Case No: HQ02X03654

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Neutral Citation No: [2004] EWHC 196 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 February 2004

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

Howe & Co	**Claimants**
- and -	
Patricia Burden	**Defendants**

- -
- -

Mr Ian Ridd (instructed by **Howe & Co**) for the Claimant

Mr David Price (of **David Price & Co**) for the Defendant

Hearing date: 28 January 2004

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Approved Judgment

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

....
Mr Justice Eady

Mr Justice Eady:

1. On 28 January 2004 I heard an application to strike out this slander action on a number of grounds. The hearing took the whole of the court day and it was thus not possible to give an *ex tempore* judgment. I now set out my conclusions in the light of the helpful submissions made on behalf of the Claimants by Mr Ridd and on behalf of the Defendant by Mr David Price.

2. The applications were structured in the following way. I heard an appeal from an order of Master Leslie dated 2 October 2003 refusing to strike out the claim as an abuse of process.

3. That appeal is supplemented by additional grounds raised in an application notice dated 12 January 2004. The Defendant thereby seeks summary judgment on the basis that the claim is bound to fail, since (a) there is said to be an unanswerable defence of qualified privilege, and no basis for asserting a plea of malice by which it might be defeasible, and (b) that even on the Claimants' own case there is a defence of consent (or "leave and licence") which is bound to succeed.

4. The longest part of the hearing was taken up with an interesting and detailed argument by Mr Price to support his contention in relation to the defence of consent (in the course of which he referred to nearly 40 authorities). He pointed out that there is relatively little modern authority in this jurisdiction on this well known but little used defence in a defamation context. He therefore referred to some of the older cases, but more particularly to more modern common law decisions from other jurisdictions. Although this was the first topic addressed by the advocates, I propose to turn first to the appeal from the Master on the case of abuse of process.

5. Considerable weight was attached both before the Master (on which occasion Mr Price did not appear) and on appeal to what Mr Price described as a "principle" to the effect that the court will strike out a libel action if there is no tangible advantage to the claimants in pursuing it; in other words, if the "game is not worth the candle". For this purpose reference was made to *Schellenberg v BBC* [2000] EMLR 296 and *Wallis v Valentine* [2003] EMLR 8. It is true that I used the phrase that the game was "not worth the candle" in an off-the-cuff remark in an *ex tempore* judgment in *Schellenberg* but specifically with reference to the very unusual facts of that case. It will be remembered that there had been a lengthy trial which the claimant had abandoned without a definitive result having been achieved. The essential point was that he had the opportunity in those proceedings of having a determination on the merits of substantively the same issues as those in the later action which came before me. That was the context of the remarks. It would not be right to elevate that phrase into a general principle of some kind to be applied in other libel actions.

6. It is important to note that the allegations complained of in the recorded telephone conversations of 11 November 2001 are very serious. It was said of the Claimant firm and Mr Martin Howe in particular (who has not chosen to sue in a personal capacity) that acts or omissions had regularly taken place with regard to public funding which were not only professionally improper but also tantamount to criminal offences. By contrast with the *Schellenberg* case, the Claimants have not yet had any opportunity of having those matters determined on the merits. It is to be noted that there is no plea of justification and, accordingly, any outcome would be predicated upon the presumption that these serious allegations are false. Mr Price's submissions, if

successful on any of the grounds put forward, would have the consequence that the Claimants would be prevented from achieving vindication in respect of those allegations through the court process.

7. Notwithstanding this, of course, it might be possible to achieve summary judgment if a substantive defence can genuinely be characterised as bound to succeed. Any such application needs to be scrutinised very carefully if it would have the effect of depriving one party or the other of a trial of the issues before a jury. I shall, in due course, address Mr Price's submissions on the substantive defences relied upon here (i.e. qualified privilege and consent). At the moment, however, I am concerned with the question of whether the Master erred in deciding at this pre-trial stage that a case of abuse had not been made out.

8. As I observed during the course of the hearing, there are a number of grounds for suspecting that the court's process has been used in this litigation on behalf of the Claimants in an oppressive and bullying way so as to silence a vulnerable ex-employee. It is, I need hardly say, impossible for me to come to a final determination on that suggestion on paper. Nevertheless, there are a number of aspects to the litigation which will no doubt at some stage require careful scrutiny by the court. I have in mind what appear to be a number of inflated costs applications over relatively minor interlocutory hearings and, more particularly, a purported conditional fee arrangement involving the Claimant firm – now abandoned.

9. Whatever the merits of the criticisms mounted on the Defendant's behalf, I should not lose sight of the fact that the litigation may nevertheless have a legitimate foundation despite its being carried on, in some respects at least, in an apparently oppressive manner.

10. It is true that these words published over the telephone to Miss Pavlow do not seem to have reached a wider audience or done the Claimants any harm. Nevertheless, the allegations are serious and damage is presumed. In the light of these factors, it seems to me that I could not possibly make a finding of abuse of process on the basis of triviality.

11. It has been stated on the Claimants' behalf by Mr Ridd that the motive for bringing the proceedings is not to obtain money from the Defendant who is, as far as I am aware, of limited means, but to achieve vindication and to prevent these serious allegations being more widely published. That is often the case with impecunious defendants, and the mere fact that a claimant may ultimately recover little or nothing in financial terms is not a reason for concluding that the proceedings constitute an abuse of process.

12. The Master was criticised as to that part of his judgment where he referred to the public interest or importance of the general subject of the public funding of litigation. Mr Price argues that this is an irrelevant consideration, since a libel action would not be an appropriate vehicle for sorting out allegations of misconduct – especially in the absence of a plea of justification. I do not believe that the Master was setting out "public interest" as a reason for rejecting the Defendant's contention that there had been an abuse of process despite being in other respects sympathetic. I understand him only to be citing public interest as one factor underlining the seriousness and the legitimacy of the claim.

13. I am unable to conclude that there has been an abuse of process and I see no reason to set aside the Master's order in this respect.

14. I shall consider next the closely related issues of qualified privilege and malice. The court at this stage needs always to be wary of coming to any final conclusion, purely on the documents, with regard to issues that might depend to a greater or lesser extent upon the resolution of factual disputes by a jury: See e.g. *Alexander v Arts Council of Wales* [2001] 1WLR 1840.

15. It is said by Mr Price that a judge is in a position on the evidence, as it stands at the moment, to conclude that Mrs Burden's case that the occasion of her communications was protected by qualified privilege is bound to succeed. Sometimes it is possible from the surrounding circumstances to come to a definitive conclusion without the need to resolve factual disputes: see e.g. *Kearns v General Council of the Bar* [2003] 1 WLR 1357. That was a case of what one might call "off the peg" privilege, where the issue can be resolved simply by looking at the relationship between the parties and the subject-matter of the relevant communication: see e.g. Gatley on Libel and Slander (10th edn) at paras. 14.8 and 14.9 and *Komarek v Ramco Energy plc* [2002] EWHC 2501 (QB) at [46]. Mr Ridd submits that this is not such a case.

16. Undoubtedly at the material time Mrs Burden and Miss Pavlow were both employees of the Claimants. It may well be that communications between fellow employees on the subject of improprieties in their employer's conduct of business will be of legitimate common and corresponding interest between them - especially when it is contemplated that there should be a complaint to an appropriate professional body, or to the police, or that there should be some other form of "whistle blowing". It is not, however, inevitable.

17. Sometimes investigation of the particular circumstances will be required to establish such a legitimate interest. This may require investigation at trial and possibly some findings of fact by a jury. As things stand, it seems to me that there is a strongly arguable case of qualified privilege, but I do not feel that I am in a position to come to a final conclusion about it at present. I appreciate that in this context there is room for a good deal of overlap between the issues of privilege and malice, but I can see that there is some scope for investigating the relationship between the two women and their relative seniority in order to determine whether, objectively judged, there was an occasion calling for the protection of qualified privilege.

18. Although, therefore, the defence of qualified privilege may ultimately prove viable, I am satisfied that this is not an appropriate case for summary judgment in that respect.

19. If I were able to say on the statements of case, the witness statements and the other available documents, that a finding of malice would be perverse, then even at this stage it might be appropriate to rule the issue out of contention: see e.g. *S v Newham London Borough Council* [1998] EMLR 583. Again, however, one would have to be satisfied that there are no areas of factual dispute requiring examination and/or determination by a jury before such a final order could be made.

20. One of the complicating factors in this case is that the plea of malice is prolix and badly set out. It was recognised by Mr Ridd that it needed substantial revision, whereas Mr Price not unreasonably suggested that he was entitled to make his submissions on the plea as it stood. Rather curiously, one of the most important aspects of the Claimants' case on malice only emerged during the course of Mr Ridd's

submissions. He wished to place reliance upon the fact that, according to the Claimants' case, the Defendant had already admitted that she had no evidence for the very grave allegations she was making. This admission was said to have taken place at a tribunal hearing of which there was no official transcript. Mr Price had no instructions on this matter and was not in a position to deal with it, given the circumstances in which it came to his attention. Its potential significance for the purposes of malice can hardly be overstated.

21. It is often said that the best evidence of malice is that a defendant knew that the defamatory words were false at the time of publication or was genuinely indifferent to their truth or falsity. Thus, if Mrs Burden had no grounds for her accusations of impropriety, and/or had made an admission to that effect, one would surely give the matter pride of place in the particulars of malice. There is no point in giving summary judgment until the case on malice has been properly pleaded and *then* found wanting. It does not seem at the moment to be a promising case for such a Draconian remedy.

22. I now turn to Mr Price's submissions on the appropriate tests for a defence of leave and licence. He submitted that, applying those criteria to the uncontroversial facts of this case, his client was entitled to summary judgment because the defence was bound to succeed. There were no issues of fact on which it was necessary for a jury to pronounce.

23. The facts are certainly unusual. The Defendant suggests that the defamatory words were spoken over the telephone on 11 November 2001 only because, in effect, conversations were initiated by Anna Pavlow with a view to getting her (the Defendant) to repeat on tape the allegations she had previously made to her. What is more, Anna Pavlow took this step with the assent, connivance and authority of the Claimants with a view to Mr Howe's using the recorded allegations for some purpose of his own. Indeed, he did use them to found the present slander case.

24. It is Mr Price's submission that one could look for guidance in determining the principles of the English law of consent to other common law jurisdictions; for example, an English court can properly infer consent if the claimant encourages or invites the defendant to make statements about him while knowing that the likely outcome is that he will utter remarks that are defamatory: see e.g. the judgment of MacPherson J. in *Jones v Brooks* (1974) 45 DLR (3d) 413, 417-419 (Saskatchewan Queen's Bench) and that of Justice Halpern in the Appellate Division of the Supreme Court of New York in *Teichner v Bellan* (1959) 181 NYS 2 d 842, 845-6.

25. Mr Ridd, however, argues that this is to go further than English authorities would support and that forseeability is not enough. What is required is positive and unequivocal consent: see e.g. Gatley on Libel and Slander (10th edn) at para 18.17.

26. Be that as it may, I am invited here to conclude that Martin Howe gave his consent to the slanders of November 2001 from accounts given in witness statements for the purpose of employment tribunal proceedings and which, it seems to me, are open to more than one interpretation. Anna Pavlow said that she told him at a meeting at her home that she intended to ring up the Defendant and, what is more, she deposed that she was doing it with a view to the protection of her own interests.

27. Since she was an employee of Howe and Co. at the time (as was the Defendant), and since the subject-matter of the conversation was almost certainly going to be the allegedly improper conduct of the firm's legal practice, Mr Price submits that the

inference is irresistible that she was acting with the assent and authority of Mr Howe. He could have instructed her, he submitted, *not* to make the calls.

28. I suppose that, on reading the available information about the scenario that Miss Pavlow was acting independently and for her own personal purposes, a reasonable reader might be rather sceptical. Nonetheless, I am quite satisfied that one could only come to a definitive conclusion after evidence was adduced focusing specifically on the motive of Miss Pavlow and the intention of Mr Howe. Cross-examination might be important. The evidence as it stands raises a number of questions which are left tantalisingly unanswered. What was Mr Howe doing at Miss Pavlow's home over a weekend? Who suggested further telephone calls in the first place? Did Miss Pavlow tell Mr Howe what her reason for doing this was? Did Mr Howe express a view as to whether she should or should not make the calls? Did he express a view as to the usefulness of recording the conversations?

29. I cannot conclude as yet that a jury would be perverse to find that Miss Pavlow was *not* acting on Mr Howe's express or implied authority. I am also conscious that it is generally wise not to give summary judgment in cases where the relevant law is uncertain or in a state of development: see *per* Sir Thomas Bingham MR (as he then was) in *E v Dorset County Council* [1995] 2 AC 633.

30. Accordingly, I am unpersuaded by each of Mr Price's arguments and therefore I dismiss the appeal from the Master and also dismiss his application for summary judgment. I will, however, strike out the plea of malice as it now stands so as to afford the Claimants an opportunity to plead it clearly. A draft will no doubt be served on Mr Price to see if he wishes to challenge it further. Whether it will pass muster at that stage remains to be seen.