall not be necessary to allege or prove special damage -
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form, or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

15. The phrase "*calculated to cause pecuniary damage*" requires a claimant to show that it is more likely than not that s/he has been caused pecuniary damage by publication of the falsehood: ***Tesla Motors Ltd -v- BBC*** **[2013] EWCA Civ 152** [27]. Nevertheless, the issue of causation remains important, whether a claimant relies upon a plea of special damage or upon s.3 Defamation Act 1952. Put simply, in s.3 cases, unless the Court is satisfied that the publication of the falsehood is more likely than not to cause pecuniary damage, the claimant will have failed to demonstrate this necessary part of his/her malicious falsehood claim.

16. If there has been publication to a large, but unquantifiable, number of publishees, it is usually impossible to ascertain what meaning(s) they understood the words complained of to bear. In those circumstances, a malicious falsehood claim can be maintained in respect of any meaning that a substantial number of people who read the words would reasonably have understood the words complained of to bear. "*In other words, a claimant can seek to show that any reasonably available meaning of the statement in question was false and made maliciously*": ***Tinkler -v- Ferguson*** **[2019] EWCA Civ 819** [29]. However, where, as here, the publication complained of is to a single individual, the only relevant question is what meaning did the publishee understand the publication to bear and, if there is a dispute about it, whether *this* meaning is an available meaning for the purposes of malicious falsehood – see observations of Tugendhat J in ***Ajinomoto Sweeteners Europe SAS -v- Asda Stores Ltd*** **[2010] QB 204** [31]. Ascertaining whether the *pleaded* meaning is an available meaning will be academic if it is not the meaning that the publishee understood the words complained of to bear. It is *that* meaning which a claimant must demonstrate to be false, published maliciously, and either to have caused special damage or, where the claimant can and does rely on s.3 Defamation Act 1952, that it was likely to do so.

17. No directions have been given for the filing of any evidence, so I do not have a witness statement from Mr Smith – the sole publishee relied upon. In consequence, I do not know what he understood the Email to mean. In the Particulars of Claim, the matter is dealt with briefly with a simple averment that the Email bore the Claimant's meaning and that this meaning was both false and published maliciously. There is no mention of what meaning Mr Smith understood the words to bear.

18. In these circumstances, it is neither necessary nor appropriate to determine issue (v) as a preliminary issue, and with the agreement of the parties, I decline to do so. For the reasons I have explained, resolving whether the Claimant's meaning is a reasonably available meaning of the Email is irrelevant, unless this is the meaning Mr Smith actually understood the Email to bear. On that issue, I have neither a pleaded case nor any evidence. Further, determining the second issue - whether it was a meaning "*that Mr Smith would reasonably have understood the words complained of to bear*" - is also irrelevant; indeed, it is entirely hypothetical. The relevant issue is not what meaning Mr Smith *would* have understood the Email to bear (reasonably or not), but the meaning he *did* understand the Email to bear.

Submissions

Issue (i): the natural and ordinary meaning of the Email

19. Ms Overman, on behalf of the Claimant, contends:

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

- the Claimant was "*not well received in our branches in Kent*";
- the Claimant was "*officially named the worst rep of all time*";
- the Defendants had "*put an official request in with Ideal boilers for him to no longer visit any of our branches*"; and
- the Second Defendant had "*huge reservations against him dealing with any of our Williams branches*," and, when she heard that Grant were taking on the Claimant, "*felt only right that [she] speak to you immediately and request very strongly that he does not look after Williams & co as a company if you do decide to take him on*."

ii) Each of these allegations appears in the Claimant's Meanings. At its simplest, the Claimant contends that the Email means what it says.

iii) Accordingly, *any* reasonable reader would have understood the words complained of to bear the Claimant's Meaning. However, a reasonable reader in the position of Mr Smith would be even more likely to do so. Relying upon the principles from ***Lewis*** and ***Theedom*** (see [11(iii)] above), a reader in Mr Smith's position would have read the Email with particular care, and would have given careful weight to each of the allegations made in it. This, it is argued, is for the following reasons:

- The Email was not a casual or personal communication but arose in the context of the business relationship between the First Defendant and Grant. The Second Defendant was a business contact of Mr Smith. As in ***Lewis*** and ***Theedom***, the publisher was an individual whose position meant her communications merited close attention.
- The purpose of the Email was clear from its timing and its contents: this was a last-ditch effort by the Second Defendant to prevent the Claimant from being offered the job as a sales representative for Grant. Relying upon Neill LJ's judgment in ***Berkoff -v- Burchill*** **[1997] EMLR 139, 151**, Ms Overman contends that, although the meaning of words in a libel action is to be determined by the reaction of the ordinary reader and not by the intention of the publisher, "*the perceived intention of the publisher may colour the meaning*." Here, she argues, a reasonable reader in Mr Smith's position would have been left in no doubt as to the intention behind the Email: it was an urgent warning against employing the Claimant.

iv) A reasonable reader in the position of Mr Smith would be well aware that such allegations, being made at the eleventh hour and with the purpose of warning Grant against employing the Claimant, would not have been made lightly. It is plain that retracting a job offer at such a late stage would have significant

repercussions for any prospective employee, and would be certain to lead to after-the-event scrutiny of the propriety of Grant's and the Defendants' actions. A reader in Mr Smith's position would therefore expect that the Defendants had themselves considered carefully each of the allegations before committing them to writing.

20. For the Defendants, Ms Simon-Shore attacks the form of the Claimant's Meaning as a breach of the repetition rule. She argues that sub-paragraphs (ii) and (iii) of the Claimant's Meaning are breaches of the repetition rule, and relies on Warby J's observations in ***Price -v- MGN Ltd*** **[2018] 4 WLR 150** [57]. The objection is to that part of the Claimant's meaning that contends that he "*has been officially named by the First Defendant as the worst sales representative of all time*" and that the Claimant's conduct had "*caused [the First Defendant's] 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.*"

21. On the substantive question of meaning, Ms Simon-Shore submits:

i) The Claimant's 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.

ii) The opening sentence of the Claimant's Meaning – that the Claimant is "*thoroughly unfit to be a sales representative at Grant*" – unjustifiably elevates what is 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.

iii) The Second Defendant makes clear that the 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*".

iv) 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 unjustified gloss on the meaning of the Email and is an example of the insertion of an adjective into the Claimant's meaning which is not part of the natural and ordinary meaning of the words: see ***Koutsogiannis*** [17].

v) 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.

vi) 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 to treat the words literally, whereas the ordinary reasonable reader would recognise the obviously hyperbolic and conversational nature of the Second Defendant's remark.

vii) "*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 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.

viii) 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, offends 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.

ix) Finally, the motivation of the Second Defendant in contacting Grant cannot substantially affect determination of the objective meaning of the Email. It is strained and artificial that this alleged motivation would have had any impact on the ordinary reasonable reader.

Issue (ii): is the meaning defamatory at common law

22. Ms Overman, relying on the principles set out in [11(iv)] above, submits that the Claimant's Meaning is defamatory because it imputes to him that he is unfit for his job as a sales representative.

23. Ms Simon-Shore argues that any imputation conveyed by the Email does not cross the threshold of seriousness to be defamatory at common law.

i) The Email did not include any allegation of culpable behaviour or negligence against the Claimant. Addressing the statement of principle from *Gatley* (see [11(iv)] above), she contends that the Email does not attribute to the Claimant any detrimental quality, or the absence of any essential quality; there is no suggestion of lack of integrity, mental stability, judgement, learning or some other necessary qualification, nor any assertion that he has been guilty of any dishonest or disreputable conduct or any other misconduct or inefficiency in his work.

ii) Instead, she submits, 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 cannot 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. It is not clear what, if anything is being said about the Claimant's character or conduct, other than it rendered him unwelcome. In the absence of any clear imputation, the Defendants submit that any meaning found could not meet the threshold of seriousness.

Issue (iii): whether the Email conveys an expression of opinion and/or statement of fact

24. Ms Overman for the Claimant contends that the context in which the words complained of were published is of particular importance. The Email was, she argues, a "*last-ditch*" effort by the Second Defendant to prevent the Claimant from being offered the job as a sales representative for Grant. If acted on by Mr Smith, she submits that it would inevitably have led to later inquiry into the propriety of the actions of all involved. Accordingly, an ordinary reader would expect the Email to contain specific factual grounds, underpinning the Second Defendant's expressed concerns, that would stand up to such scrutiny. Those grounds are clearly set out in the Claimant's Meaning and form the essential sting of the Email. They concern the Claimant's past conduct; his relationships with others; and the measures that the Defendants had been forced to take as a result. They would plainly strike the ordinary reader as factual in nature.

25. For the Defendants, Ms Simon-Shore submits:

i) The Email was an expression of opinion, and would strike the ordinary reasonable reader as such.

ii) The sole focus 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 Second 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. That the Email stated that the Claimant was "*officially named the worst rep of all time*" rather than "*he is the worst rep of all time*" would make it clear to the reasonable reader that it is not the Second Defendant herself, but others, who hold the Claimant in such low regard and therefore it is also their opinion she is passing on to the reader.

iii) 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 the Claimant's qualities; she does not make statements of verifiable fact about his conduct, skills or lack thereof. She conveys the conclusion that the Claimant is "*persona non grata*" within the

First Defendant's branches but does not express detailed reasons as to the basis for that position.

iv) 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.

Issue (iv): if the Email conveyed an expression of opinion, whether it indicated, in general or specific terms, the basis of the opinion(s) stated

26. In her written submissions, Ms Overman accepted that if the Court determined that the Email was or contained a statement of opinion, then the Email did indicate the basis of the opinion stated and that this issue should be determined in the Defendant's favour.

Decision

27. For the reasons I set out below, my decisions on the preliminary issues are:

i) the natural and ordinary meaning of the Email is:

> "The Claimant was unfit (or unable) satisfactorily to perform the role of sales representative of Grant because, in his past dealings with the First Defendant's sales team, he had consistently fallen seriously below the standards to be expected of a competent and diligent sales representative."

ii) the words up to "because" in that meaning are an expression of opinion and the balance makes an allegation of fact.

iii) both elements are defamatory at common law.

iv) the Email did indicate the basis of the opinion expressed.

The Defendants have therefore demonstrated the first and second conditions that are required to be proved for the defence of honest opinion under s.3 Defamation Act 2013.

Reasons

Meaning

28. Ms Simon-Shore's preliminary objection to the form of sub-paragraph (ii) of the Claimant's meaning is-well founded for the reasons she advanced. The principle, identified by Warby J in ***Price -v- MGN***, has also been recognised and applied in ***Koutsogiannis*** [32(ii) and (iii)]. In defamation proceedings, a pleaded meaning – whether advanced by a claimant or by a defendant – must identify the act(s), condition(s) or attribute(s) of the claimant which it is alleged is/are defamatory of him/her, not reports of them from others. For example, it is impermissible to plead, as a meaning, "*X had been reprimanded by his employers for repeated breaches of health and safety regulations*". This is to say no more than X's employers had

stated/believed/established that X had repeatedly breached the relevant regulations. The form of the defamatory imputation – avoiding the repetition rule – should be, depending upon the overall context of the words complained of, either: "*X was guilty of breaching health and safety regulations*" or "*there were reasonable grounds to suspect that X had breached health and safety regulations*".

29. The form of the defamatory imputation can usually be checked by considering whether it would be permissible to seek to prove, as true, the relevant imputation. Here, for example, it would not be permissible for the Defendants to seek to prove, simply as a matter of fact, that the Claimant had been "*officially named by the First Defendant as the worst sales representative of all time*" and/or that the First Defendant had put in a request to Ideal that the Claimant no longer visit any of its branches. That is because, in their different ways, these imputations are in the form of conclusions or statements of others, not the underlying act(s), condition(s) or attribute(s) of the Claimant which are said to be defamatory of him.

30. The overall impression created by the Email is that, on the basis of his unsatisfactory historic performance of his role as a sales representative for Ideal in his dealings with the First Defendant he was unfit to be appointed to a similar role with Grant. Largely, I consider the Defendant's Meaning captures the meaning of the Email, but with some material changes. Although the Email does not identify any particular acts of the Claimant which were unsatisfactory, it clearly conveyed the impression that they were sufficiently serious to warrant the Claimant being named "*the worst rep of all time*" and to have led to a request to be made to his employers that he no longer visit any of the Second Defendant's branches. These were therefore not trivial failures –for example clashes of personality which might be remedied in the future – but repeated and serious failures to perform his role adequately. I have reflected this aspect in the meaning by the inclusion of the words "*consistently fallen seriously below the standards to be expected of a competent and diligent sales representative*".

Fact/Opinion

31. In my judgment this is very close to a text-book example of the expression of opinion. It can be divided, relatively simply, into the expressed opinion based on indicated facts. The hypothetical ordinary reasonable reader would immediately recognise this as conveying the Second Defendant's opinion. When someone expresses "*huge reservations*" that is usually a sure indication that an opinion is being offered. I reject Ms Overman's argument that the hypothetical ordinary reasonable reader would ponder the consequences of sending the Email – and the suggested *post-mortem* that would likely follow – and then conclude that the Email contained allegation(s) of fact. This is far too analytical. However, I also reject Ms Simon-Shore's submission that the Email consists solely of the expression of opinion and does not make any factual allegations. There is a clear underlying factual allegation that the Claimant's performance had fallen seriously below the standards to be expected of a competent and diligent sales representative. Whilst the Second Defendant does not spell out clearly what the Claimant has done (or failed to do), the imputation is plainly conveyed by implication from the reported facts: the Claimant being named "*the worst rep of all time*" and the request that he no longer service any of the First Defendant's branches.

Defamatory at common law

32. I accept Ms Overman's submissions on this point. The meaning I have found imputes conduct which would substantially affect, in an adverse manner, the attitude of other people towards the Claimant or have a tendency so to do. For the reasons I have explained in relation to the meaning I have found, the imputation was that there had been serious – not trivial – failures by the Claimant in the discharge of his role as a sales representative.

Facts indicated upon which opinion based

33. Although Ms Overman conceded this point, I am satisfied that the Email indicated the basis of the opinion that was expressed: i.e. the past performance of the Claimant in his dealings with the First Defendant's staff.