Neutral Citation Number: [2010] EWHC 2411 (QB)

Case No: HQ09X01852

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/10/2010

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Metropolitan International Schools Limited (T/A Skillstrain And/Or Train2game)	**Claimant**
- and -	
(1) Designtechnica Corporation (T/A Digital Trends) **(2) Google Uk Limited** **(3) Google Inc**	**Defendants**

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- -

Mr David Hirst (instructed by **Eversheds LLP**) for the Claimant
The Defendants did not appear and were not represented

Hearing dates: 28 July 2010

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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 TUGENDHAT

Mr Justice Tugendhat :

1. This judgment contains my assessment of the damages which the court will order the First Defendant ("Digital Trends") to pay to the Claimant for libels upon the Claimant published by Digital Trends through the internet. The material complained of is identified in paras 13-16 and 20-24 of the Particulars of Claim and summarised below. It was published from 2006 until about August 2009. At that time the First Defendant removed the material from its website after it had been served with these proceedings. But it has not otherwise responded to these proceedings.

2. I have assessed damages in the sum of £50,000 for the reasons explained below. I have made this assessment after hearing evidence from a Director of the Claimant company, Mr Jaroslav Bradik and after reading documentary evidence submitted to the court.

THE PROCEDURAL HISTORY

3. On 1 May 2009 the Master gave permission to the Claimant to serve proceedings outside this jurisdiction on both Digital Trends and the Third Defendant. The Third Defendant (but not Digital Trends) applied to set aside that order. On 16 July 2009, in judgment [2009] EWHC 1765 (QB), this court did set aside that order as it related to the Third Defendant.

4. The Claimants had joined the Second and Third Defendants as defendants to this action. But the claim against the Second and Third Defendants was narrower than the claim against Digital Trends. It was confined to a search result identified in para 17 of the Particulars of Claim. When the judge set aside the order, the result was that the claims against the Second and Third Defendants were not pursued. The fact that the claims against the Second and Third Defendants failed in this way has nothing to do with the truth or falsehood of the words published by Digital Trends. All that this court held was that the Third Defendant was not, as a matter of law, responsible for the publications complained of. That was so whether the publications complained of were true or false. The decision involved no determination of the issue of truth or falsity.

5. As is well known, under the laws of England if a claimant proves that defamatory words have been published about him, he does not have to prove that he has suffered actual damage in order to obtain a judgment in his favour. Nor does he have to prove that the defamatory words are false. These two matters are presumed in his favour. But claimants are not obliged to rely on these presumptions of law, and in practice claimants only rely upon these two presumptions to a limited extent. Claimants normally rely on these presumptions only during the stages of the proceedings up to the trial of the action. At any trial (or any assessment of damages) claimants normally choose to put before the court evidence with a view to proving both that the words complain of are false, and that the claimants have suffered actual damage as a result of the defamatory publication.

6. The reason why claimants normally do this at a trial (or at any assessment of damages) is that if they do not do that then the jury, or the judge (if the judge is sitting without a jury), may well award damages only in a low or nominal sum. And if that

happens then the claimant may not be seen to have vindicated his reputation and may not recover his costs.

7. In the present case the Claimant did not choose to rely upon the presumptions of falsity and damage which the law permits a claimant to rely on. From the start of this case the Claimant chose to allege in its Particulars of Claim that the words it complained of were factually incorrect (para 27). It also alleged in its Particulars of Claim that it had been gravely damaged in its business and trading reputation, and gave particulars of its case in support of that (para 35).

8. The Claim Form in this action was issued on 1 May 2009. It was served out of the jurisdiction on 5 May 2009 by permission of the Master given on 1 May. As noted above, unlike the Third Defendant, Digital Trends did not apply to this court to set aside the order giving permission to serve it out of the jurisdiction. But neither did they enter an Acknowledgement of Service, which they needed to do if they were to defend the action. So on 11 June 2009 this court entered judgment against Digital Trends and directed that there be a hearing for the assessment of the damages payable by the Digital Trends to the Claimant. That order was served on Digital Trends and upon its lawyers Dunn Carney Allen Higgins & Tongue LLP in Portland Oregon. The Claimant also served upon them the evidence it intended to rely upon at the hearing of the assessment of damages.

9. Digital Trends chose not to respond to these steps in the proceedings. They have not challenged the jurisdiction of this court, and they have not responded in any way to any of the allegations made against them (other than by removing the material complained of from their website). That is their right. But it means that the court does not have the benefit of any arguments or evidence submitted on their behalf.

THE FACTUAL BACKGROUND

10. The facts were summarised by Eady J in his judgment granting the application of the Third Defendant for an order setting aside the permission to serve the Third Defendant out of the jurisdiction. I gratefully adopt the following:

> "1. The Claimant in these proceedings is Metropolitan International Schools Ltd, which now trades as "SkillsTrain" and/or "Train2Game". Over the period from 1992 to 2004 the Claimant apparently traded under the name Scheidegger MIS. It is described as one of the largest European providers of adult distance learning courses and claims to have over 50 years experience in teaching vocational skills. It is only recently, with effect from 16 March 2009, that it has carried on business under the style "Train2Game" providing distance learning courses in the development of computer games and their design. The name "SkillsTrain" has been used since February 2004 in connection with the Claimant's distance learning courses in Information Technology and book-keeping. The way the system works is that students who enrol on its courses work independently on materials provided by the Claimant and periodically submit assignments for assessment via the Internet.

Its tutors may be contacted either by telephone or email…

3. The First Defendant is Designtechnica Corporation, which trades as "Digital Trends". It is incorporated under the laws of Oregon in the United States and maintains a website with the URL www.digitaltrends.com. This is said to provide "news, professional reviews, and opportunities for public discussion of the latest consumer electronics products, services and trends". The evidence suggests that the website receives some two million unique visitors per month and that requests are made for more than ten million page views per month.

4. The First Defendant's website contains some 14 separate bulletin boards or forums with the URL http://forums.digitaltrends.com/. It is alleged that these forums have 14,000 members and that they comprise 13,000 separate threads or discussions, in which almost 75,000 individual postings have been made up to the commencement of these proceedings.

5. Internet users who wish to post a comment within a specified thread, or to commence a new thread, are required to register a username with the website. This will then be published alongside any posted contribution together with the date and time on which it was made. Anyone may access the forums and read their contents. So too, the contents are accessible to Internet search engines.

6. The Second Defendant, Google UK Ltd, is a subsidiary of the well known US corporation, Google Inc (being incorporated under the laws of Delaware and based in California). Google Inc has been joined as the Third Defendant. Its services can be accessed via the Internet from most countries in the world. …

7. The scale of the operation emerges from the evidence of Mr Jaron Lewis, who is the solicitor for the Second and Third Defendants. There were in January 2005 approximately 11.5 billion publicly indexable web pages; that is to say, pages which a search engine such as that made available by Google would be able to access. Since then, the number of such pages has increased to approximately 39 billion. This figure is derived from worldwidewebsize.com. As at 31 March of this year, there were approximately 1.59 billion users accessing the Internet. This is based on the most recently available statistics published by InternetWorldStats.com.

8. The Second Defendant does not operate the Google search engines… it is pleaded on behalf of the Second Defendant that

" … the Claimant has sued the wrong person and should discontinue its claim or have judgment entered against it"…

The nature of the claims

15. The Claimant complains of two distinct matters so far as the First Defendant is concerned. At paragraphs 13–16 of the particulars of claim, it pleads a forum thread commenced on 25 March 2009 by a user with the username richardW under the title "Train2Game new SCAM for Scheidegger" ("the Train2Game thread"). It was said to be comprised of 146 separate postings, published between 25 March and the date of the pleading (1 May 2009), running to 15 separate web pages. A copy of the thread was served as Annex 2. It is unnecessary to rehearse it for the purposes of this judgment, but at paragraph 16 of the particulars of claim six natural and ordinary meanings are spelt out, namely that there are reasonable grounds to suspect:

> i) that the Claimant's sales representatives for Train2Game sign up students in a cavalier manner irrespective of their suitability for the course such that the Claimant may be liable for a legal claim for misrepresentation;
>
> ii) that the Claimant's sales representatives employed a bogus and fraudulent credit checking and loan financing assessment that does not comply with UK consumer credit law;
>
> iii) that the Claimant knowingly takes money from students' bank accounts without authorisation;
>
> iv) that the Claimant's sales claims for Train2Game courses are unfeasibly overblown, and that the course, in fact, offers appalling value for money and is of such low quality that the Claimant should be investigated by UK Trading Standards;
>
> v) that the Claimant has knowingly infringed the copyright of third parties in the preparation of Train2Game course materials;
>
> vi) that the Claimant's Train2Game course is nothing more than a scam or fraud intended to deceive honest people out of substantial sums of money.

16. Secondly, the Claimant complains against the First Defendant of the forum thread commenced on 1 September 2006 by a user with the username Becca2006 under the title "Scheidegger/SkillsTrain" ("the SkillsTrain thread"). This is particularised in paragraphs 20–24 of the particulars of claim. It is said to comprise 1,364 separate postings, all published between 1 September 2006 and 1 May 2009, running to 137 separate web pages. Excerpts are attached to the pleading as Annex 4. At paragraph 23, the following natural and ordinary

> meanings are identified, namely that there are reasonable grounds to suspect:
>
> > i) that the Claimant's sales representatives for SkillsTrain sign up students in a cavalier manner irrespective of the suitability or affordability of courses such that the Claimant would may be liable for misrepresentation;
> >
> > ii) that the Claimant's sales claims for SkillsTrain courses are unfeasibly overblown, and the course offers appalling value for money and low standards such that the Claimant should be prosecuted by UK Trading Standards;
> >
> > iii) that the Claimant's SkillsTrain courses are nothing more than a scam or fraud intended to deceive honest people out of substantial sums of money….

11. As to the Second and Third Defendants, the claim is confined to a search result identified at paragraph 17 of the Particulars of Claim:

> "17. Since 25 March 2009 or around 25 March 2009, on each occasion that an Internet search is performed on 'Train2Game' the Second and/or Third Defendant published or caused to be published at www.google.co.uk and/or www.google.com a search return for the Train2Game thread which for 3 weeks preceding the date of these particulars set out the following words defamatory of the Claimant as the third and fourth highest search result:
>
> > 'Train2Game new SCAM for Scheidegger' … "

12. The natural and ordinary meaning pleaded is that the Claimant's Train2Game course was a scam or fraud intended to deceive, and a further example of the Claimant's fraudulent conduct.

13. Para 17 of the Particulars of Claim is not now relevant to any claim against the Second and Third Defendants because that has failed. But it remains relevant to the claim against Digital Trends. By para 32 of the Particulars of Claim the Claimant pleads that publication by means of the search engines was the natural and foreseeable result of the publications by Digital Trends, and so that Digital Trends is liable for the republication.

THE APPLICABLE LAW

14. The law on damages for libel so far as material is summarised in *Duncan & Neill on Defamation 3rd ed* ch23. It is commonly said that an award has three purposes: first, to compensate the claimant for the damage to his reputation, second to vindicate his good name and third to take account of the distress, hurt and humiliation which the defamatory publication has caused. In the case of a corporation such as the Claimant the third purpose has no application, since corporations have no feelings. In the present case the element that the Claimant relies on is substantially the second, namely the need for vindication. Factors relevant to the amount of any award include

in particular the gravity of the allegation and the number of readers and the extent to which those readers may cause harm to a claimant if, as a result of the libel, they treat the claimant unfavourably or less favourably than they would otherwise do, for example by not doing business with the claimant.

15. As Lord Hailsham expressed it in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1017:

> "Not merely can [the claimant] recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by [the court] sufficient to convince a bystander of the baselessness of the charge".

16. Since one of the issues that arises in the assessment of damages is the seriousness of the libel, I must decide what the words complained of meant.

17. The meaning of words complained of as libellous is an issue which is decided by the jury if the judge is sitting with a jury, or by the judge, if he is sitting without a jury. In this case there is no jury. But in either case the principles to be applied are the same. There are a number of cases in which the Court of Appeal has given guidance as to the applicable principles, but the most recent is *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 (and Gatley on Libel and Slander 11th ed 3.13). Sir Anthony Clarke MR said at [14]:

> "The governing principles relevant to meaning … may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…" …. (8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense.""

MEANING

18. The words complained of in this case are very extensive and it is unnecessary to set them all out. Examples are as follows. As stated above, Scheidegger is a former trading name of the Claimant.

19. From about 1 September 2006 the First Defendant published a thread comprised of 1364 postings up to the time the Particulars of Claim were served. It included "03-03-2009 08:04… Skills Train Joke …I was suckered into this scam back in Jan 2006 … Just pay them nothing at all. The loan people aren't going to take you to court when they know you'll be raising the issue of them being hand in hand with notorious scamming fraudmonkeys like Skillstrain…"… "03-26-2009 06:48 … people have GENUINELY been misold courses by Skillstrain's course advisers … 12:53 …I've informed trading standards …"

20. On and after 25 March 2009 the First Defendant published a thread "Train2game new SCAM from Scheidegger … [and there follow 146 separate postings including] "03-30-2009 06:40 … it seems like Train2game can sound like a complete scam and have nothing to do with major Games Developers … I'm hoping that I don't get any more of a ripoff than I just did a few days ago. I think I should change my CC info before ringing them up for a cancellation because you never know what they may do"… "04-08-2009 12:14 …they'll send a course adviser to your house who will promise things that they can't guarantee, …" … "04-15-2009 … In the welcome pack all the lessons exactly copied word for word … Surely this is copyright infringement? And here's for the pot proof that this is a scam!!! They offer you a loan, credit etc … so why are they nor any of their companies … registered with the FSA. This is very illegal …"

21. A Google UK search engine return dated 27/4/09 for "Train2Game" included in the first 10 results two headed "Train2Game new SCAM for Scheidegger" and referring to Digital Trends with a link to the threads complained of in these proceedings.

22. Applying the relevant principles to the words complained of, I find that they bear the meanings which, in paras 16 and 22 of the Particulars of Claim the claimant contends that they bear. These are set out above in the extract from the judgment in para 10 above.

FALSITY

23. In September 2008 the Claimant had started to work in conjunction with DR Studios Ltd to develop the two courses now provided under the names Train2game, a computer games developer course and a computer games designer course. DR Studios is one of the largest games developers and publishers in Europe. The Claimant and DR Studios have spent significant sums of money in funding the development of the Train2game course materials with a view to producing courses of high quality. The courses have been developed over a period of up to three years.

24. The Train2game business was launched on 16 March 2009, just nine days before the start of the thread commencing on 25 March 2009 which included the allegations that the business was a scam.

25. Students are recruited through advisers acting on behalf of a company called Multimedia Computer Training Lted ("MCTL"). The advisers are fully trained and their performance is checked, for example by representatives posing as potential

students. Students have 21 days in which to cancel a contract. Credit checks are carried out with a student's consent using the leading credit checking company Experian. Students are offered finance through Barclays Plc and other providers. The Claimant is able to offer 0% finance by discounting the price of the course paid to it by the lending bank. Debits are made to a student's account only with the student's authority.

26. The Claimant works with the University of Bedfordshire, which uses its course for the University's BSc Computer Games Development course. The courses are endorsed by Tiga, the National Trade Association for the computer fames industry.

27. The courses were created as stated above, and do not infringe the copyright of any third party.

28. On the documentary and oral evidence before me, I concluded that the meanings complained of are proved to be false.

EXTENT OF PUBLICATION WITHIN THIS JURISDICTION

29. In the Particulars of Claim, verified by a statement of truth, it is said that the First Defendant's website's 'corporate factsheet' records that the website www.digitaltrends.com receives 2 million unique visits per month with 10 million plus pages views per month.

30. I accept Mr Bradik's evidence that this is an indicator that the material complained of was frequently accessed. I infer that many of the posting come from the UK from the following facts. There are references to advertising (the Claimant advertises only in the UK) and to English bodies or companies such as Trading Standards, FSA, OFT and Barclays Bank. There are references to individuals meeting or speaking to representatives of the Claimant, and the Claimant trades predominantly in England and Wales.

THE CONDUCT OF THE FIRST DEFENDANT

31. On 30 April 2008 the Claimant's solicitors put the First Defendant on notice that its website was hosting defamatory statements about the Claimant (at that time in relation to Skills Train only). On 6 May 2008 the First Defendant through its attorneys refused to remove the material complained of. Following the start of the Train2game thread in March 2009, solicitors for the Claimant wrote a letter before action to the First Defendant, to which the First Defendant did not respond. The procedural history is set out above.

THE EFFECT OF THE PUBLICATION

32. The Claimant makes no claim for loss of specific business. But Mr Bradik gave evidence both in his witness statement and orally to me that the Claimant was continuing to receive questions from potential students asking the origin of the allegation that the Claimant's business was a scam. A number of websites include comments upon the Claimant's proceedings against Google which they misrepresent as showing that the allegations that the business is a scam is true. I infer that the

Claimant has suffered actual damage, in the form of students who would have taken their courses but have been put off from doing so.

33. In June 2009 the Claimant had in excess of 200,000 students. In recent years the Claimant has enrolled about 20,000 students a year, and most enquires are generated by electronic marketing. The Claimant invests heavily in marketing, including £100,000 per month on Google. The turnover of the Claimant is of the order of £65m per year. Mr Bradik explained that potential students commonly make internet searches when contacted by the Claimant and at the time of enrolment.

34. About 70%-80% of the Claimant's customers are in England. The courses are expensive: Train2game costs about £5000 and the IT skills course costs between £2500 and £4000.

AMOUNT OF DAMAGES

35. The primary purpose of the damages sought in this case is vindication of the Claimant's reputation. Applying the principles set out above, in my judgment the sum necessary to demonstrate the falsity of the allegations complained of in this case is £50,000. There will be judgment for that sum.