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Case No: IHJ/08/0125
IHJ/08/0397

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2008

Before :

MR JUSTICE TUGENDHAT

- -

Between :

Stuart Bray	**Claimant**
- and -	
Deutsche Bank AG	**Defendant**

- -
- -

Mr Richard Rampton QC & Jane Phillips (instructed by **Lewis Silkin LLP**) for the **Claimant**
Mr Andrew Caldecott QC & Catrin Evans (instructed by Clifford Chance LLP) for the Defendant

Hearing dates: 19th, 20th May

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Judgment

Mr Justice Tugendhat :

1. On 9 March 2006 the defendant ("the Bank") made a public announcement reporting adjustments to its 2005 preliminary results ("the Press Release"). The Claimant is a former employee of the bank and sues for libel on that Press Release. The Claim Form was issued on 21 February 2007, shortly before the expiry of the one year limitation period. Amended Particulars of Claim ("APOC") are dated 23 November 2007. The Defence was served on 11 January 2008 and the Reply on 1 February 2008. It is at this stage of the proceedings, before any disclosure of documents or service of witness statements, that the Bank, on 22 February 2008, gave notice of intention to apply for summary judgment under CPR 24.2, against the Claimant on a number of alternative bases, alternatively for the trial of preliminary issues. But Mr Caldecott

made clear that that application will not be pursued, if at all, until after this judgment has been handed down. By a second notice dated 9 May 2008 the Bank seeks an order pursuant to Section 69(1) of the Supreme Court Act 1981 that the trial of this action be heard by judge alone. An alternative application under Section 69(4) (trial by judge alone of certain preliminary issues) is not pursued.

2. From 1997 to 1999 the Claimant was employed in a senior position by, as he puts it, "Bankers Trust" (the precise identity of the corporation in question and of a more precise identification of his job description need not be set out in this judgment). His employer was taken over in 1999 by the Bank and the business for which the Claimant was responsible was merged with the corresponding department in the Bank. Following the merger, the Claimant continued as co-head of a department made up of the merged departments of the former Bankers Trust and of the Bank. In July 2001 the Claimant left the Bank's employment. What is important is that the Claimant's responsibilities throughout this period included what are referred to as certain tax-oriented transactions. In substance, these were loans by the Bank to individuals with a view to their reducing their tax liabilities to the US authorities.

3. The Press Release included the following:

> "[The Bank] today announced that the Management Board in finalising the Bank's 2005 accounts reviewed a number of recent developments and as a result increased legal provisions.
>
> Significant new information relating to certain legal exposures has emerged since the disclosure of the bank's preliminary unaudited 2005 earnings on 2 February 2006. As a result of the new information, Deutsche Bank is obliged to change its estimate of contingent liabilities in order to comply with US GAAP, which requires that contingent liabilities be reflected in the financial statements when those liabilities are probable and estimable (Financial Accounting Standards Number 5). Any developments affecting such estimates must be reflected if they become known before the financial statements are finalized.
>
> *This adjustment mainly relates to certain tax-oriented transactions with US counterparties executed from approximately 1997 through 2001, which include transactions executed by a subsidiary of the former Bankers Trust acquired by Deutsche Bank in 1999*. The new information includes, among other things, the entry by another financial institution into a deferred prosecution agreement with the US Department of Justice in respect of that financial institution's involvement in similar transactions.
>
> The net increase in legal provisions will reduce the previously announced net income by EUR 250 million. Most of this adjustment is treated as not deductible for income tax purposes…

> As a result of these changes, net income for 2005 will be EUR 3,529 million and the adjusted diluted earnings per share will be EUR 6.95. …"

4. As a matter of form it is the whole of the Press Release that is set out in APOC as the words complained of. But I shall refer to the words in the third paragraph of the Press Release, which I have italicised, as the words complained of, because, as the Claimant states, those are the words which contain the sting of the defamatory allegation against the Claimant..

5. The Bank accepts that the Claimant did have responsibility for certain tax transactions while employed by Bankers Trust, but Mr Caldecott emphasises that what is referred to in the Press Release is "a subsidiary of the former Bankers Trust". The Bank's case in its Defence is that the unnamed subsidiary was formerly known as BT Alex Brown. The parties agree that the Claimant did not have responsibility for the transactions of that subsidiary.

6. The Claimant is not named in the Press Release. But a person may be defamed, when not named, if one or more publishees of the words complained of (that is to say a person who reads and understands the words complained of) knows facts from which the publishee in question may reasonably understand that person to be referred to. Here the Claimant claims that the Press Release would be, and was, understood to refer to him by a number of readers of the Press Release. This is by reason of the fact that he was known to have held, in the period of years which is specified, a position which included responsibility for tax-oriented transactions at Bankers Trust, and that he had been co-head of the Bank's department with that responsibility following the merger. The person with whom he shared that responsibility at the Bank I shall refer to as Y.

7. At the start of the hearing I made an order that the names of certain people who are mentioned in the pleadings should not be referred to in open court. The reason for this was that in the APOC and Reply there are serious allegations made against the individuals concerned, those individuals have not yet answered the allegations, and one of the questions that I have to decide is whether those allegations should go forward at all. The principal other individuals covered by the order are referred to as A, B and X. The Bank is, as is well known, a German corporation and one of the world's leading financial institutions, with a substantial presence in London and New York and many other places. The individuals referred to as A, B, X and Y today hold very senior positions in the Bank. The allegations made in this action could, if they go forward and if they are proved at any trial, have significant consequences for those individuals and for the Bank, and possibly in the financial markets.

8. The background to the Press Release is pleaded in APOC paras 7.4.1 to 7.4.4 which are largely uncontroversial. The scale of the tax-oriented loans in question ("the impugned transactions") is said to be of the order of US $10 billion. What happened is set out in the Bank's words in its Financial Report 2005. An extract is available to me in the form of what is marked as a "Sign-off copy for the Management Board Meeting on March 7, 2006". The scheduled date of that Meeting was thus two days before the publication of the Press Release. The "legal exposures" that had emerged since the disclosure of the bank's preliminary unaudited 2005 earnings on 2 February 2006

included an exposure to possible charges of criminal offences relating to involvement in tax evasion.

9. The extract before me includes a note [33] headed "Litigation". A sub-heading is "Tax-Related Products". The note states that:

> "Deutsche Bank AG, along with certain affiliates and employees (collectively referred to as "Deutsche Bank"), have collectively been named as defendants in more than 75 legal proceedings brought by investors in various tax oriented transactions. Deutsche Bank provided financial products and services these investors … The investors claimed tax benefits as a result of these transactions, and the United States Internal Revenue Service has rejected those claims. In these legal proceedings, the investors allege that, together with Deutsche Bank, the[ir] professional advisers improperly misled the investors into believing that the claimed tax benefits would be upheld by the Internal Revenue Service…
>
> The United States Department of Justice ("DOJ") is also conducting a criminal investigation of tax-oriented transactions that were executed from approximately 1997 through 2001… In connection with that investigation, DOJ has sought various documents and other information from Deutsche Bank and has been investigating the actions of various individuals and entities, including Deutsche Bank, in such transactions. In the latter half of 2005, DOJ brought criminal charges against numerous individuals… other than Deutsche Bank. In the latter half of 2005, DOJ also entered into a Deferred Prosecution Agreement with an accounting firm… On February 14, 2006, DOJ announced that it had entered into a Deferred Prosecution Agreement with a financial institution [identified in the Defence as Bayerische Hypo-und Vereinsbank]… Deutsche Bank provided similar financial products and services in certain tax-oriented transactions that are the same or similar to the tax-oriented transactions that are the subject of the above-referenced criminal charges. … DOJ's criminal investigation is on-going".

THE ISSUES IN THE CASE

10. For the purposes of the application before me the Claimant's pleaded case on meaning and reference is not in issue. It is not in dispute that the Claimant has an arguable case that the Press Release refers to him. Likewise there is no dispute before me, that the Press Release bore a meaning defamatory of the claimant. It is right that I should say that both these issues will be in dispute if the matter proceeds to trial.

11. The meaning pleaded by the Claimant is that he:

> "… was responsible for allowing illegal tax-oriented transactions to be executed from 1997 through 2001, including

> transactions executed by a subsidiary of the former Bankers Trust, acquired by [the Bank] in 1999 as a result of which [the Bank] was obliged to lower its estimated earnings for 2005 by 250 million Euros".

12. There is a plea of aggravated damages. As originally pleaded it covered just over two pages in seven sub paragraphs. In correspondence solicitors for the Bank objected that it lacked particularity. Some eighteen new pages were added by amendment. There was no objection raised to the proposed amendment. Much the greater part consists of twenty eight sub sub paragraphs to paragraph 7.4.

13. In its Defence the Bank raises the issues of reference and meaning already referred to, and a defence of qualified privilege at common law. There is no defence of justification or truth. The gist of the defence of qualified privilege is that the regulatory framework within which the Bank operated, in particular in New York, required, in the circumstances described in the Press Release, that the Press Release be published.

14. In the Reply the Claimant contends that the occasion of publication was not one of qualified privilege. Mr Caldecott submits that the Claimant has no real prospect of succeeding in defeating the defence that the publication was on an occasion of qualified privilege.

15. In the alternative, in his Reply the Claimant raises a plea of malice in the event that it is held that the occasion was one of qualified privilege. The plea of malice is on two alternative bases, the primary basis identifying X and Y, and the other, which is very much a fall back position, identifying the Management Board which included A. The Particulars of malice include the whole of paragraph 7.4 of the APOC which, when pleaded in APOC, went only to aggravated damages. The plea is summarised as follows:

> "The Defendant published the allegations set out above knowing they were false and/or with reckless disregard for their truth or falsity and/or with the dominant improper motive of injuring the Claimant, making no contact with the Claimant himself, but choosing instead to publish a wholly misleading account of events which improperly sought to lay the blame for the adjustments to its 2005 results at the Claimant's door (who had left the company in 2001) in order to deflect attention away from the Defendant, and in the knowledge that, as a result of confidentiality undertakings in the Claimant's compromise agreement with the Defendant upon leaving he Defendant's employment, the Claimant was unable publicly to answer the seriously defamatory allegations against him".

16. It is common ground that in a libel action against a corporation, the corporation may be vicariously liable for a defamatory publication. But in such a case it is necessary for the claimant to identify one or more individuals who are responsible for the words complained of, and who had the state of mind required to constitute malice in law. A company's mind is not to be assessed on the totality of knowledge of its employees: see *Broadway Approvals v. Odhams Press* [1965] 1 WLR 805, 813.

17. Accordingly in paras 7.4.6 and 7.4.7 of APOC it is pleaded that that sentence in the words complained of that includes the dates "1997 through 2001" and the reference to "the former Bankers Trust" was deliberately included in the Press Release, and the publication of the Press Release was authorised or instigated by the two individuals X and Y. It is said that they were the Bank's senior managers responsible for the relevant tax-oriented transactions. It is said that each of those two individuals was seeking to hide their own responsibility for, and close participation in, the Bank's relevant tax-oriented trades which were the subject of the investigation by the US Department of Justice.

18. In the Defence the Bank specifically pleads that the Press Release was not authorised or published or contributed to in any way by either X or Y, and that they had no role in its preparation, whether directly or indirectly.

19. In the APOC there are eleven sub sub paragraphs, covering over three pages, pleaded in support of sub paragraphs 7.4.6 and 7.4.7. In para 7.4.17 the claimant also pleads in four sub sub paragraphs what are said to be four deliberate decisions by X and Y relating to the wording of the paragraph of the Press Release which includes the dates 1997 to 2001 and the name of Bankers Trust. In para 7.4.17(4) the Claimant pleads there was a deliberate decision by X and Y to include the name of Bankers Trust combined with the inclusion of the specific dates 1997 to 2001, thereby pointing any reader who knew the facts about the Claimant's career at Bankers Trust and at the Bank to the Claimant. In para 7.4.17(3) the Claimant pleads there was a deliberate decision by X and Y to use the word "mainly" in the words complained of to give a misleading impression. I shall return to these two points below.

20. While the Defence includes a denial in general terms of the substance of the allegation, it also records an objection that the pleading of the APOC relating to X and Y lacks necessary particularity and is deficient. The Defence does not contain any pleading to the sub paragraphs 7.4.6 to 7.4.26, stating that it is unnecessary for the Bank to do so until the Court has decided the question whether or not X and Y caused the publication of the announcement. This is an unusual stance for a defendant to adopt. But Mr Rampton does not invite the court to make any order arising out of this form of pleading. Rather, he submits that I must look at the pleadings as they stand, bearing in mind that the Bank has chosen not to answer those allegations, at least so far, notwithstanding that it has had the opportunity to answer them in its Defence.

21. Accordingly, there is an issue of publication in the present action. The issue is not whether the Bank published the words complained of, which is obviously not in dispute. The issue is whether X and Y are publishers in the sense that that word is used in the law of libel, that is whether there was sufficient authorisation or other involvement on the part of X and Y so as to attract liability in law.

22. In the course of the hearing Mr Caldecott made clear that if the case on publication against X and Y is held to be sufficiently pleaded at this stage, no issue arises at this stage as to the adequacy of the plea in malice as it is made against them (although the plea of malice against them will be an issue at any trial).

23. There is in the APOC and the Reply the alternative plea of malice, which is made against individual members of the Bank's Management Board among whom was A. This arose in the following way. In the course of correspondence solicitors for the

Bank had said that X and Y had no role in the preparation and publication of the Press Release. In response to that, in the APOC para 7.4.27 the Claimant pleads, in the alternative, that if (contrary to his primary case) the Press Release was drafted with no information or input from X or Y, then the members of the Management Board were reckless as to the truth or otherwise of the words complained of and had deliberately turned a blind eye to the true facts.

24. So far as concerns the alternative plea of malice, Mr Caldecott submits that it is deficient in law and in particulars, and has no real prospect of success.

25. Thus the Defendant's attacks on the two cases advanced against it on malice are different. Mr Caldecott submits that the claim based on the identification of X and Y has no real prospect of success on the issue of their involvement in the publication. Whereas he submits that the claim based on the identification of the Management Board has no real prospect of success on the issue of malice.

26. The Defendant therefore seeks summary judgment against the Claimant on the whole claim, alternatively on one or more of the following issues, namely whether:

    i) The occasion was one of qualified privilege

    ii) The case on X and Y's involvement in the publication is defective

    iii) The case on A and B's malice is defective.

27. The fourth issue arises on the Defendant's application for an order that trial be by judge alone. The Claimant made his application for trial to be with a jury in his allocation questionnaire. Mr Rampton realistically recognises that the case has the air of one that might well be tried by judge alone, assuming that it is tried. He accepts that it may well be that the court will in due course form the opinion that the trial requires a prolonged examination of documents which cannot conveniently be made with a jury (that being the condition to be satisfied under s.69(1) of the Supreme Court Act 1981). But he submits that on the present state of the pleadings, and at the present stage (before disclosure or exchange of witness statements), the application is premature.

28. There was some debate between the parties as to the sequence in which I should decide the applications under Part 24 and the application under s.69(1). The test under CPR 24.2(a) is whether the court considers that the Claimant (in this case) has a real prospect of success on the issue. If he has none, then summary judgment may (and in practice must, in the present case) be given against him. Neither side suggests that if that test is satisfied in this case, then there is any other compelling reason why the case or issue should be tried (CPR 24.2(b)).

29. But where a trial is with a jury, the judge must not trespass on the jury's role as sole judge of the facts. He may only withdraw an issue of fact from the jury if a finding by the jury in favour of (in this case) the Claimant would be perverse: *Alexander v Arts Council of Wales* [2001] 1WLR 1840 para 37; *Spencer v Sillitoe* [2002] EWCA Civ 1579 para 23. So there is a higher threshold to be satisfied before summary judgment can be given in favour of the Defendant, unless I order trial by judge alone before embarking upon the Defendant's application for summary judgment.

30. There is at least an apparent technical inconsistency in the stance of the Defendant. The Defendant is not asking me to order trial by judge alone: what he is asking for is that there be no trial at all.

31. Mr Rampton has enabled the court to cut through this technicality, saying that for the purposes of this application the court should adopt the test most favourable to the Defendant, namely the test under CPR 24.2(a). He argues his case on the basis that the court should not be concerned about any trespass on the role of the jury, notwithstanding that, subject to any further order, a jury is at present to be the statutory tribunal of fact at any trial.

THE LEGAL PRINCIPLES TO BE APPLIED TO THE APPLICATION

32. There is no dispute between the parties on the legal principles potentially applicable. There is an issue as to which of the potentially applicable principles prevails. There are two separate principles, both to be taken from *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1. There is the general principle as to the court's approach to summary judgment. And there is the particular principle applicable to allegations of dishonesty. Allegations of malice in libel actions fall into the category of dishonesty.

33. The general principle to be applied in considering CPR 24 is set out by Lord Hope of Craighead:

> "94 … the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is—what is to be the scope of that inquiry?
>
> 95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman* [[2001] 1 All ER 91], at p 95, that is

> not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

34. Lord Hobhouse of Woodborough put it succinctly at para 158:

> "The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality."

35. The particular principle applicable to an allegation of malice in libel (which is equivalent to dishonesty) requires the claimant to pass a much higher threshold. A pleaded case in malice must be more consistent with the existence of malice than with its non-existence. In libel the principle is now generally taken from *Telnikoff v Matusevitch* [1991] QB 102. The principle is of general application and was set out by Lord Hobhouse in *Three Rivers*, when he said:

> "160 … Where an allegation of dishonesty is being made … the [claimant] must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross-examination of a witness at the trial does not suffice.
>
> 161 … The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden—the balance of probabilities—but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out. The allegation must be made upon the basis of evidence which will be admissible at the trial."

36. The burden of proving malice is not easily satisfied: *Horrocks v Lowe* [1975] 135.

37. Mr Rampton emphasises the general principle in relation to all the three issues. Mr Caldecott emphasises the particular principle in relation to the issues of publication by X and Y, and of malice on the part of the Management Board.

38. In applying these principles it is necessary for the court to assume that the allegations of fact made by the Claimant in the APOC and the Reply, as to publication and malice (if sufficiently particularised), will all be established as true. Similarly, it is necessary for the court to assume that the allegations of fact made by the Defendant in support of his plea of qualified privilege will all be established as true. These assumptions are not findings of fact, or expressions of opinion as to the likely outcome. It is simply that if the assumptions are not made, the points will not arise. For example, if the Claimant's case that the Press Release refers to him is not upheld at trial, he will have failed on his whole case at that stage, and the other parts of his case will not require to

be determined. At a hearing such as this one the later thresholds or tests in a party's case have to be examined on the assumption that he has passed the earlier ones.

39. The denials by the other party, whether made in a pleading, or in a witness statement or affidavit, are of little assistance, unless they fall into one of the exceptions identified by Lord Hope at para 95: cases where it is possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, that is, where it is clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. It must follow that a bare denial, even on oath, from the most eminent source cannot be expected to bring a case within that exception.

40. In applying these principles it is also necessary for the court to assume that at trial the Claimant's case as to meaning will be upheld. This gives rise to an important point, which is not in dispute. It is discussed in Gatley on Libel & Slander 10th ed para 16.20 under the heading "Malice and Variant Meanings".

41. The general rule in defamation is that there is a single meaning to be attributed to the publication, if it is defamatory at all: *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 171-2. The law attributes to the words only one meaning, although different readers are likely to read the words in different senses. This meaning is to be objectively ascertained by the jury, or by the judge if he is sitting alone. It is the meaning an ordinary reasonable reader would give to the words. Evidence is not admissible as to what any reader of a publication thought it meant.

42. But the single meaning rule does not apply to a determination of an issue of malice. Words may be capable of more than one meaning (one of which is not defamatory of the complainant), and it may happen that a publisher (in the libel sense) will say that that was not the defamatory meaning that he intended to convey. The most common form of malice is where a publisher publishes what he does not believe to be true. A publisher who says he did not intend to convey the defamatory meaning, is also likely to say that he did not believe the defamatory meaning to be true. It has been held that in such a case the publisher is not to be found malicious unless he is proved to have known that the ordinary reasonable reader would understand the words to be defamatory of the complainant, or that he was reckless. The test for malice is subjective, not objective. Of course, this point does not often arise, because in the normal course the publisher of words can be expected to perceive the meaning an ordinary, reasonable reader is likely to give to the publication. And the more obvious that the words are defamatory of the complainant, the less weight a court will attach to other possible meanings when considering the state of mind of the publisher. See *Loveless v Earl* [1990] EMLR 530, 538-541 and *Bonnick v Morris* [2002] UKPC 31 paras 19-25.

43. It follows from this that where there is a real issue as to whether the words are defamatory of the claimant, and where the claimant has to prove malice to defeat a plea of qualified privilege, the claimant must plead that the defendant (or identified representatives of a corporation) either knew the meaning (defamatory of the claimant) that an ordinary, reasonable reader is likely to give to the publication, or was reckless as to whether or not his words were likely to be understood in that meaning.

44. As to what is required for an individual to be responsible in law for a libel the parties referred me to *Bataille v Newland* [2002] EWHC 1692 QB. At p 8 Eady J said:

> "There are various acts that can give rise to legal responsibility, for example, encouraging the primary author, supplying him with information intending or knowing that it will be re-published, or, if one is in a position to do so, instructing or authorising him to publish it."

THE RESPONSIBILITY OF X AND Y FOR PUBLICATION.

45. In the APOC it is alleged that the inclusion in the announcement of the dates 1997 through 2001 and the name of Bankers Trust was authorised or instigated by X and Y. In accordance with the principle in *Loveless v Earl* the Claimant pleaded (at the APOC paras 7.4.6 and 7.4.16) that X and Y included, or caused to be included, in the Press Release the words complained of, seeking to hide their own and the Bank's responsibility, to protect their own and the Bank's reputations, and improperly to blame the Claimant, who they knew was innocent of any wrongdoing. It is stated that they were the Bank's senior managers responsible for the relevant tax-oriented transactions, and their job titles are given. There is set out a detailed account of why it is said that they had a motive for doing this.

46. Essentially the case that is made is as follows. Y was the senior manager responsible at the Bank between 1997 and 1999 (that is before the merger with Banker's Trust), and following the merger he was jointly responsible with the Claimant until the Claimant's employment was terminated on 3 July 2001. Thereafter he was solely responsible for the merged business. X was the superior of the Claimant following the merger, and X procured the promotion of Y to joint responsibility of the business. Prior to the merger the tax-oriented transactions business run by the Claimant had been profitable and lawful. Following the merger X did not agree with the Claimant's approach. Prior to the merger the Bank had conducted its tax-oriented trades in a manner which would never have received approval at Bankers Trust. The Claimant strongly disagreed with the Bank's approach, and he informed X that it was dangerous. It was as a result of this difference with the Claimant, that X procured the promotion of Y to the position of joint responsibility with the Claimant, and subsequently the termination of the Claimant's employment.

47. In response to the denial that X and Y caused the publication of the material part of the Press Release, the Claimant sets out in the Reply his case for maintaining the averment that X and Y did cause the publication of the words in question. The contents of paragraph 7.4 the APOC are repeated in their entirety. It is said again that X and Y had a motive (a) to conceal the true extent of the Bank's responsibility for the impugned transactions by deflecting the blame for them onto other (wholly innocent) targets, namely Bankers Trust and the Claimant and (b) to abuse the occasion presented by the need of the adjustments and the consequent Press Release in order to defame the Claimant.

48. First he pleads that there was no legitimate occasion to refer to Bankers Trust in the Press Release, since Bankers Trust had not at any time had any hand in any of the transactions which gave rise to the need for the Bank to make the adjustments in question. Next it is said that the Bank itself was responsible for the vast majority (in

terms of value) of the impugned transactions, and the naming of Bankers Trust was a deceitful stratagem intended to mislead the market into believing that Bankers Trust was the only corporate entity that had engaged in such transactions on a scale warranting specific reference to it in the Press Release.

49. It is said that this stratagem was successful. Among other reasons given for this allegation is that a number of news media reported the Press Release on this understanding (or, as the Bank contends, misunderstanding) of the meaning it was conveying, but the Bank did not take the opportunity to correct this (mis)understanding. These news reports are relevant to prove the subjective state of mind of the publishers, in accordance with *Loveless v Earl*, not because of what the journalists wrote, but because of the Bank's omission to respond to what they wrote (that is, the Bank's omission to correct what it claims is a misunderstanding). For example, on 10 March 2006 there was published in The New York Times an article headed "Legal Costs of Shelter Case Hurt Deutsche Bank Profit". Referring to the Press Release, the journalist suggests that the Press Release is attributing responsibility to a unit of Bankers Trust, and not to the Bank itself. And, having seen the documents herself, she goes on to suggest that the Bank was wrong to exonerate itself. The article includes the following:

> "The Bank said it was taking the charge after uncovering "significant new information related to certain legal exposures" concerning "tax-oriented transactions" from 1997 to 2001 by a unit of Bankers Trust, which it bought in 1999…
>
> The documents appear to suggest that Deutsche Bank's involvement in a variety of shelters was not limited to the Bankers Trust Unit. Deutsche Bank declined to comment".

50. In the Reply the Claimant goes on to plead, as is common ground, that the content of the Press Release was of the highest importance for the Bank, and required to be considered at the highest levels within the Bank. The Claimant states that having regard to the senior positions and responsibilities of X and Y within the Bank, and their intimate knowledge of the impugned transactions, all of which had been set out in the APOC paragraph 7.4.7 (1) (3) and (8) " it is not credible… that the passage [in the Press Release referring to the dates and naming Bankers Trust] could or would have been included in the Press Release without the knowledge and authority of X and Y". It is said that, of the Bank's officers and employees who could have had a role in the decision as to what the Press Release should contain in relation to these matters, only X and Y had a detailed knowledge of the underlying transactions and knew the full history.

51. The Claimant's pleaded case is expanded in his witness statement dated 23 April 2008. He there sets out over a number of paragraphs his personal knowledge and experience, acquired as a senior manager of the Bank, as to how a decision on the contents of the Press Release is likely to have been reached. The Claimant also comments upon an e-mail which is exhibited to the witness statement of X. It provides some support for what had been pleaded in the APOC para 7.4.7. The e-mail is timed in the late afternoon before the publication of the Press Release. It is addressed to X and five other members of the Bank's Group Executive Committee, and copied to fourteen other persons. In the print-out only three of each group of

names is visible. X states that this was sent by A to him for information only, and he was not asked to, and did not, comment on the contents of the Press Release. The Claimant contends that that supports his contention that X had some involvement, and he would wish to explore that e-mail in cross-examination, with a view to establishing that X has understated his involvement. The Claimant states that by reason of his ability to generate very large revenues, X had in practice a strong influence on the decisions made at the Bank. The Claimant does not accept that the disclosed e-mail can have been the first information that X received as to the contents of the intended Press Release.

52. The case on the involvement of X and Y in the publication is thus based at this stage on inferences from the circumstances. There is no direct evidence. In short it is said that the drafting of the Press Release had to be considered at the highest level within the Bank, that those with knowledge of the material facts were X and Y and it is to be inferred that X and Y were the source of the information in the words complained of. Moreover, insofar as it is alleged that the information communicated in the Press Release was defamatory of the Claimant and false, X and Y had a motive for ensuring that, namely to deflect attention from their own responsibility for the exposure the Bank was then facing to a criminal investigation by the DOJ.

53. As already noted, the Bank's pleaded response to the plea contained in the APOC is a denial that X or Y had any involvement. But for the reasons already referred to, the Bank does not set up in its defence a positive case as to the source of the information as to the dates and the reasons why Bankers Trust was named. The Defence is of course supported by a Statement of Truth and this is signed by the General Counsel of the Bank for the UK and Western Europe. In addition there are witness statements from A, B, X, and Y all refuting in general terms the allegation that X and Y were involved. But none of the witness statements include any particulars as to how the dates and the name of Bankers Trust came to be inserted into the Press Release.

54. Mr Caldecott submits that there is a contrast between the APOC which pleads involvement by X and Y in the drafting, and a more general contention in Mr Bray's witness statement that they "must have had some direct or indirect involvement". He then turns to the Claimant's contention that there was no legitimate reason to refer to Bankers Trust in the Press Release. Mr Caldecott submits that the Press Release does not apportion individual responsibility and in any event, it is clear that Bankers Trust is named as the parent company, whereas any responsibility is attributed to its unnamed subsidiary.

55. In approaching this submission I remind myself that I have to assume that the jury or judge has concluded that the ordinary reasonable reader would understand the words to be defamatory of the Claimant. On this assumption, the reader has understood that the reference to Bankers Trust attributes responsibility to the Claimant – notwithstanding that lawyers and others may know that the managers of a parent company do not necessarily, or normally, bear responsibility for the transactions of a subsidiary company.

56. At this stage of the proceedings I cannot form any view as to why the name of Bankers Trust appears in the Press Release at all. But I do not find there to be a clear and obvious explanation for the appearance of the name of Bankers Trust in the Press Release which is likely to assist the Bank. The Claimant's suggested explanation is

not improbable, namely that blame is to be attributed in some way to that company, and so to the individuals who managed that company, and to deflect attention from the Bank itself.

57. The witness statements for the Bank made by Mr Davis and by A refer to those who were responsible for the drafting. They do not establish that the Claimant's case on this point is less than probable, or lacking in reality. They deny in general terms that X and Y were involved, and that those who were involved had the Claimant in mind. Mr Davis goes on to say that the Press Release "did not address and would not reasonably have been read as addressing individual responsibilities for the tax-oriented transactions", and that the unnamed subsidiary was one in which the Claimant had no responsibility. This is an argument which goes first to meaning, and which (for reasons explained) I must assume that the jury or judge will have rejected on that issue. B says much the same and adds that it was not his purpose to attribute individual responsibility. The point does not arise in the witness statements of X and Y, because they deny any involvement in the drafting.

58. For this purpose, I assume (indeed it is common ground) that the Press Release is true in so far as it expressly states that the transactions in question included some executed by a subsidiary of the former Bankers Trust. But the fact that a proposition is true is not a sufficient reason for stating it. A reasonable reader may ask him or herself why the statement is being made. A true express statement may carry an implication, to be understood from the context. The fact that the express statement is true, does not preclude the implication being false. It may be that there is an explanation which will be apparent from disclosed documents, or which witnesses for the Bank will give at trial, as to what they intended the reference to Bankers Trust to convey to the reader.

59. Mr Caldecott also submits that it is clear as a matter of grammar that the Press Release does not suggest that the Bank is exonerating itself, or that it is attributing responsibility mainly to the unnamed subsidiary of Bankers Trust. The word "mainly" in the words complained of governs the main clause (ie the provision is said to relate mainly to tax-oriented transactions). The word "mainly" does not govern the subordinate clause (ie the Press Release is not saying that the transactions in question are mainly ones executed by the unnamed subsidiary of Bankers Trust).

60. I see the force of this argument, but it is a point that can only be developed at trial. It is likely to be an argument advanced to the jury, or judge, as to why the words are not defamatory of the Claimant at all. But if it fails at that point (as for present purposes I must assume it will), I cannot say that, because of this argument, it is not probable that the Claimant's case on malice will succeed. To adapt the statement in *Bonnick*, those who drafted the Press Release can be expected to have perceived the meaning that an ordinary, reasonable reader was likely to give to it. If the defamatory meaning is upheld (as I must assume), the weight to be attached to an argument based on grammar, and on company law relating to parent and subsidiary corporations, is a matter for the jury or judge at trial.

61. Mr Caldecott further submits that it is wrong to suggest that the information in the Press Release could only have come from X and Y. He points out that it is common ground that the DOJ enquiry had been menacing the Bank for some time, and that in 2004 the Bank had provided information to a Committee of the US Senate through the Bank's lawyers. So the history of the transactions must have been known to lawyers

and others, apart from X and Y. Again this is a point to be developed only at a later stage than the present.

62. In my judgment, the case advanced by the Claimant on the involvement of X and Y in the publication of the Press Release is more consistent with X and Y having published or caused or authorised the publication of the words complained of than with their not having done so. The case as at present advanced against X and Y is sufficiently particularised, and is based on admissible evidence. This is, of course, subject to contradiction and explanation in the course of disclosure or in evidence a trial, but that is not relevant at this stage. Neither the denials of A, B, X and Y, nor the submissions of Mr Caldecott, make it possible to say with any confidence that the claim is less than probable, still less entirely without substance.

63. If it is to be said that X and Y were not the source, then the force of the Claimant's pleaded case is such that this cannot be done at this stage by attacking the inference to be drawn from the facts that are pleaded. It must be done by documents and witnesses explaining where the information did come from, and who suggested that it be included in the Press Release. The Bank has not attempted to do this at this stage. It had the opportunity to do so in the Defence. CPR 16.5(5)(2) requires a defendant to set out the reasons for any denial and the defendant's own version of events, if he intends to put one forward. It has not taken this opportunity, and I must reach my decision on the material that the parties have chosen to put before me.

64. I have reached this conclusion applying the more rigorous test which is applicable in cases where malice or dishonesty is alleged, and not the lower threshold which is otherwise applicable in relation to CPR 24. It follows that I do not have to decide which of the two tests is applicable to the allegations relating to X and Y. If I were applying the lower general test I would conclude that there is no absence of reality in the case the Claimant makes in relation to X and Y.

65. There are a number of other points relied on by the Claimant in support of the plea against X and Y, two of them based on what is not said in the Press Release (the APOC para 7.4.17(1) and (2)). I do not need to refer to all of these points, or to Mr Caldecott's responses to them. Mr Caldecott also submits that specific parts of the pleading lack the required particularity, for example paras 7.4.7(10). I see the force of his submissions, but there is no separate application on this basis, and I do not need to determine these issues for the purposes of making my decision on whether or not to order summary judgment.

MALICE OF THE MANAGEMENT BOARD

66. The Claimant's case on publication against the Management Board relies in part on the same facts as his case on publication against X and Y, namely upon their seniority in the Bank and their knowledge of the impugned transactions. He pleads in paragraph 7.4.27 of the APOC that if the Management Board drafted or caused the Press Release to be published with no input or information from X or Y, then (given the senior positions and knowledge of X and Y) the Management Board were reckless to the truth or otherwise of the words complained of, and deliberately turned a blind eye to the true facts. As Mr Rampton made clear, this way of putting the case assumes that X and Y are honest and would, if consulted, have told the truth and prevented the

Press Release going out bearing the defamatory meaning which I must assume it does bear.

67. The particulars of the Claimant's case against the Management Committee, as it is headed, are pleaded in five sub paragraphs, covering one page of the pleading. It is said that they knew certain facts, namely the background to the Press Release and the DOJ investigation (set out above). It said that there was a deliberately erroneous date in the Press Release, which referred to the period 1999 to 2001, whereas the Report of the Senate Committee to which the Bank had given information discloses that it was in October 2000 that the Bank reorganised and refocused its handling of tax products. This is a point made against X and Y also, and which I did not find it necessary to refer to in relation to the case against them, given the other material pleaded against them.

68. But this point assumes a larger proportion of the case against the Management Committee. In response to it the Bank has produced a letter written in 2004 by its lawyers to the Senate Committee, which gives the date in question as October 2001. It is the Bank's case that the error is in the Report, and that the Press Release is correct. The Claimant has not had an opportunity to investigate this, and does not withdraw this allegation. For present purposes I assume that the point remains (doubtful though that now appears). It is still a weak point. It does not seem to me that the meaning of the Press Release would be likely to be understood as materially different if it had said "1999 through 2000". That is a period, albeit a year shorter than the full period, during which the Claimant had the relevant responsibilities.

69. Apart from these matters, the plea goes on to refer to the difference between the Press Release (which does name Bankers Trust) and the draft notes to the Bank's Financial Report 2005, cited above, (which does not). There is no doubt that those differences exist, but they do not of themselves appear to me to support an allegation that those who drafted the later document were malicious.

70. The plea also refers to letters written by the Claimant in the days after the termination of his employment in July 2001, and to there having been an internal investigation at the highest level in the Bank into the control deficiencies, particularly over tax risk, which the Claimant states he brought to the Bank's attention.

71. Mr Caldecott submits that the points pleaded are all insufficient to support the allegation of malice. And he points out that there are deficiencies in the pleading as well. There is no plea against the Management Board that they knew that the Press Release was defamatory of the Claimant, or that they were reckless, as required by *Loveless v Earl*. Nor is it pleaded that the Management Board knew the facts about the Claimant's career which are relied upon to support the allegation that, though unnamed, he is referred to by the Press Release.

72. In a witness statement A states that he had responsibility for approving the wording of the Press Release on behalf of the Board. He states that at no time did the Claimant's involvement or otherwise in the tax-oriented transactions feature in his deliberations. For reasons given above, if the case against the Bank based on identification of A was otherwise sufficient, that denial would not suffice to support an order for summary judgment in favour of the Bank. But what is significant in the witness statement is that it does not contain admissions which make good in substance the absence of

allegations which would have to be made in the Reply, if the allegation of malice is to go ahead. For example, A does not admit that he knew the details of the Claimant's career which are relied upon in support of the case that the Press Release refers to the Claimant.

73. There is also a witness statement from B in which he says he was closely involved in the drafting of the Press Release. The witness statement is directed to denying malice, and there is nothing in it which the Claimant can rely on as making good what is missing from his own pleaded case.

74. In my judgment, as at present pleaded, the case in malice against the Management Board of the Bank based on identification of A and B falls short of the high threshold required for a plea of dishonesty to go forward to trial. It does so both in particularity and in the strength of the case made on the probability of malice. There is nothing pleaded which is more consistent with malice than with carelessness or inadvertence.

QUALIFIED PRIVILEGE

75. The Bank's defence of qualified privilege is based on a number of facts which are not in dispute. Its shares are listed on the Frankfurt and New York Stock Exchanges. In New York the Bank is subject to the reporting and disclosure requirements under the US Securities and Exchange Act 1934 and the New York Stock Exchange Listed Company Manual Rules ("the Rules"). The meaning and effect of these documents are matters of foreign law, and so would, if they are not agreed, have to be the subject of evidence from experts in that law. For present purposes it is common ground that the Bank was obliged by law in New York to announce the increased legal provisions referred to in the Press Release.

76. The Rules require the release to the public of information which might reasonably be expected to materially affect the market for its securities (Rule 202.05). Rule 202.06 lays down a procedure of public release of information. It includes release to the public press, and immediate publication to a number of news organisations, some of which are named, such as Dow Jones, Reuters and Bloomberg, and others of which are identified by description, such as newspapers in the cities where the company has major facilities.

77. The qualified privilege relied on in para 12.11 of the Defence is that which subsists at common law where a defendant is under a legal social or moral duty to publish information and the recipients have a corresponding and legitimate interest in receiving it.

78. Of the issues raised in the Reply, two were pursed before me by Mr Rampton.

79. First it is said that the Rules require that information released should be full, fair and factually accurate. Rule 202.06 includes the passage:

> "Unfavorable news should be reported as promptly and candidly as favorable news… This necessitates careful adherence to the facts".

80. Mr Rampton also referred me to provisions of the Exchange Act 1934 § 240.10b-5 which are not pleaded in the Reply. These include a provision which makes it unlawful to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make a statement not misleading. Mr Caldecott objects, with good ground. If a claimant intends to rely upon any illegality para 8.1 of the Practice Direction to CPR 16 requires that to be specifically set out in the Particulars of Claim. The same must apply to a Reply (such as the Reply in this case) which is required to be served under para 2.9 of the Practice Direction to CPR 53.

81. It follows from the Rules, so it is said, that the release of information by a company pursuant to the Rules which does not fulfil those criteria contravenes both the letter and the spirit of the Rules, does not serve the public interest, but is inimical to it, and cannot therefore attract qualified privilege. It is said that the Press Release was not published on an occasion of qualified privilege because it was inaccurate and misleading. The inaccuracies identified correspond to the defamatory meaning which is attributed to the words complained of, - in essence that the Press Release suggested that it was Bankers Trust, rather than the Bank, that had engaged in the impugned transactions on a scale that warranted specific mention in the Press Release.

82. It is the Bank which is asking for summary judgment against the Claimant on the issue of qualified privilege. It follows that, unless it is clear beyond question from the Bank's evidence or submissions that the Claimant's case is bound to fail or lacks reality, I must assume that the Claimant's pleaded case on the inaccuracy of the Press Release will be established. If the Claimant's case on inaccuracy is not established, then its challenge to the defence of qualified privilege under this head will not arise.

83. The Bank's primary case before me is that the Claimant's case on inaccuracy does lack reality. But these submissions are ones which, if sound, could equally be advanced in support of an application that the words complained of are incapable of bearing the defamatory meaning pleaded in the APOC. There is no such application in relation to meaning. And unless the jury or judge finds that the words complained of are defamatory of the Claimant, the Bank will not need to rely on their defence of qualified privilege.

84. I therefore prefer to approach this issue on the assumption that the Press Release is inaccurate, while stressing that this is not a finding of fact, but a hypothesis.

85. Mr Caldecott submits that the variety of qualified privilege the Bank relies on does not require that the publication be accurate or fair. These qualities are relevant only to malice.

86. The common law of qualified privilege relied on by the Bank in this case was summarised by Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at p 149:

> "… [there is a] public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be inaccurate".

87. In my judgment Mr Caldecott's submission is correct. Inaccuracy does not defeat this form of qualified privilege, only bad faith.

88. Mr Rampton referred to other forms of common law qualified privilege in which accuracy is a condition of, or relevant to, the existence of the privilege. He also drew an analogy with cases under Defamation Act 1996 s.15 and Sch 1, where privilege is afforded to a fair and accurate report of various categories. He submits that if it were otherwise then the public policy reasons for the privilege would be undermined.

89. None of these types of privilege are relied upon by the Bank. And the public policy, as stated by Lord Diplock, would not be undermined if Mr Rampton's submission were wrong. On the contrary, it would be undermined if his submission were right. The consequence would be a very extensive limitation upon freedom of expression.

90. This issue is one where it is possible to say that it is clear, as a matter of law, that there should be summary judgment for the Bank, subject to the one remaining point.

91. The second and last point taken by the Claimant on qualified privilege is that qualified privilege has expired by the passage of time. The Reply pleads that there was no privilege beyond the date when the adjustment to which the Press Release related had been made, and the Bank's final financial statements and auditor's report prepared and published, namely the last week in March 2006. Accordingly it is said that publication of the Press Release in its original, unqualified, form following the notification of the complaint on 31 January 2007 is not protected by qualified privilege. Such publication may occur when a person obtains access to the document which remains accessible on the Bank's websites.

92. There is little authority on the question whether qualified privilege can be lost by the passage of time. The point arises because English law continues to recognise that each publication (in the sense used in the law of libel) gives rise to a separate cause of action: *Berezovsky v Michaels* [2000] UKHL 25; [2000] 2 All ER 986; [2000] 1 WLR 1004; *Jameel (Yousef) v Dow Jones* [2005] EWCA Civ 75; [2005] QB 946. If qualified privilege (that is in respect of press publications pursuant to the variety of privilege in question in this case) can be lost by passage of time, then that would have far reaching consequences. As Mr Caldecott submits, the back copies of newspapers held in libraries and websites would have to be regularly reviewed and edited. But there would no way for the holder of the information to know when or in what form the editing was required.

93. I am aware of one case (not cited before me) in which the court was concerned with a communication of information which the publisher might have had an interest or duty to communicate at an earlier date, but in which he no longer had an interest at the date of publication: *Ley v Hamilton* [1935] 153 LTR 384. The defence of qualified privilege failed after trial in the House of Lords on that account. But that case turned on the relationship of the parties having ended at the time of the original communication. It did not relate to a communication which had originally been privileged. The question of a subsequent loss of an existing privilege by passage of time did not arise.

94. In strict logic Mr Rampton's submission would have some force. The classic statement for this kind of common law privilege is the well known passage in *Adam v Ward* [1917] AC 209 at 234:

> "A privileged occasion is … an occasion where the person who makes a communication has an interest, or a duty, legal or moral, to make to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

95. It can be seen from this statement that the reciprocity of duty and interest is expressed to be required in the present tense: " … has an interest or a duty … to make … has a corresponding interest or duty to receive it …"

96. The same point as Mr Rampton makes could also be made in relation to *Reynolds* privilege. In *Jameels v Wall Street Journal Europe Sprl* [2006] UKHL 44 Lord Bingham of Cornhill stated the law as follows:

> " The decision of the House in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 built on the traditional foundations of qualified privilege but carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues. Both these aspects are, I think, important in understanding the decision.
>
> Underlying the development of qualified privilege was the requirement of a reciprocal duty and interest between the publisher and the recipient of the statement in question: see, for example, …; *Adam v Ward* [1917] AC 309, 334; …. Thus where a publication related to a matter of public interest, it was accepted that the reciprocal duty and interest could be found even where publication was by a newspaper to a section of the public or the public at large."

97. If that is read literally, and "publisher" is interpreted in the usual libel sense of a person who communicates words to a recipient who understands the words, then the privilege would in some cases be lost by the time when (months or years after the event) a person went to the library or database to read the old newspaper containing such an article, so giving rise to a new publication. Such a reading would seriously limit the effect of *Reynolds* privilege, and so constitute a limit to the freedom of expression which that privilege gives effect to.

98. This is an entirely novel point, for which Mr Rampton cited no authority. One practical reason for the lack of authority may be that until recently qualified privilege for statements (other than reports of the doings of others) was overwhelmingly confined to communications of a private nature, such as references for employees. See Gatley para 14.2. For the recent recognition of a wider scope for common law privilege of this type see *Alexander v Arts Council* [2001] EWCA Civ 514; [2001] 1 WLR 514 and *Adu Aezick Seray-Wurie v Charity Commission for England and Wales* [2008] EWHC 870 (QB) paras 17-19 and 23. Documents such as references for

employees are less likely than the contents of a newspaper or press release to be available to the public in libraries, or, since the invention of the internet, in publicly accessible databases. And in cases where, as here, the claimant is not named in the words complained of, it may be that (even where the words complained of are publicly accessible) there is little risk of republication to anyone who will know the facts necessary to identify the claimant as the person referred to. The problem of old documents containing personal information has now been addressed by Parliament in the Data Protection Act 1998, Sch 1 paras 4 and 5 (the requirement not to keep personal data longer than is necessary). This legislation is in a context other than the law of libel, but it may in practice limit the likelihood of stale defamatory publications.

99. The consequences of the proposition advanced by Mr Rampton would make the law unworkable. It is hard to see how the keeper of a library or database can guard against the risk of liability for defamation where there is a publication of a statement written at a time when it was protected by common law privilege (of the reciprocal duty and interest type), but where the same reciprocal duty and interest may not subsist at some subsequent date upon which the document is read by a new reader. In my judgment, in the context of publication to the world of the Press Release in this case, mere passage of time is not capable in law of resulting in the loss of the privilege, if it existed on first circulation of the document in March 2006. It may be said that the conclusion that I have reached is not consistent with the principle of English libel law that each publication is a separate tort. Nevertheless, for the reasons I have given, I have formed the clear view that the proposition that Mr Rampton advances is not arguable.

100. It follows that the Claimant has no real prospect of defeating the defence of qualified privilege on either of these two bases, but can do so, if at all, only on the basis of his claim in malice identifying X and Y that I have earlier held should not be the subject of summary judgment.

CONCLUSION ON THE SUMMARY JUDGMENT APPLICATION

101. For the reasons given above, there will be summary judgment against the Claimant on the basis that he has no real prospect of defeating the Bank's defence that the occasion of publication was one of qualified privilege, and on the basis that he has no real prospect of success on his alternative case in malice against the Management Board. But I do not grant judgment against him on his primary case on malice. The application for summary judgment on the whole claim therefore fails, and the case will go forward to the next stage towards a trial.

MODE OF TRIAL

102. As already noted, Mr Rampton submitted that the application for an order that the trial be by judge alone is premature. I agree. It has not been necessary for me to make an order on this application in order to reach decisions on the Bank's application for summary judgment. It may well be that the second application would not have been made but for the consideration that it might have had to be resolved in order for me to reach decisions on the application for summary judgment.

103. These proceedings are still at an early stage. The Bank has not pleaded to important parts of the APOC, and it has raised issues as to the adequacy of the particulars in some parts of the APOC. It is at present impossible to foresee what the issues in this case will be.

104. In principle the case made by the Claimant is one which any jury would readily understand. The allegations are a story of rivalry, and of blaming a former colleague to keep oneself out of trouble. The setting is the highest levels of the banking world, where millions of dollars are at stake. But that will not bring the case within s.69 (1) of the 1981 Act unless at trial the court also has to understand complicated transactions in banking and securities. It is not yet clear whether that will be the case or not.