Neutral Citation Number: [2009] EWHC 959 (QB)

Case No: HQ08X00297

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2009

Before :

MRS JUSTICE SHARP DBE

- -

Between :

JOHN MONKS **Claimant**

- and -

WARWICK DISTRICT COUNCIL **Defendant**

- -
- -

Mr Monks in person
Aidan Eardley (instructed by **Berrymans Lace Mawer**) for the **Defendant**

Hearing date: 28th April 2008

- -

Judgment

Mrs Justice Sharp :

Introduction

1. The Claimant, Mr Monks, is a chartered surveyor and owner of a Grade II listed house in Kenilworth. The Defendant is the local district council for the area in which the house is situated. Mr Monks brings proceedings for libel against the Defendant in respect of an email ("the Email") sent on the 14 August 2007 by the Defendant's Communication and Press Officer, Richard Brooker, to a journalist from the *Leamington Observer*; and also in respect of an article which was published by the *Leamington Observer* on the 16 August 2007 under the headline *"Taxpayers to foot £15,000 court bill over brick wall"* ('the Article').

2. The trial (by jury) is due to begin on 15 June 2009, with a time estimate of 4 days. Time for exchanging witness statements has been extended, pending the determination of these applications, until 6 May 2009. Mr Monks was initially represented by solicitors and counsel, who settled all the statements of case, but has been acting in person since 26 January 2009.

The facts

3. The brief facts are as follows. In its capacity as the district council with responsibility for local planning issues, the Defendant brought a prosecution against Mr Monks in respect of his demolition of a wall at his house, which was alleged to be an offence contrary to section 9(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. The prosecution failed. Mr Monks was acquitted at Warwick Crown Court in July 2007.

4. In August 2007 Mr Brooker was approached by a journalist from the *Leamington Observer* who was preparing an article on Mr Monks' acquittal and who requested an "on the record" response on behalf of the Defendant. Mr Brooker then sent the Email which was in the following terms:

> "40 New Street, Kenilworth
>
> We can say as follows:-
>
> The property is a listed Victorian dwelling within the Kenilworth conservation area. The Council was alerted to the demolishment and removal of both front and side walls of the property by a number of concerned local residents. A visit from a Council Building Inspector confirmed that work was in progress to remove the walls. When the builders were advised of the listed status and asked to cease works the request was declined. Work continued, with no regard for conservation of the Victorian bricks. Contact was immediately made with the site owner, but all attempts at negotiation proved fruitless.
>
> The Planning Committee had given various permissions for other works at the site as far back as 2001. However, at no

> time was permission sought, or given, for demolition of the boundary walls.
>
> The removal of these walls constitutes a criminal offence under the Listed Buildings legislation and, as such, was listed for the Crown Court. The Council takes its statutory duties for the protection of listed buildings very seriously and there was significant local and statutory concern about the alterations taking place at the property. The council is very disappointed with the outcome of the case but will continue to carry out its duties to protect the heritage of the district. It is tragic that these historic Victorian walls have now been lost. [underlining added]
>
> The estimated cost of the case is £15,000."

5. The Article appeared in the *Leamington Observer* two days later. It set out part of the Email, but also included a great deal of other material, including a statement that the jury had acquitted Mr Monks after less than an hour's deliberation, and statements by Mr Monks himself. The full text of the Article is as follows:

> "**Taxpayers to foot £15,000 court bill over brick wall**
>
> A court battle over a brick wall will cost taxpayers £15,000 after a jury cleared a Kenilworth man of its demolition.
>
> Warwick District Council took the action against New Street resident John Monks after he carried out work on the front wall of his house which was listed as a "building of special architectural or historical interest".
>
> During the hearing at Warwick Crown Court last month, it was alleged that chartered surveyor Mr Monks had illegally knocked down the wall and then rebuilt it using a different colour of brick.
>
> But Mr Monks argued that the work was for essential repairs on the wall after a car had hit it a number of years earlier and that the bricks used to repair it were more authentic that those taken out.
>
> After hearing all the evidence, the jury took less than an hour to clear Mr Monks.
>
> Warwick District Council has defended its decision to go to court and the £15,000 cost of the five-day hearing.
>
> A spokesman said: "The council was alerted to the demolishment and removal of both front and side walls of the property by a number of concerned local residents.

> "Kenilworth Town Council also made representations about the wall's demise.
>
> "The removal of these walls constitutes a criminal offence under the Listed Buildings legislation and, as such, was listed for the Crown Court.
>
> "The council takes its statutory duties for the protection of listed buildings very seriously and there was significant local and statutory concern about the alterations taking place at the property.
>
> "The council is very disappointed with the outcome of the case but will continue to carry out its duties to protect the heritage of the district.
>
> "The estimated cost of the case is £15,000."
>
> But Mr Monks says he has been left with the fall out of the case, especially the damage to his professional reputation.
>
> He said: "The last three years have been absolute hell particularly because of the nature of my profession as a chartered surveyor.
>
> "The whole prosecution was futile and the cost to myself and my business has been significant.
>
> "It is a difficult undertaking to renovate a listed building as anyone who has tried will know.
>
> "All I was trying to do was restore it and since then, I have had a number of comments on the good job that's been done.
>
> "This is local government at its worst."

These proceedings

6. Proceedings for libel were begun on 25 January 2008 and the Particulars of Claim were served on 8 February 2008. In paragraph 4 of the Particulars of Claim Mr Monks complains of two lines only from the Email (those underlined in paragraph 4 above). Paragraphs 5 and 6 of the Particulars of Claim are as follows:

> "5. The said words were reproduced in an article which appeared in the Leamington Observer on 16th August 2007 under the headline ***"Taxpayers to foot £15,000 court bill over brick wall"*.** It is to be inferred from the facts and matters set out in paragraphs 1 to 4 above that this republication of the words complained of was the intended, and/or natural and probable or foreseeable, consequence of the Defendant's original publication of the email to the Leamington Observer referred to in paragraph 4 above.

> 6. In their natural and ordinary meaning the words complained of meant and were understood to mean that notwithstanding his acquittal, the Claimant was in fact guilty of the criminal offence under the Listed Buildings legislation for having removed the front and side walls of his property."

7. Mr Monks claims aggravated damages. In relation to that claim, he relies on the allegedly malicious nature of the publication, on the fact that his acquittal was negated by the "on the record" statement by the Defendant, on the fact that the Defendant was alleging a "malicious vendetta" against him and on the way in which the criminal prosecution was prosecuted by the Defendant. He also claims that he should be compensated as part of an award of general damages for what is described as "the likelihood of a general loss of custom and business" the actual amount of which is said to be "impossible" to identify.

8. In its Defence served on 18 April 2008, the Defendant does not dispute that Mr Brooker had sent the Email, or that it is vicariously liable for his conduct in so doing. However it asserts (in trenchant terms) that the claim as pleaded is embarrassing, since it fails to make clear whether Mr Monks is claiming in respect of the Article as well as the Email. It also pleads two substantive defences. First, justification (truth) to a lesser defamatory meaning than that complained of by Mr Monks, namely that "despite the Claimant's acquittal, there had been sufficient evidence to suspect the Claimant of having committed a criminal offence under the Listed Buildings Legislation such as to justify the decision to prosecute him in the Crown Court". Second, qualified privilege in relation to the publication of the Email, on the ground (broadly) that the expenditure of public money on Mr Monk's prosecution was a matter of legitimate concern to readers of the local newspaper. Therefore it is said, the Defendant had a social or moral duty to convey the explanation contained in the Email, in response to the queries of the journalist, and the readers had a corresponding interest in receiving such an explanation.

9. In his Reply, Mr Monks alleges that the Defendant was actuated by express malice. Reliance is placed (i) on the parts of the claim to aggravated damages to which I have already referred; (ii) on an allegation that (contrary to an assertion in the defence that the purpose of the Email was "to explain the reasons why the Council felt it right to prosecute Mr Monks") the words in the Email obviously went beyond that purpose; (iii) on an allegation that the Defendant knew that Mr Monks was not guilty of a criminal offence and did not defend such an allegation as true; and (iv) on an allegation that the content of the Email was "false" as to a number of facts which were set out in relation to the prosecution of Mr Monks. In the premises, it is said, "the Defendant published the words complained of maliciously, knowing that the allegation complained of was false or being cynically indifferent to its truth and/or acted out of spite or to damage Mr Monks and his reputation having abjectly failed in the pursuit of their self-instigated criminal proceedings against him at an embarrassing cost to local taxpayers." No individual within the Defendant is identified as having published the words complained of with the requisite state of mind.

10. On 14 November 2008, in response to a request for further information, Mr Monks asserts (i) that he complains of the republication in the Article of the words or sting complained of in the Email; (ii) that it is not his case that the Article itself taken as a

whole conveys the same defamatory meaning as the Email and as is set out in the Particulars of Claim; and (iii) that pending disclosure and/or provision of information by the Defendant, it is Mr Monk's case that 5 officers' conduct is relied on in respect of the case on malice. They are Helen Clues (Planning Enforcement Officer); Martin Perry (Planning Enforcement Officer – Lead Officer); Richard Brooker (Communications and Press Officer); John Edwards (Group Leader Planning Development & Control) and John Archer (Head of Planning and Engineering).

The Applications

11. There are two applications before the court. The Defendant's application seeks to strike out or obtain summary judgment on parts of the claim, namely (i) the claim in respect of the Article; (ii) the allegation of malice and (iii) the claim for general loss of custom and business. Mr Monks' application seeks to amend the Particulars of Claim to add a claim for special damages ("to compensate for the complete destruction of the Claimant's business as a chartered surveyor and chartered builder", but not further particularised) and a claim for exemplary damages.

The Defendant's Application
Issue 1: the claim in respect of the Article

12. Mr Eardley, appearing on behalf of the Defendant, submits it was initially unclear from the way paragraphs 5 and 6 of the Particulars of Claim were formulated, whether a separate cause of action was asserted at all in respect of the Article. The words complained of from the Article were not set out, there was no separate meaning pleaded in respect of that discrete claim and the pleadings consistently referred to the "publication" complained of. Though Mr Monks then confirmed he was making such a claim this was only for *"the republication in the Article of the words or sting complained of in the email"*. The problem which this gives rise to is this. One meaning is relied on for both publications. But Mr Monks has also said in terms that it is "*not the Claimant's case that the Article itself when taken as a whole conveys the same defamatory meaning as the email*. The only conclusion that can be drawn from this is that Mr Monks is complaining of a very small portion of the Article, in order to advance a defamatory meaning which the Article, read as a whole, does not bear.

13. This, it is said, is a straightforward breach of the principle that a claimant may not artificially select passages of an article in order to assert a defamatory meaning which, read in the context of the article as a whole, they do not bear: see *Gatley* 11th ed 3.30 and *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65. It is plain it is said therefore that Mr Monks' pleaded case in respect of the Article as currently formulated is defective and cannot succeed.

14. I agree. If Mr Monks wishes to found a cause of action on the Article, even if he wishes to rely only on a small part of it, the words complained of must be read in their context. An acceptance by Mr Monks that the Article, when read as a whole, bears a different defamatory meaning to that relied on for the Email (or the extracts from it in the Article) is thus fatal to a claim in which the meaning complained of is the same for both the Email and such parts of the Article as Mr Monks wishes to rely on.

15. Though Mr Monks has been on notice of this point for some considerable time before this hearing (including when he had the benefit of legal representation), he has not

sought to amend the Particulars of Claim, for example to identify a different defamatory meaning for the Article which he wishes to rely on. The inescapable inference says Mr Eardley, is that he has not done so because he is not interested in suing on any lesser defamatory meaning, than "guilt". During the course of the hearing, on a number of occasions I invited Mr Monks to consider whether he wished to rely on a lower defamatory meaning for the Article than that advanced in respect of the Email. He made it very plain that he did not wish to do so. His case was that the Article, if anything, was more defamatory than the Email. He said it plainly meant that he was a criminal, and was lucky to have been found not guilty of being a criminal. On the footing that this was the meaning which Mr Monks now wishes to advance, Mr Eardley invited me to rule whether the words were capable of bearing that meaning pursuant to CPR PD 53, para. 4(1) and it is obviously right that I should do so.

16. The proper role of the judge on a question of this kind, and the principles the court has to apply in relation to such a ruling, are well settled and were summarised by Eady J in his judgment in a passage which was described as "impeccable" by Lord Phillips MR in *Gillick v Brook Advisory Centres* [2001] EWCA Civ 130 at [20].

17. Bearing those principles and the requisite approach in mind, in my judgment, the meaning which Mr Monks wishes to rely on falls outside the permissible range of meanings of which the words are reasonably capable of bearing. Reading the Article as a whole (or the extract from it, repeating parts of the Email, in the context of the Article as a whole) the reasonable reader could not conclude that Mr Monks was guilty of the offence of which the jury had acquitted him, or that the jury had got it wrong and that he was lucky to have been found not guilty of being a criminal. That conclusion completely ignores the context in which the extracts from the Defendant's response to Mr Monks' acquittal were placed, as is implicitly acknowledged so it seems to me from the case Mr Monks had hitherto advanced in pleadings. The relevant context was Mr Monks' "resounding" acquittal in short order by the jury, and what Mr Monks himself had to say about the case and the Defendant's conduct in bringing it. It would be utterly unreasonable in my view to draw the conclusion that Mr Monks was guilty in those circumstances. Indeed it might be thought in the light of the jury's verdict, and the way in which the Article was written, that the reasonable reader could have simply concluded that the Council's statement was no more than the reaction of a disappointed "litigant". If Mr Monks had sought to rely on a lower defamatory meaning, Mr Eardley would have submitted that the Article was incapable of bearing any meaning defamatory of Mr Monks. But in the absence of an alternative meaning being advanced by Mr Monks, it is not necessary for me for present purposes to say what lesser defamatory meaning, if any, I think the words are capable of bearing. It is sufficient for me to rule that the words are incapable of bearing the only meaning which Mr Monks (as he has made very clear) wishes to rely on, and I do so.

18. In those circumstances, the claim in respect of the Article must be struck out, and Mr Monks is confined to his case to the publication of the Email alone.

Issue 2: Malice

19. In its Request for Information, the Defendant made a series of requests of Mr Monks, in order to ascertain whether, and on what basis, it was alleged that some specified

employee(s) of the Defendant who was/were responsible for publication of the Email had the requisite state of mind. As I have already indicated, in his response, Mr Monks simply named 5 employees, but there was no explanation as to what their relevant conduct was, what they knew (and how), or how they were said to be involved in the publication of the Email.

20. Though the response was expressed to be *"pending full disclosure and/or the provision of information by the Defendant"* Mr Eardley submits that a claimant is not permitted to fish for a case of malice, but in any event, disclosure has now taken place and there has been no application to amend in the light of that disclosure.

21. It is said therefore that Mr Monks has failed to set out a case (or a sufficiently particularised case) against any individual employee of the Defendant who is alleged to have had the relevant malicious state of mind *and* to have been responsible for the publication of the Email.

22. In particular (i) the individual identified in the Particulars of Claim as having written the Email is Mr Brooker. There is no basis set out in the Particulars of Claim or the Reply for inferring that he knew the contents of the Email were false, or was reckless in relation to it. It is not alleged that he was involved in Mr Monks' prosecution; (ii) the suggestion that (by implication) Mr Brooker was being spiteful by answering a journalist's request without first "warning" Mr Monks, is self-evidently far-fetched and is incapable of supporting an inference of malice; (iii) no basis is put forward for alleging that Mr Perry, Ms Clues, or anyone else involved in Mr Monks' prosecution was also involved in the publication of the Email; (iv) the fact that the Defendant has declined to justify the words complained of in the meaning relied upon by Mr Monks provides no support for an allegation of malice; (v) assertions as to what the Defendant (or even an identified employee of the Defendant) "ought to have known" are irrelevant to the issue of malice.

23. Mr Eardley submits the following principles are relevant:

    i) There are particularly stringent requirements imposed on a claimant who asserts malice (reflecting the fact that an allegation of malice is akin to an accusation of fraud or dishonesty and should not be lightly made). The reply must give particulars of the facts and matters from which malice is to be inferred, and generalised or formulaic assertions are not permitted: see *Gatley* 11th ed 30.5**.** *"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"*: *Seray-Wurie v Charity Commission* [2008] EWHC 870, [35].

    ii) Where (as here) malice is alleged against a corporate defendant "it is necessary to find an individual who is responsible for the words complained of and who had the state of mind required to constitute malice in law" (Webster v British Gas Services Ltd [2003] EWHC 1188 at [30]; see also Bray v Deutsche Bank [2008] EWHC 1263 at [16]). In such a case the claimant should give particulars of the person or persons through whom it is intended to fix the corporation with the necessary malicious intent, as well as pleading the facts from which malice is to be inferred: Gatley 11th ed 30.5. See also Bray v Deutsche Bank [2008] EWHC 1263 at [16]

iii) The issue of malice may only be left to a jury where the evidence is capable of giving rise to a probability of malice, and is more consistent with its existence than with its non-existence. The approach is similar to the Galbraith test in criminal cases: Seray-Wurie (above) at [32]-[33]. Where there is no evidence upon which a reasonable jury, properly directed, could hold that the defendant acted maliciously, the defendant is entitled to summary judgment.

24. On the application of those principles, which in my view correctly state the law, it is clear in my judgment that the plea of malice as currently formulated is defective and should be struck out. There is nothing in the current pleading which links any of the named individuals, apart from Mr Brooker, with the publication of the Email at all, nor are there any proper particulars as to their individual state of mind. It plainly necessary that a properly particularised case in respect of both aspects must be pleaded, and that the facts relied on in the particulars, if true, satisfy the test set out in paragraph 23 i) above.

25. Mr Monks does not now pursue the case on Ms Clues at all. But in the case of the other individuals identified he sought at the hearing before me to rely on matters additional to those already pleaded, in support of the case on malice. In the case of Mr Perry, his submissions concerned Mr Perry's involvement in and responsibility for the criminal prosecution. Mr Monks also asserted that Mr Perry was the editor of what he described as the "Base Document". This was a Planning Committee Report of 13 March 2006 made prior to the criminal prosecution, and on which Mr Monks suggested the Email was based. But in the absence of any evidence that Mr Perry was responsible for the publication of the Email (and there was none) in my judgment, neither of those matters raised an arguable case on malice against Mr Perry. In the case of Mr Archer, Mr Monks accepted there was no clear evidence of his involvement in the publication of the Email, but he suggested that he was malicious on the ground that he did not prevent its publication and because of his involvement in the prosecution. But, as with Mr Perry, those matters are irrelevant in the complete absence of evidence that Mr Archer knew that the Email was to be published, or of that he had the requisite state of mind in relation to its publication.

26. In the case of Mr Brooker and Mr Edwards, Mr Monks relies on a series of emails surrounding the preparation and publication of the Email. In my view, the emails clearly demonstrate that Mr Edwards was not responsible for the publication of the Email. Though he was involved in discussions which preceded its publication, its contents were composed by Mr Brooker, relying at least in part, it appears on the Base Document.

27. Mr Monks submits that the emails demonstrate that Mr Brooker was malicious. He says this because although Mr Brooker asked for Mr Edward's assistance in composing the response to be sent to the journalist, in the end, he did so himself (basing it substantially on the Base document which predated the prosecution), and sent it to the journalist before receiving Mr Edward's comments or approval as Head of the Planning Department. It is important to bear in mind however that an allegation of malice is akin to an accusation of fraud or dishonesty, and the higher threshold which a claimant must therefore satisfy before a claim can be allowed to go forward. "Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence" (per Lord Hobhouse in *Three Rivers DC v Bank of England (no 3)* [2003] 2 AC 1 at [161]). In my view, the most that can be said of Mr Brooker

on this point alone, is that he was careless, and this is not sufficient. Mr Monks' case on malice cannot go forward therefore, either on the pleaded basis, or on the further matters which he relied on in the course of the hearing.

Issue 3: damages for general loss of custom and business

28. Finally, I turn to the application to strike out the claim for damages for general loss of custom and business. The claim obviously depended on the claim in respect of the Article, and it is not alleged, nor could it be, that such losses as Mr Monks may have sustained were the result of the publication of the Email to one person. In the circumstances, the pleaded claim for damages for general loss of business has no real prospect of success and will be struck out.

29. For the sake of completeness I should add that even if the claim in respect of the Article had not been struck out, I would not have permitted the claim for special damage to go forward as currently formulated for a number of reasons. First, the loss is alleged to have been the decline in operating profits sustained by a company, Choyce Survey Ltd ('CSL') a company of which Mr Monks is sole director, and which is not a party to this action. It may be that a claimant can identify an indirect loss to himself in such circumstances, but there is nothing in the pleadings which does so. Moreover, it is apparent from the financial documents I have seen, that there is a real difficulty in ascertaining what income Mr Monks actually derives from CSL and whether that income has necessarily declined because of a decline in CSL's business. Mr Monks for example did not draw a salary in the year to the year before the publication of the Email and Article or in 2008. In addition, CSL appears to be one of a number of companies controlled by Mr Monks, and is ultimately owned by a holding company, Choyce Holdings Ltd, not Mr Monks personally. In the last 3 years dividends paid by CSL have been paid to Choyce Holding Ltd rather than Mr Monks. In any event it is not clear from the accounts that there has been the alleged loss of income to CSL. CSL's pre-tax operating profit had been in the region of £40,000 in the three years up to the year ending 28 February 2006. In the year ending 28 February 2007 it dropped to £21,359 and then, in the following year (when the words complained of were published) there was a modest recovery to £25,406.

30. Though Mr Monks has some explanations for these matters, they could not have been put forward, in the absence of a proper pleading; and in relation to that, the court would have to consider the likely need for expert evidence, and the inevitable loss of the trial date.

The Claimant's Application

31. Mr Monks has not provided any draft pleading in respect of his application to add a claim for special damages. From the brief details that have been provided however, the new claim appears to be very similar, if not identical to the existing claim for general damages as it is currently formulated, and it manifests the self-same defects. But in any event, in the absence of a claim in respect of the Article, the proposed claim has no real prospect of success for the reasons I have already given in paragraph 28 above.

32. So far as the claim for exemplary damages is concerned, there is no evidence whatever that the Defendant's conduct (and for this purpose, that would mean Mr Brooker's conduct, for which the Defendant is vicariously liable) fell into either of the two categories of conduct in relation to which exemplary damages may be claimed in libel actions, following the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129, 1227, namely (i) "oppressive, arbitrary or unconstitutional action by servants of the government"; or (ii) where the defendant's conduct "has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." There is no basis in my view for suggesting that in answering an enquiry from a journalist, Mr Brooker was exercising official power (even assuming he is to be regarded as a government servant for these purposes). See in this context, *Shendish Manor Ltd v Coleman* [2001] EWCA 913 at [59]-[62]. Nor is there any evidence from which it could properly be inferred that Mr Brooker had made the necessary calculation.

33. But in any event there is no draft pleading before the court, nor any explanation as to why this matter is raised so late. In the absence of a properly formulated claim at this very late stage, or any explanation as to why it is raised so late, or any evidential support for it, the application for permission to amend to add a claim for exemplary damages is refused.