Case No: IHJ140376

Neutral Citation Number: [2014] EWHC 2266 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2014

Before :

MR JUSTICE NICOL

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Between :

(1) Cartus Corporation	**Claimants**
(2) Cartus Ltd	
- and -	
(1) Wayne Siddell	**Defendants**
(2) Paul Williamson	

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Andrew Caldecott QC and Caroline Addy (instructed by **Howard Kennedy Fsi LLP**) for the **Claimants**
Jonathan Cohen (instructed by **Metis Law**) for the **Defendants**

Hearing dates: 24th and 25th June 2013

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Judgment

Mr Justice Nicol :

1. On 20th March 2014 Supperstone J. granted an interim injunction to restrain publication of a document entitled "The Ugly Truth" and a covering letter to customers of the Claimants. It is the Claimants' case that the documents would have been defamatory of them and imminent publication was threatened. The application was made without notice to the Defendants. The injunction was granted for 7 days in anticipation that the Claimants would apply for its continuation on notice to the Defendants. The Claimants did so, but the hearing of their application was postponed until it came before me on 24th June 2014.

2. On 10th June 2014 the Claimants issued a further application notice. By then, the Defendants had served a Defence (signed by the 1st but not the 2nd Defendant) which pleaded Truth and Qualified Privilege. In their further application, the Claimants asked the Court to rule on the meanings of "The Ugly Truth" and its covering letter, to strike out the defences of Truth and Qualified Privilege and to grant a final injunction in an amended form. However, the Defence also said that the Defendants no longer intended to publish "The Ugly Truth" now. On 23rd June 2014 (and so the day before the hearing) the Defendants served a proposed Amended Defence (which was signed by both Defendants). This recast the meanings of "The Ugly Truth" and the covering letter which the Defendants were prepared to defend as true and repeated that any such publication would be covered by qualified privilege. The Amended Defence continued by saying that any words which the Defendants did publish would go no further than to make certain imputations to which it will be necessary for me to return. Neither the original Defence nor the Amended Defence referred to the covering letter, but, in the course of his oral submissions to me, Mr Cohen, on behalf of the Defendants, said that the same applied to that as well.

3. In brief summary, Mr Cohen's position was that, in view of the Defendants' present position, it would be an arid exercise to rule on the meanings of "The Ugly Truth" and the proposed covering letter, but, if I was against him on that, the meanings of those documents which the Defendants would wish to defend as true were correct, the pleading of Truth was sufficiently particularised at this stage and should not be struck out. Likewise, the pleading of qualified privilege was arguable and should not be struck out. Since the Defendants had arguable defences to the Claimants' claim, an interim injunction was wrong in principle and, besides, for a number of additional reasons, the without notice injunction should never have been granted by Supperstone J.

4. For the Claimants, Mr Caldecott QC and Ms Addy argued that the threat to publish "The Ugly Truth" and the covering letter remained. They also argued that those documents had the meanings attributed to them in the Claimants' application notice of 10th June. There was good authority for the court to establish the meanings of the words complained of in a defamation action at the earliest possible time. Because of Defamation Act 2013 s.11, the trial of this action would be by judge alone and therefore it was open to me to rule on the actual meaning of the words (as opposed to the practice, when a defamation action was to be heard by a judge and jury, of ruling on the meanings which the words were capable of bearing). They submitted that the plea of Truth lacked proper particulars and it could, and should, be struck out at this stage. They argued as well that the plea of qualified privilege was also unsustainable. If that were so, then there was no reason why a final injunction could not be granted

in the terms which were sought. Some of the criticisms which the Defendants made of the *ex parte* injunction were without foundation. Those which had force, did not lead to the conclusion that the injunction should never have been granted and should not prevent a final injunction being made now.

5. The 1st Claimant is a Delaware corporation. The 2nd Claimant is its UK subsidiary. The 2nd Claimant has some 400 employees within the jurisdiction. The Claimants (whom I shall now refer to collectively as 'Cartus') provide services to clients who have employees who are moving from one place to another. These services may include the physical movement of goods and people. The physical forwarding of goods is sub-contracted by Cartus to other companies who operate as freight forwarders. There are a large number of such companies. Since 2001 Cartus has used a computerised system called Acadia to enable forwarders to make competing bids for particular routes and particular methods of transportation. The system is intended to encourage competition on price. It also incorporates feedback from clients as to how well a particular forwarder has performed. The forwarder's contract is with Cartus who, in turn, invoices the client. Cartus charges the client a flat fee for each transaction which it arranges. It also adds a percentage to the forwarder's basic charge and certain extras which can be predicted in advance as necessary. Cartus makes use of another company called Parsifal to audit the invoices of forwarders and to investigate any discrepancies. Parsifal and the 1st Claimant are joint owners of the patent in Acadia.

6. One of the forwarders who provided such services for Cartus was Atlantic Corporate Relocation Ltd ('ACRL'). In January 2014 ACRL went into voluntary liquidation. Until then the Defendants were directors of ACRL. ACRL provided services to Cartus on a large number of occasions between 2003 and 2012. In September 2012 Cartus suspended ACRL from using the Acadia system or otherwise contracting with Cartus. It alleged that audits by Parsifal had detected a considerable number of false invoices. ACRL and the Defendants were aggrieved by this suspension.

7. One of the employees of the 1st Claimant was Charles Destival. He had the title "Director Supply Chain Management" although the Claimants say he was not a member of the Board of Directors of any of the Claimants' group of companies. It is the Defendants' case (and this was one of the principal aspects of "The Ugly Truth") that Mr Destival put pressure on ACRL to enter unreasonably low bids on the Acadia system, but to then make up the shortfall between those bids and their "real prices" by charging additional extras. Initially, the Defendants say, Mr Destival's point of contact within their company was an employee of theirs called Isobel Santos who was their Client Services Director and who began to work at ACRL in 2009. Ms Santos appeared to be particularly successful at getting in work and, at first, the Defendants say, they were brushed off by her when they attempted to question the rates she was quoting. However, there was a meeting between the Defendants and Mr Destival in New York in early to mid 2011. Mr Sidell's first witness statement then explains,

> "It was at this time [Destival] informed us that we needed to 'cheat' the system in order to maintain our mutual success. He explained that this was common practice within Cartus. I will admit that I did not ask him directly what he meant by cheating the system but I had understood what he meant. By this time both Paul [the 2nd Defendant] and I knew that we were being favoured by Cartus because of the close relationship between Santos and Destival. We adopted a

> selfish view which was that we would work in whatever way Cartus required so long as no harm was done to [ACRL]. We agreed to turn a blind eye to Destival's comments and let Cartus do what, we were advised, it wishes to do and has done for some time with its 'preferred' suppliers."

8. In mid-2011 the number of accounts questioned by Parsifal in its auditing role very substantially increased. The number of "audits" (i.e. questioned accounts) increased from around 60 per year to 450 in less than 6 months. Mr Sidell's witness statement says that Ms Santos was left to deal with the matter and she hid the audits from the Defendants. When they did discover them, Mr Sidell says he was reassured by Ms Santos that Mr Destival was dealing with them.

9. Mr Sidell says that in September 2011 he and the 2nd Defendant discovered that Mr Destival and Ms Santos had an intimate relationship. He knew that this would be a significant problem for ACRL and Cartus because the flow of work to ACRL might be harmed if the relationship ended on a sour note. Mr Sidell suspected that the number of audits was because someone was looking for evidence that ACRL was being favoured as a result of this relationship. However, ACRL accepted Ms Santos's resignation which took effect either at the end of January 2012 or the end of March 2012 (the evidence from the Defendants is ambiguous as to the date). Mr Sidell says that "The relationship between her and Destival was never disclosed to Cartus as we did not feel this was necessary."

10. It is the Defendants' case that the technique which they were under pressure to adopt (viz quoting a low basic rate but then making up by charging for extras) was commonplace in the forwarding industry.

11. As I have said, the Claimants suspended their arrangements with ACRL in September 2012. At another meeting in New York that month, the Defendants were confronted by a representative of Cartus with items for which ACRL had charged extra but which were unjustified. Notably, these included parking permits ostensibly issued by local authorities but which were in fact forgeries. The Claimants dispute there was a general practice of quoting low basic rates and then adding substantial extras, but the Claimants say that, in any case, there could be no justification at all for adding extras based on forged documents.

12. The Defendants say that after Ms Santos's departure they were hampered in responding to these complaints because she was no longer available and she had wiped her email records. They argue, however, that Cartus's clients did not suffer. The prices which they were quoted were unrealistically low. The extras merely made up the cost to what the clients would anyway have had to pay. Cartus respond that it was only because of the low basic rates which they quoted that ACRL got the business at all.

13. ACRL argued that, after its suspension, there were significant sums owed to it which were not affected by the challenged "extras". Negotiations over these continued into 2013. Mr Sidell accepts that in early 2013 Cartus paid the full amount which was owing. However, the Defendants, who were aggrieved by the termination of their arrangement with Cartus, wrote "The Ugly Truth" and a copy was sent to Cartus in February 2013.

14. No publication of the leaflet in fact took place. Discussions continued between US attorneys representing the Claimants and Defendants, but on 17th March 2014 Mr Sidell sent to the 1st Claimant an email which said that due to Cartus's non-responsiveness what I have referred to as "the covering letter" would be sent to each and every client of Cartus by close of business on the following day. The covering letter itself said that "The Ugly Truth" was attached. Mr Sidell's email to the 1st Claimant continued "You do the maths".

15. Discussions between the US attorneys continued, but on Thursday 20th March 2014, Mr Jeffrey Bernstein, the attorney for the Defendants, refused to provide a written undertaking not to publish "The Ugly Truth" to James Brown, the US attorney for the Claimants.

16. The Claimants are seeking a *quia timet* injunction. As with any other prospective tort, a claimant who has advance notice, does not have to wait until the tort has been committed. He may seek an injunction in advance to restrain publication. But, as Lord Dunedin said in *Attorney-General for Canada v Ritchie Contracting* [1919] AC 999 at 1005, "No one can obtain a *quia timet* order by merely saying 'Timeo'; he must aver and prove that what is going on is calculated to infringe his rights." As *Gatley on Libel and Slander* (12th edition 2013) adds at para 25.10, "Thus there must be evidence that a defamatory statement concerning the claimant is about to be published."

17. For this reason, no doubt, the Claimants duly plead in paragraph 13 of their Particulars of Claim that, unless restrained by the Court, the Defendants will publish the words contained in "The Ugly Truth" and the covering letter or similar defamatory words.

18. The Amended Defence's response to this is important. It says in paragraph 19;

> "Paragraph 13 of the Amended Particulars of Claim is denied [they are referred to as the Amended Particulars of Claim because the Claimants' application notice of 10th June 2014 sought to amend the original Particulars]. 'The Ugly Truth' was written over a year ago and has not yet been published; the Defendants no longer intend to publish that document now. Nor is it admitted that the Defendants intend to publish or cause to be published similar words. The Defendants are currently considering the appropriate balance to strike between the protection of their own legitimate commercial interests, the protection of the legitimate commercial interests of customers and former customers of the Claimants, the right of all concerned to communicate and receive information under Article 10 of the Convention and the necessarily chilling effect of the Claimants' claim. Any words which the Defendants may now choose to publish would go no further than to impute that the Acadia system is not infallible or necessarily fair, competitive and service oriented but susceptible to corruption and manipulation as evidenced by the fact that (a) a senior employee of the Claimants instructed [ACRL] to manipulate the Acadia system, following which [ACRL] were then victimised by having their relationship with the Claimants terminated for having done so, and (b) the consequences for at least one named customer ('A') was that it was exploited by the corruptible and fallible Acadia system and suffered financial loss as a consequence."

19. The Amended Defence was signed with a statement of truth by both the Defendants. It made no express reference to the covering letter but, as I have mentioned previously, Mr Cohen said at the hearing before me that I should read this paragraph of the Amended Defence as embracing that threatened publication as well. He said that his clients were prepared to give some form of undertaking with the qualifications in paragraph 19 of the Amended Defence.

20. Mr Caldecott argues that the pleading says that there is no intention to publish the document "now", leaving open the question as to whether the intention might change in the future. He notes that the precise terms of the undertaking which Mr Cohen was prepared to give was not easy to identify. He urges me to have regard to the history of the matter and, in particular, what he would say was the naked threat in Mr Sidell's email of 17th March 2014, "You do the maths". Supperstone J. was persuaded that the absence of an undertaking not to publish was critical and so should I be. In any case, the concluding words of paragraph 19 of the Amended Defence clearly envisage some, albeit a more limited, publication along the same lines.

21. While Mr Caldecott put his submissions very attractively, I am not persuaded that the Claimants have shown that the Defendants do intend to publish either "The Ugly Truth" or the covering letter. I read the word "now" in the Amended Defence as distinguishing their present intention from that when "The Ugly Truth" was written in February 2013 and the covering letter in March 2014. The matters which Defendants go on to say they are contemplating publishing are far more limited in their reach and imputations than either "The Ugly Truth" or the covering letter. The paragraph says in terms that any words which the Defendants did choose to publish would go no further than those imputations.

22. I do take into account that the formulation of an appropriate undertaking is far from simple. Mr Caldecott accepted that the injunction granted by Supperstone J should not have extended to the whole of "The Ugly Truth", since it was only parts of that which were said to be defamatory of the Claimants. While he does not accept that Mr Destival was corrupt or dishonest, he accepts that in advance of a trial, he could not continue an injunction which prevented the Defendants from saying that he was. If and so far as there was criticism to be made of the Claimants for having a middle manager with those characteristics (and for whom they may have been vicariously liable), he also accepted that he could not restrain the Defendants from making it at this stage. Nor, at this stage, could he insist on an injunction which prevented the Defendants from saying that the Acadia system was allegedly susceptible to manipulation by bidders. I emphasise that Mr Caldecott was prepared to make these concessions, not because he accepted that the imputations were true (he did not), but because of the Court's unwillingness to grant an injunction in libel cases in advance of trial where the Defendant was prepared to defend publication as true and where the defence was not manifestly hopeless. I should also in fairness to the Claimants record that Mr Cohen accepted that the Defendants were not asserting that the Mr Destival was acting on instructions from any of those above him in relation to any of the misconduct which the Defendants attributed to him.

23. Mr Sidell's email of 17th March was unattractive. Mr Caldecott properly acknowledged, that a defence of Truth is not dependent on good faith – see *Holley v Smythe* [1998] QB 726, but I can well understand how it affected Supperstone J's assessment of whether there was, on 20th March 2014, sufficient evidence of an

intention to publish "The Ugly Truth" and the covering letter. However, by the time the case came before me, things had moved on. Shortly before my hearing, (very shortly it has to be said) the Amended Defence supported by statements of truth, made the Defendants' positions much clearer (although, as I have mentioned, the original Defence denied any intention to publish "The Ugly Truth").

24. For these reasons I agree with Mr Cohen that there is no point in reaching a conclusion on the meanings to be attributed to "The Ugly Truth" or the covering letter. In the standard libel action, deciding on the meaning of the words complained of is an unavoidable duty, but that is because, in the usual libel action, publication has already taken place and determining the meaning of the published words is an integral part of assessing damages and in deciding what, if any, injunction may be necessary to avoid repetition. But where the words complained of have not in fact been published and where, as I find, the Claimants have not been able to show that those words will be published, the position is different.

25. For the same reason, it seems to me that it would be a barren exercise to consider whether, if "The Ugly Truth" or the covering letter were to be published, they could be defended as true or as publications on an occasion of qualified privilege. Absent publication, or proof of intended publication, potential defences are immaterial.

26. I have reflected on whether I should go on to consider whether the Defendants should be enjoined from publishing words with the imputations at the conclusion of paragraph 19 of the Amended Defence. It could be said on the Claimants' behalf that, to that extent at least, I could be satisfied as to the Defendants' intentions and to that extent there is a threatened publication for the purposes of a *quia timet* injunction.

27. However, the difficulty here is a different one. A claimant in a libel action must plead with reasonable certainty the words which were used (if publication has already taken place) or which are threatened (if the claim is for an injunction in advance of publication). As Hirst LJ said in the Court of Appeal in *British Data Management v Boxer Commercial Removals plc* [1996] EMLR 349 at 362,

> "In a libel case, the first question is whether the words are defamatory of the plaintiff, which depends on their meaning; unless the plaintiff succeeds on this fundamental issue, his action will fail. Next, a number of questions may arise on the defences which the defendant may wish to raise e.g. a plea of justification, which depends on whether the words are true or false, and similarly, *mutatis mutandis* in the case of a plea of fair comment.
>
> The purpose will not be achieved unless the words are pleaded with sufficient particularity to enable the defendant not only to understand what it is the plaintiff alleges that they meant, but also to enable him to decide whether they had that meaning, and, if not, what other meaning they had or could have. Equally, unless the words are so pleaded the defendant will not be able to determine whether the words in their alleged meaning or other perceived meaning are true, fair comment, and plead accordingly. Moreover, whenever an injunction is sought, such particularity is needed to enable the court to frame an injunction defining and with reasonable precision what the defendant is restrained from publishing."

28. While the Defendants in this case have indicated meanings which they may be minded to include in a publication, they have not set out the words which they say would incorporate those meanings or even indicated with reasonable certainty what they might be. Quite rightly in a libel action attention focuses on the meaning or imputations of a publication or threatened publication, but the meaning or imputation is not self standing: it is derivative from the words complained of. Further, as Hirst LJ said, the particular words used can affect whether the defendant has a defence of truth or fair comment.

29. It may be thought curious that the Claimants are hampered because the Defendants have chosen not to say more about their intentions. But that is the Defendants' right. If they do later publish libellous statements about the Claimants, they will be required to pay damages and may then be enjoined. But the right to "publish and be damned" is an aspect of the usual, though not invariable, principle that prior restraints will not be imposed on publication.

The Defendants' criticisms of the Claimants' conduct in obtaining the injunction from Supperstone J.

30. These do not affect the principal conclusions to which I have come, nor, because of those, are they material to the main relief which the Claimants seek. However, since they were fully argued, I will deal with them briefly.

31. Mr Cohen's criticisms were as follows:

    i) In her skeleton argument for the hearing before Supperstone J, Ms Addy misstated the appropriate test for deciding whether the application for an injunction in restraint of freedom of expression could be made *ex parte*. She said there had to be "good reasons" for not giving notice to the respondents. The Human Rights Act 1998 s.12(2) says that notice must be given unless there are "compelling reasons" not to do so.

    ii) The Judge was told that Jeffrey Bernstein, the US attorney for the Defendants, had asked for further meetings and discussions but had "expressly declined to offer any written undertaking" and, while the Defendants wanted to negotiate, they "will give no comfort and they will not hold the ring so that those discussions can take place". These were conversations which had taken place on the same day that Ms Addy was before the Judge and he required her to put them in proper form after the hearing. Subsequently, James Brown, the Claimants' US attorney, swore an affidavit on 24th March 2014 in which he said "I squarely asked Mr Bernstein if his clients would give a written undertaking to not distribute 'The Ugly Truth' or any other communication of similar content. Mr Bernstein advised that he could not provide such an undertaking by his clients." Mr Bernstein responded in an email of the same day that he was asked whether his clients would commit in writing to never distributing "The Ugly Truth". Mr Bernstein says that his clients were only agreeing to presently "hold fire" but, because of the imprecision of the request (it related to any other communication of similar content), no such commitment could be given. In a further affidavit in response, Mr Brown elaborated on what he meant by "similar content" and repeated that Mr Bernstein had said his clients could give no such undertaking because they did

intend to inform others who dealt with Cartus about the allegations of wrongdoing in "The Ugly Truth". Mr Cohen submits that it is notable that Mr Brown does not deny that Mr Bernstein said the Defendants were presently willing to hold fire. The Judge, he argues, was therefore misled. Mr Cohen submits as well that, while Mr Sidell had set a deadline of close of business on 18th March 2014 in his email of the previous day, that deadline had passed without publication by the time Ms Addy went before Supperstone J. He argues that there was no evidence that the Defendants would, if given notice of the injunction application, have rushed to publish so as to frustrate the application. Consequently the Judge could not have been satisfied that the high threshold test set by s.12(2) of the Human Rights Act 1998 had been satisfied.

iii) The Claimants had not drafted Particulars of Claim and so the Judge could not see the words to which objection was taken and the meanings which the Claimants attributed to them.

iv) The order sought and granted was excessive. It extended to the whole of "The Ugly Truth" although, when the Particulars of Claim were served, it could be seen that there were only parts of the document which the Claimants claimed defamed them.

v) Following the Defamation Act 2013 s.1(2), a publication will only be defamatory of a body that trades for profit if it has caused, or is likely to cause, that body serious financial loss. This requirement was not drawn to the Judge's attention. The intended recipients of "The Ugly Truth" were listed in the leaflet itself. The vast majority were overseas customers of Cartus. Much of the threatened publication was therefore going to take place outside the UK. Mr Cohen observed that the Particulars of Claim did not, when served, plead that the Claimants were likely to suffer serious financial loss if publication took place.

vi) The order granted by Supperstone J had no territorial restriction and would therefore mean that the Defendants were restrained from publishing "The Ugly Truth" anywhere. That was excessive.

vii) The judge was misled as to the prospects of the Defendants establishing Truth as a defence. In particular, he was not shown (and counsel did not have) a copy of an industry publication that Mr Cohen alleged showed that Acadia was unreliable and corruptible.

viii) The Defamation Act 2013 s.2(3) provides that "if one or more of the imputations is not shown to be substantially true, the defence under this section does not fail, if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation." This is an echo of the previous position, but had to be restated since s.2(4) abolished the common law defence of justification and repealed s.5 of the Defamation Act 1952 – see s.2(4) of the 2013 Act. Mr Cohen submits that the position where there are multiple allegations in a publication was not sufficiently explained to the Judge.

ix) Mr Cohen also argues that the Judge was not sufficiently addressed on why damages would be an inadequate remedy for the Claimants.

32. I will deal with these in turn.

i) Mr Cohen is right that the test for proceeding *ex parte* was misstated in Ms Addy's skeleton. Mr Caldecott agreed that "compelling reasons" imposed a higher threshold than "good reasons". In her defence, he noted that she had apparently copied *Gatley* which, at paragraph 25.2 makes the same mistake. I agree this was an error and should not have happened, but I accept that it was one that was made in good faith.

ii) However, I do not accept that the Judge was misled as to what had transpired between the US attorneys earlier that day. The essential position remained as Ms Addy had relayed to him. "The Ugly Truth" had been written the year before, but only three days previously Mr Sidell had threatened to publish it the following day (i.e. on 18th March 2014) and to do so as part of its negotiating campaign to be re-admitted to the Acadia system. Mr Sidell's email comment, "You do the maths" made that plain. In this context, the unwillingness of the Defendants to give a written undertaking not to publish while negotiations continued was significant. In the circumstances that arose, the Claimants cannot be criticised for not repeating to the Judge the precise words which had been exchanged in the verbal discussion between Messrs Bernstein and Brown. The Judge said that he was quite satisfied that it was appropriate to proceed *ex parte*. Notwithstanding all the points made by Mr Cohen, I am satisfied that, if the Judge had been told the correct test by Ms Addy, he would have reached the same conclusion.

iii) While, ideally, it would be preferable for a Claimant to present draft Particulars of Claim when an interim injunction is sought, I do not agree that these are essential. In her skeleton argument and in her oral submissions to the Judge, Ms Addy did adequately identify the words of which the Claimants complained and the meanings which were attributed to them.

iv) Mr Caldecott accepted that the injunction ought not to have extended to the whole of "The Ugly Truth" since there were parts of that document which the Claimants could not, and did not, say were defamatory of them. He has also accepted that, his clients could not restrain the Defendants in advance of the trial from criticising Mr Destival or referring to him as an employee of the 1st Claimant.

v) It is correct that Ms Addy did not address s.1(2) of the Defamation Act 2013 in her skeleton argument or in her oral submissions. This is a new feature of defamation law and, in future, Claimants will need to address it. In his submissions, Mr Caldecott argued that the Particulars of Claim allege that the words were defamatory of the Claimants and, because of s.1(2), that must embrace an allegation that publication of the words was likely to cause them serious financial loss (since otherwise the words would not be defamatory of them). I note, however, that *Gatley* at paragraph 26.2 says that "When s.1(2) comes into force, a body that trades for profit will have to set out how the publication has caused or is likely to cause serious financial loss." I agree. By

CPR r.16.4(1)(a) Particulars of Claim must include a concise statement of the facts on which the Claimant relies. Paragraph 16.4.1 to the White Book notes that "The claimant should state all the facts necessary for the purpose of formulating a complete cause of action." Those will now have to include the matters to which *Gatley* refers.

But, while Ms Addy omitted to address this part of the Claimants' cause of action, I do not accept that this was significant. The allegations against the Claimants in "The Ugly Truth" and the covering letter were serious. Some, even a majority, of the intended recipients may have been foreign corporations, but the Defendants do not contend that all of them were. At the stage of considering an interlocutory injunction restraining freedom of expression, the Judge would have had to decide whether the Claimants would have been likely to obtain such relief at trial – see Human Rights Act 1998 s.12(3). Had his attention been drawn to s.1(2) of the 2013 Act, I have no doubt that the Judge would have considered that the potential harm to the Claimants' reputation within the UK was such that they would be likely to prove this element of their cause of action.

vi) It is right that the order of Supperstone J. was silent as to its territorial extent. Mr Caldecott submitted that, by implication, it would only have an impact within the UK. Had the Claimants wished to have an injunction prohibiting the Defendants from publishing anywhere in the world, he submitted, this would have had to be made express. He took me to no authority for that proposition (nor did Mr Cohen for the contrary proposition). While I incline to think Mr Caldecott is right, the importance of making clear to a person named in an injunction precisely what he cannot do needs to be borne in mind. Where, as in this case, the potential publications at least include those overseas, it would be better for the territorial extent of the injunction to be made express rather than left to implication.

vii) "The Ugly Truth" referred to an earlier industry publication. This reference was expressly drawn to the Judge's attention, although, as already noted, Ms Addy also told the Judge that she did not have a copy. A copy was produced for the purposes of the hearing before me. I agree with Mr Caldecott that the proposed publications by the Defendants went very substantially beyond what was said in that report. The fact that Ms Addy was not able to show it to the Judge is, in my judgment, of no significance.

viii) Ms Addy's skeleton argument addressed the defence of Justification where a publication consists of two or more distinct allegations. It quoted s.2 of Defamation Act 2013. It then elaborated by reference to the common law (and notably *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412), but Mr Cohen has not argued that the statutory defence of Truth is in this respect significantly different to the previous law. I consider that there is nothing in this objection.

ix) It is right that Ms Addy's skeleton did not in terms make submissions as to why damages would be an inadequate remedy. However, I accept Mr Caldecott's response that the seriousness of the potential libels and the difficulty of proving special loss as a result of defamatory publications mean

that, if the matter had been raised with the Judge, he would have been satisfied that damages would not have been an adequate remedy.

x) It is very unusual for a Claimant to be able to obtain an injunction to restrain a libel in advance of trial where a Defendant intends to defend the proposed publication as true. Ms Addy properly referred the Judge to the relevant authorities, notably *Bonnard v Perryman* [1891] 2 Ch 269 CA and *Greene v Associated Newspapers Ltd* [2005] QB 972. Despite Mr Cohen's criticisms I am persuaded that the Judge would nonetheless have still granted an injunction on this occasion, although in perhaps somewhat different terms.

Conclusions

33. I am not satisfied that the Claimants have shown that the Defendants intend to publish "The Ugly Truth" or the covering letter or similar words. While the Defendants have indicated a possible intention to publish other words with certain imputations, they have not indicated with reasonable certainty what those words will be. In these circumstances, the Claimants are not entitled to the injunction which they seek.

34. This finding also means that it is an arid exercise to determine the meanings of the words complained of in "The Ugly Truth" and the covering letter. It is also pointless to decide whether words with those meanings could be defended as true or whether their publication would be on an occasion of qualified privilege.

35. I will invite the parties to make submissions as to precisely what orders are appropriate in the light of this judgment.