Neutral Citation Number: [2009] EWHC 3244 (QB)

Case No: HQ08X04447

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 December 2009

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

PETER HUGHES **Claimant**

- and -

(1) WILLIAM RISBRIDGER (sued as "Bill Risbridger")
(2) BRITISH AIRWAYS PLC **Defendants**

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Henry Spooner (instructed by **Sahota Solicitors**) for the **Claimant**
Manuel Barca (instructed by **Addleshaw Goddard LLP**) for the **Defendants**

Hearing date: 30 November 2009

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Judgment

Mr Justice Eady :

1. The primary application before the court is that of the Defendants, Mr William Risbridger and British Airways Plc, seeking summary judgment in accordance with the provisions of CPR Part 24. The Claimant, Mr Peter Hughes, has sued for libel in respect of a number of internal emails sent by Mr Risbridger to other members of British Airways staff on or about 14 December 2007. It has been accepted on the Claimant's behalf that, in respect of the eight pleaded recipients of the email, there would be a defence of qualified privilege. The basis of the present application is that the claim is bound to fail because Mr Hughes has proved unable to formulate a plea of malice against Mr Risbridger which has any realistic prospect of success.

2. The background is that the Claimant was employed by British Airways in a senior cabin crew position, at the "purser" grade. His career with British Airways stretched back for some 20 years. On the morning of 13 December 2007 he emerged, with his colleagues, from an overnight flight from Hong Kong. A joint stop-and-search operation was mounted that day by Metropolitan Police officers and officers acting on behalf of the Revenue and Customs. Such checks are carried out from time to time with a view to detecting any criminal offences that may have been committed by flight and cabin crew.

3. The First Defendant, Mr Risbridger, had been given prior notification of the operation and was invited to attend by the Metropolitan Police. This was against the possibility that any persons found to be in possession of stolen or contraband goods were employees of British Airways. The search in question was directed towards crews from a number of airlines, but in the event the only people suspected of having goods in their possession improperly were British Airways employees. The reason for Mr Risbridger's involvement is that, having retired from the Metropolitan Police with the rank of detective sergeant, he was employed by British Airways within their division known as "Asset Protection Group: Corporate Security". He is responsible for investigations and security, including with regard to crimes committed against British Airways, whether by its own employees or others.

4. The email which forms the subject-matter of this claim was initially sent at 11.21am on 14 December 2007 to Mr Harrington, the Inflight Services Operations Manager, and it was copied to five other colleagues of Mr Risbridger (whose identities do not matter for present purposes). As I have already made clear, there is no dispute that those publications were the subject of qualified privilege. The purpose of the email was to serve as a report by Mr Risbridger on the stop-and-search operation of the previous day.

5. At 12.33pm on the same day Mr Risbridger forwarded the email to two further recipients; namely a Mr Wreford Abrahams and "the Duty Operations Manager". That is a role, rather than any specific individual, and it would be fulfilled by different persons at different times. Again, however, there is no dispute as to the defence of qualified privilege in respect of these two further publications.

6. The Claimant was found to be in possession of 12 miniature bottles of whisky by a customs officer called Justin Evans. According to Mr Evans' witness statement, the Claimant initially told him that he had bought the miniatures and he then "started to

look for a receipt". At this stage, I understand that Mr Risbridger was no more than about ten feet away and was in a position to observe what was happening.

7. The next stage was that Mr Evans called over a police officer, Ms Burke, who joined him. Mr Risbridger states that he went with her. According to the evidence of Ms Burke and Mr Evans, it is accepted that Mr Risbridger may well have been present at this juncture, although the Claimant denies this.

8. In the course of his conversation with Ms Burke the Claimant admitted that he had not paid for the miniatures. He offered the explanation that the bar had been shut. He put the bottles into his bag and then forgot to pay. He was arrested and cautioned on suspicion of theft and taken to Uxbridge Police Station. The ultimate decision was that the police would take no further action. This outcome was notified to Mr Risbridger by Ms Burke.

9. It is fair to say that the Claimant at no stage admitted theft. He admitted taking the miniatures, but there was no point at which he made an admission to the relevant *mens rea*.

10. Despite this, the words complained of from the email sent the following day included the following passage:

> "In police interview he [the Claimant] stated that he took the miniatures on the return flight to LHR and as the bar had already closed he did not have the opportunity to pay for them and then forgot to do so. He was released by the police with no further action to be taken. In my view HUGHES can count himself as extremely lucky not to have received a police caution at the very least *as he admitted to theft in the interview*."

(Emphasis added.)

11. Obviously, as a former detective sergeant of many years experience, Mr Risbridger would know the elements of the offence of theft and, in particular, that there is the mental element of having an intention permanently to deprive. What he now says, in paragraph 37 of his witness statement, is:

> "I was quite surprised that the police had decided to take no further action against Mr Hughes. It seemed clear to me at the time of writing the email that as Mr Hughes could not possibly have purchased as many as 12 miniatures, he was unlikely to have had any intention to pay for them. It was on that basis that I felt I was correct in stating that he had effectively admitted to theft, as it seemed to me that Mr Hughes was likely to have acted dishonestly."

12. Later, at paragraph 39, he added:

> "Whilst my intentions were honest at the time of writing the email, I acknowledge that I would, if I could write the email

> again, not refer to Mr Hughes having admitted to theft but would instead refer to him having admitted to not paying for the miniatures. I had thought Mr Hughes' statement at the time was tantamount to an admission of theft. I can now see that it was inaccurate. I do, however, still feel that Mr Hughes was lucky to have been treated so leniently by the police."

13. It is thus clear that Mr Risbridger regards himself as having made an honest mistake. If that is so, then it is likely that the defence of qualified privilege would be upheld and not vitiated by malice. On the other hand, the Claimant wishes to allege that the attribution to him of an admission of theft must have been dishonest. The application for summary judgment, argued by Mr Barca on the Defendants' behalf, would involve my concluding that there is no possible basis for such a contention and, indeed, that a jury would be perverse to draw such an inference.

14. The relevant law is succinctly stated by the learned editors of *Gatley on Libel and Slander* (11th edn) at para 30.5:

> "It is not sufficient merely to plead that the defendant acted maliciously. The plea must be more consistent with the presence of malice than with its absence; if it is not, it is liable to be struck out.
>
> Generalised or formulaic statements will not be permitted."

15. In the latest edition of *Duncan and Neill on Defamation*, at 18.21, the relevant principle is stated as follows:

> "An allegation of malice is tantamount to an accusation of dishonesty and should not be lightly made. The court is often called upon to strike out pleas of malice which are vague or speculative. When considering such applications the court applies a test similar to that used in criminal cases in the light of *R v Galbraith* [1981] 1 WLR 1039. The claimant must set out a case which raises a probability (rather than a mere possibility) of malice."

Reference is then made to the recent case of *Seray-Wurie v Charity Commission of England and Wales* [2008] EWHC 870 (QB) at [34]-[35]:

> "In order to survive, allegations of malice must go beyond that which is equivocal or merely neutral. There must be something from which a jury, ultimately, could rationally infer malice; in the sense that the relevant person was either dishonest in making the defamatory communication or had a dominant motive to injure the claimant.
>
> It is necessary, in effect, for a claimant to demonstrate that the person alleged to have been malicious abused the occasion of privilege, for some purpose other than that for which public policy accords the defence. Mere assertion will not do. A

> claimant may not proceed simply in the hope that something will turn up if the defendant chooses to go into the witness box, or that he will make an admission in cross-examination."

16. The principle that a pleading of malice, and indeed the evidence in support of it, must be capable of giving rise to the probability, as opposed to a mere possibility, apparently derives from *Somerville v Hawkins* (1851) 10 CB 583 and was followed in *Turner v MGM* [1950] 1 All ER 449, 455 (House of Lords) and in *Telnikoff v Matusevitch* [1991] 1 QB 102, 120 (Court of Appeal).

17. Here, submits Mr Spooner for the Claimant, there is more than mere assertion or speculation. There is the undisputed fact that the Claimant never admitted to theft (i.e. to dishonesty) and, to be placed alongside it, the uncontroversial fact of Mr Risbridger's long experience as a detective sergeant. In his skeleton argument, Mr Spooner further argued that Mr Risbridger " … would or should have known that a person in the Claimant's predicament at Uxbridge Police Station would only receive a Caution if he had confessed to an act of intentional dishonesty". From these facts, it is said that a jury would not be perverse to infer that he must have included in the email something which he knew to be false. Why he would have done so, however, can only be a matter for speculation.

18. Mr Spooner goes on to make an additional point, to the effect that Mr Risbridger was labouring under a serious misunderstanding in that, contrary to his belief, British Airways policy at the time would have permitted the Claimant to have as many 12 miniatures in his possession. Some evidence was produced to the effect that, in practice, a member of staff might be allowed to have six bottles in respect of an outward journey and another six in respect of the return, thus giving rise to circumstances in which an employee might properly have a total of 12 bottles on arrival. This does not in itself assist his case, however, since to attribute to Mr Risbridger a mistaken but honest belief might tend to point away from malice. On the other hand, this is not an essential limb of his argument.

19. What matters in this case is not so much to pin any particular motive upon Mr Risbridger, but to concentrate on the charge that he said something which he must have known to be untrue.

20. It may be, for all I know, that Mr Risbridger believed the Claimant to have been dishonest and wanted to see him get his "just deserts". He may have thought that having escaped the possibility of criminal prosecution or, at the least, a caution, he deserved to have the full rigours of the internal disciplinary process meted out to him. To encourage this, Mr Spooner suggests that he may have overstated the evidence against him. As it happened, he was dismissed but appealed successfully and received a lesser penalty. It is not accepted that the email complained of had any influence on either of these outcomes. These are matters which might possibly be explored in cross-examination. It is not for me to speculate at this stage.

21. On the other hand, on these particular facts, I believe I should be exceeding my function if I were to hold that a fact-finding tribunal would be perverse to come to the conclusion that Mr Risbridger made an allegation about the Claimant which he knew to be false (i.e. to the effect that he had admitted dishonesty). It may well transpire, if the matter comes to trial, that Mr Risbridger was merely careless in his use of

language and that a jury would thus conclude, in effect, that he was in no way abusing the occasion of privilege. Nevertheless, I do not consider it appropriate to shut out Mr Spooner from exploring the matter at a full hearing in due course – if matters have to go that far. I therefore reject the Defendants' application for summary judgment.

22. There is another matter which I have to consider, in that somewhat late in the day the Claimant's advisers have applied to amend their pleaded case in order to add further publishees of the defamatory allegations. It may well be that the intention is to try to establish publication to someone outside the scope of qualified privilege and thus avoid the uncertainties of malice. The application notice, dated 23 November 2009, seeks to add the following words in the particulars of claim:

> "Paragraph 2A The Claimant claims, against each Defendant, for every publication and/or re-publication of the Email that has, or transpires that has taken place, from initial publication to the conclusion of this action."

It is also sought to add to the reply, at the end of paragraph 33, the following words:

> "Furthermore qualified privilege is denied, in respect of publication and/or re-publication to individuals whose names are disclosed during the course of this litigation, unless expressly admitted to by the Claimant in writing."

23. This is somewhat muddled. The proposed addition to the particulars of claim is far too vague to justify amendment at this late stage. Where there is an intention to add publishees, the appropriate course is to plead individuals and, where necessary, to add the circumstances from which it is to be inferred that the additional publication took place. The burden obviously rests upon the Claimant. There is no presumption of publication merely because information is posted on a website or has become accessible to someone if he or she chooses to go to it. All that has emerged is that the terms of the offending email are being retained electronically until such time as this litigation is concluded. It *could* thus be accessed by certain individuals if they chose to take that step.

24. The proposed amendments in the reply appear to jump the gun. What is anticipated is that, in respect of the proposed additional publishees, the Defendants *would* plead qualified privilege (assuming permission to have been granted for the amendment). It is in anticipation of that hypothetical defence that the amendments to the reply are proposed.

25. I cannot permit either of these amendments. I think Mr Barca fairly makes the point that the Claimant and his advisers have had every opportunity to make any amendments they wish and were prompted to do so by the Defendants' solicitors in correspondence. Even now, however, no additional publishees are identified. The Claimant's applications are both refused.