



Neutral Citation Number: [2008] EWHC 2927 (QB)

Case No: HQ08X02765

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 December 2008

Before :

THE HONOURABLE MR JUSTICE EADY

Between :

TISCALI UK LIMITED

Claimant

- and -

BRITISH TELECOMMUNICATIONS PLC

Defendant

Richard Spearman QC and Matthew Nicklin (instructed by Schillings) for the Claimant
Ronald Thwaites QC and John Samson (instructed by BT Legal & Business Services) for the Defendant

Hearing date: 14 November 2008

Judgment

Mr Justice Eady :

1. The Claimant in these proceedings is Tiscali UK Limited, part of a large group of telecommunications companies based in Italy. The Defendant is British Telecommunications Plc, which is a rival of the Claimant in the provision of broadband internet within the United Kingdom. It is accepted that the Defendant is dominant in the market.
2. Reports were published in January of this year suggesting that the Claimant's business was a potential takeover target. My attention was drawn, for example, to an article in the *Financial Times* on 23 January 2008 which was headed "Tiscali boss expects to be targeted by rivals" and began with the following two paragraphs:

"Tiscali, the Milan-listed company that supplies broadband in the UK and Italy, expects its businesses to be bought up by rivals in the next two years, according to Tommaso Pompei, its chief executive.

Mr Pompei said he did not see many opportunities for Tiscali to buy rivals, and therefore it was more likely that the company's UK and Italian broadband operations would be sold."

3. On the same day there was an article to similar effect in *Total Telecom* headed "Tiscali CEO expects company to be taken over". This was introduced as follows:

"Tiscali CEO Tommaso Pompei said Wednesday he expects the Italy-based broadband provider's operations to be taken over by rivals in the next two years.

He said in an interview with the *Financial Times* that he doesn't foresee many opportunities for his company to make acquisitions of its own, and as a result he says Tiscali's Italian and UK broadband operations are likely to be acquired.

Europe has seen widespread consolidation in the consumer broadband sector, some of which has involved Tiscali."

4. It has not been suggested, however, that the Claimant's business was in anything other than a healthy condition. Statements issued in March 2008 reported "a strong acceleration in growth in 2007 and a 37% rise in revenues". This positive note was again sounded in statements issued in May following the group's results for the first quarter of this year.
5. In July 2008 the Defendant sent a letter to a large number of the Claimant's customers, individually addressed, in an attempt to persuade them to change to the BT Total Broadband service. The recipients were invited to visit a site which was linked to a page on the Defendant's website (www.broadband.bt.com/tiscali) containing a similar message. This commercial ploy was described by the Defendant's counsel, Mr Thwaites QC, as a bit of "opportunism".

6. The contents of the letter and the relevant page on the website form the subject-matter of these proceedings. The Claimant sues in libel and malicious falsehood. The offending words are as follows:

“Tiscali chief plots sell-off.

You can be confident with BT Total Broadband.

Dear [Tiscali customer]

We can understand why you’re wondering what might happen to your Tiscali broadband service. And because no-one really knows the answer yet, it could be a good time to look at an alternative broadband service.”

Additionally, so far as the letter is concerned, complaint is made of the following paragraph:

“Changing your provider to BT could be the right move if you’re worried about the future of your broadband service. Because BT Total Broadband is the UK’s most complete and is here to stay ... ”

It then continues by telling the reader how easy it would be to switch and giving particulars of a special offer which was to end on 17 July 2008.

7. As to the claim in defamation, reliance is placed on a natural and ordinary meaning and also, by way of alternative, on an innuendo to the following effect; namely, that the Claimant had been guilty of a lack of honesty and candour towards its customers by failing to warn them that the continuity and/or reliability of their broadband service was potentially in jeopardy if the Claimant company was sold.
8. It is necessary to set out the particulars of the facts relied upon by way of innuendo from paragraph 5 of the amended particulars of claim:

“5.1 Suggestions that the Claimant might be sold by its Italian parent company, Tiscali SpA, had appeared in the UK press in late January 2008 following a statement by Tiscali SpA’s chief executive, Tommaso Pompei, that there was likely to be further consolidation in the European market for broadband internet (see *Financial Times*, 23 January 2008: ‘*Tiscali boss expects to be targeted by rivals*’; and *Total Telecom*, 23 January 2008: ‘*Tiscali CEO expects company to be taken over*’).

5.2 However, throughout the period from this initial speculation until publication of the words complained of, Tiscali SpA made a series of public announcements which would have given customers of the Claimant the clear impression that the business of the Claimant was

thriving (and that if the Claimant was sold, it would be sold as a going concern). For example:

5.2.1 In the 'Outlook and Prospects' section of Tiscali SpA's Draft Financial Statements for the year ended 31 December 2007 (issued to the public on 19 March 2008 and made available on www.tiscali.com) it was stated:

'The Strategic Plan approved in November 2007 envisaged a reinforcement of the Group's position in Italy and the UK, focusing, especially in 2008, on a rapid integration of Pipex in the UK and on a strong marketing push in Italy. Tiscali's positioning will be maintained on the high-capacity Dual Play (voice and data) offer and competitive prices, with an offer progressively enlarged to include IPTV services (already active in the UK and currently being launched in Italy) and the integration with mobile services ...'

5.2.2 At the shareholders meeting of Tiscali SpA on 29 April 2008 (a report of which was published on www.tiscali.com) the company reported that *'The Group recorded significant growth in terms of ADSL users, revenues and results during the financial year'*; and

5.2.3 In its public statement announcing the results for the first quarter of 2008 (available on www.tiscali.com), Tiscali SpA acknowledged the expressions of interest that had been received for purchasing the company as a whole and its operating companies in Italy and the UK (i.e. the Claimant) and also reported a 55% increase in revenues for the Claimant as a result of a rise in broadband customers.

5.3 Further, in the period immediately leading up to the publication of the words complained of, the Claimant had been expressly advertising and promoting the reliability of its broadband service.

5.3.1 During May and June 2008, newspaper advertisements promoting the Claimant's broadband service as *'fast and reliable'* and the winner of the JD Power Survey appeared in the following publications: *Daily Telegraph, Daily Mail, Independent, Times, Metro, London Paper, London Lite, Sun, Daily Star, Daily Mirror,*

Sunday Telegraph, Sunday Times, Observer, Independent on Sunday, Sunday Express, News of the World, Mail on Sunday, Daily Star on Sunday, Daily Express, Guardian and Sunday Mirror.

5.3.2 Radio adverts promoting the Claimant's broadband service as '*superfast and reliable*' and '*fast and reliable*' were broadcast during April and May 2008 on the following radio stations: *Smooth North West, Rock/Magic 1161, Key 103/Magic 1152, Capital Radio, Hallam/Magic AM, Radio City/Magic 1548, Talksport, Virgin Total Network, Heart 106, Total Heart UK Digital, LBC Total, Classic FM, Big City Network and Magic 105.*

5.4 It is to be inferred, from the above, that a large proportion of the recipients of the Letter would, prior to its receipt, have understood the Claimant as having given them no warning that the continuity of their broadband service was at risk in any potential takeover and, by making positive statements about the position of the Claimant and the reliability of the Claimant's broadband service, had thereby given the impression that there was no risk."

9. The application before the court on 14 November, on the Defendant's behalf, was to seek a ruling in accordance with paragraph 4.1 of the Practice Direction attached to CPR Part 53. At the outset of the hearing, I ruled that for the purposes of such an application evidence should not be admissible, which the Defendant was seeking to introduce, by way of challenging the accuracy of the pleaded facts in support of the innuendo. There was no application made under CPR Part 24, for example, seeking to establish that the Claimant had no realistic prospect of success in establishing at trial the accuracy of the pleaded facts. It seemed to me that not only should no evidence be admissible on the challenge to the natural and ordinary meaning relied upon, but also that, in relation to the innuendo, I should proceed on the assumption that the Claimant would indeed succeed at trial in establishing those facts and, moreover, that some of the readers at least would have knowledge of those matters. No authority was cited by Mr Thwaites QC to suggest that evidence would be admissible on an application of this kind. It is really a matter for submissions.
10. The Defendant's submission is, quite simply, that the words complained are incapable of bearing the pleaded defamatory meaning or indeed any meaning(s) defamatory of the Claimant. The principles to be applied on an application of this kind are well established and are summarised conveniently in para 30.5 of *Gatley on Libel and Slander*, 10th edition. There is no need to rehearse them in this judgment, but I will bear them well in mind.
11. I was also reminded that the court's function is to "delimit" the meanings that the words complained of are capable of bearing: see e.g. *Mapp v News Group*

Newspapers Ltd [1998] QB 520, 526. Moreover, when a judge is invited to exclude one or more meanings at the pre-trial stage, it is necessary to bear in mind that the exercise should be one of “generosity not parsimony”: *per* Sedley LJ in *Berezovsky v Forbes* [2001] EMLR 1030 at [16].

12. The court should only exclude any meaning from consideration by the jury if satisfied that the jury would, if the meaning were upheld, be perverse to do so: see e.g. the remarks of Simon Brown LJ (as he then was) in *Jameel v Wall Street Journal Europe* [2004] EMLR 6 at [14]. The judge’s function is thus confined to “pre-empting perversity”. It is also submitted by Mr Spearman QC, on the Claimant’s behalf, that it is important to bear in mind that headlines may have a powerful influence in colouring the meaning borne by the article as a whole: see *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 72. I turn, therefore, to the parties’ submissions on the central question.
13. Mr Spearman placed particular emphasis upon the headline “Tiscali chief plots sell-off” which, he says, sets the tone of the article.
14. He argues that the letter to Tiscali customers was telling them that “something is afoot”. The use of the word “plot” would suggest, he submits, that the Claimant is keeping something from its customers which the Defendant was in a position to reveal; namely, that their broadband service could be in jeopardy as a result of the “plot” to sell off Tiscali.
15. It is suggested that readers would get the message that the Claimant’s service, by contrast with that provided by the Defendant, was not “here to stay” because of the supposed “plot”.
16. It is important to remember that in ordinary usage a corporation does not “plot”. Only a human being, either alone or in concert, is capable of “plotting”. Here, there is no human claimant. It has been pointed out before that the court needs to be wary of corporations being “put up” as claimants in libel actions, when the real target or subject of the words complained of is the conduct of an individual: see e.g. *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 28. The only claimant in these proceedings, as I have said, is Tiscali UK Limited. Mr Pompei is not joined in the action. The important question, therefore, is whether or not the words complained of, at this stage, are capable of conveying a defamatory meaning of that corporation; that is to say, one that reflects upon its trading or business reputation. Mr Spearman, when I raised the matter in argument, said that readers would naturally take Mr Pompei to have been “plotting” on behalf of the company (i.e. to sell off its own shares). I did not find this convincing.
17. Mr Spearman submits that the overall flavour of the message conveyed by the words complained of is that “Tiscali is not playing straight with its customers: it is not telling them what is going to happen to their broadband service following any takeover”. It is said that the Claimant has been guilty of a lack of honesty and candour towards its customers by failing to warn them that the continuity and/or reliability of their broadband service was potentially in jeopardy if the company was sold.

18. The question was correctly identified by Mr Spearman as being whether a jury would be perverse to find that the words bore that meaning. The Defendant's submission is that such a reading would indeed be perverse. Furthermore, so far as the innuendo is concerned, its case is that one has to consider whether it would be perverse for someone knowing of the facts alleged in the pleading to interpret the words in the relevant defamatory sense. Could it be that knowledge of those pleaded facts, of itself, might invest the words complained of with a meaning defamatory of the company without the reader who so understood the words being perverse?
19. Although its primary case is that the words convey, on the part of the corporate Claimant, duplicity, dishonesty or lack of candour, consistent with the alleged "plot", it has also identified a lesser defamatory meaning, of which it also says that the words are capable. This is set out in a letter of 11 November 2008 as follows:

“ ... that the Claimant had failed to safeguard the interests of its customers by ensuring the continuity of its broadband service and/or failed to warn its customers that its broadband service was at risk in the event of a sale or takeover of its business.”
20. It is important for the court always to focus on the words themselves and not to be distracted by the creative ingenuity of the pleader.
21. The Defendant submits that, when one concentrates on the words themselves, the reasonable reader (or the "non-perverse reader") would have gleaned the clear impression that the Claimant company was being sold off and that, *if* he or she was worried that something *might* happen to their broadband service *in the future* (and by implication under a new owner after the sell-off), because no-one really knows the answer *yet*, then it *could* be a good time to shop around for an alternative broadband service. (The added emphasis comes from Mr Thwaites' written submissions.) It is thus suggested that the Defendant was merely giving the customers an opportunity of choosing BT Total Broadband as an alternative service – and that in itself is not capable of being defamatory.
22. The Defendant's argument is that it is, correspondingly, fanciful to read into the words any suggestion that the corporate Claimant was acting without honesty or candour in the running of its business. They were merely addressing the somewhat uncertain circumstances that might apply in the event of takeover. No reasonable reader could make the leap to dishonesty or "lack of candour" – or even a failure to safeguard customers. Is it supposed that there was a duty on the Claimant, at the time in question, to send a circular to customers saying that at some stage the company *might* be taken over and, in that event, this broadband service *might*, for some unspecified reason, be jeopardised? In so far as there is anything reprehensible about "plotting", that would only reflect on the individual identified. Even that was expressed to be in the context of the Tiscali group being an attractive target for acquisition (presumably because of having valuable assets or a successful business).
23. I agree that all this is rather contrived. It may be that Mr Thwaites is correct in his suggestion that the claim represents an overreaction to his client's opportunistic commercial ploy, but I need not speculate about that. The sole question I need to address is whether the Claimant's meanings, even though contrived, are such that it

would be perverse to uphold them. In giving an answer, I need to err on the side of generosity (i.e. towards the Claimant).

24. My conclusion is that it would indeed be perverse for a jury to uphold these meanings. It may well be that the Defendant was stirring up concerns among the Claimant's customers unnecessarily, and without any justification, but it is a step too far to suggest that any reasonable person would construe them as saying that the Claimant was dishonest or in breach of some duty towards its customers.
24. As to the alternative innuendo meaning, I do not believe that knowledge of the pleaded facts would make any difference. I accept that the Claimant announced good results, and/or chose to puff its products or services, and/or even reported that interest had been expressed in acquisition, but I see no reason why any of this should give rise to the inferences pleaded at paragraph 5.4 of the pleading cited above.
25. In these circumstances, I will uphold the Defendant's application and strike out in consequence the part of the claim founded in defamation.