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Case No: HQ14D00944

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2016

Before :

MR JUSTICE WARBY

- -

Between :

FlyMeNow Limited	**Claimant**
- and -	
Quick Air Jet Charter GmbH	**Defendant**

- -
- -

Adam Speker (instructed by **Wright Hassall LLP**) for the **Claimant**
William Bennett (instructed by **Fladgate LLP**) for the **Defendant**

Hearing dates: 6 & 7 December 2016

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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.

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MR JUSTICE WARBY

Mr Justice Warby:

Introduction

1. The claimant is an aircraft charter company, registered in England. A significant strand of its business is sourcing aircraft for ambulance flights. The defendant is a German aviation company which specialises in the provision of private jet aircraft, including air ambulances. In 2013 the claimant and the defendant did some business together, in the form of contracts for the provision of air ambulance flights. The first took place in March 2013. Those which matter most in this case took place in July and August 2013 ("the July and August Flights").

2. It was some months before the claimant made full payment for the July and August Flights. There were still sums outstanding on 5 December 2013 when the defendant circulated an email, addressed "to whom it may concern" ("the Notice"). The Notice was headed: "WARNING. Company you should not deal with! Pecuniary difficulties!" It said that the claimant was "not able to pay" outstanding amounts due to the defendant. This is the trial of the claimant's claim for damages for libel in the Notice.

3. The Notice was circulated internationally, but the claim relates solely to publication in England and Wales. It is conceded by the defendant that within this jurisdiction the Notice was emailed to the generic corporate email addresses of 26 companies in the aviation industry.

4. The date of publication means that the Defamation Act 2013 does not apply.

Issues

5. It is admitted not only that the defendant published the Notice in this jurisdiction, but also that it referred to and was defamatory of the claimant. The statements of case give rise to the following main issues on liability:-

    (1) What was the natural and ordinary meaning of the Notice? (Meaning).

    The claimant's case is that the Notice bore a meaning suggesting that the company was insolvent ("the Insolvency Meaning"). The defendant's case is that the Notice bore a lesser defamatory meaning ("the Warning Meaning"): it warned fellow companies in the aviation business against dealing with the claimant, on the basis that it had pecuniary difficulties, but did not go as far as to suggest insolvency.

    (2) Was the Notice substantially true? (Justification).

    The defendant's case is that the Notice was true in the Warning Meaning; alternatively that if it bore the Insolvency Meaning it was also true. An important issue in relation to justification is whether, as the defendant maintains, the claimant's contractual obligation was to pay the charter fees before the flights. The contract documentation indicates that this was the payment obligation, subject to contrary agreement. The claimant's case is that there was a contrary agreement, made orally by telephone before either of the

July and August charters were entered into, which entitled the claimant to time to pay. The defendant's case is that there was no such agreement, and that the claimant has invented this as an excuse for its payment defaults.

(3) Did all or any of the publications take place on an occasion protected by qualified privilege? (Privilege).

The issue is twofold: did the defendant have a social or moral duty to communicate on the subject-matter, and the publishees a corresponding legitimate interest in receiving it? Alternatively, was the publication privileged on the basis of common and corresponding interests?

(4) If any publications were privileged, did the defendant have a dominant improper motive for publishing the Notice? (Malice).

The claimant's pleaded case is that the defendant's dominant motive was "to improperly force the claimant to make payments contrary to the contractual terms it considered were agreed."

6. Mr Bennett has raised a further line of defence. The Defence pleads that the claimant led the defendant to believe that it was unable to pay its bills, and that if that was not true and the defendant has no other defence available then the claimant still ought not to succeed on liability: "The defendant ought not to be penalised for accepting at face value what it was being told by the claimant." This is pleaded under the heading of justification, but on analysis and in its fully developed form the argument seeks to raise a third, alternative defence of abuse of process.

7. If the question of damages arises, the issues are relatively limited.

(1) There is no claim for special damage. A claim for aggravated damages which was pleaded at the outset is not pursued, on Counsel's advice. The claim is therefore for general damages, to compensate for the probable financial impact of any reputational harm, and to vindicate.

(2) The defendant's case is that if, contrary to all of its primary arguments, the Notice was libellous any damages should be minimal on the grounds that (a) there is partial justification; and/or (b) damages should be reduced because of the claimant's conduct in leading the defendant to believe that the claimant could not pay its bills as they fell due; and/or (c) in all the circumstances no real or substantial vindication is required or warranted.

Evidence

8. The evidence consists of one lever arch file plus two ring binders of documents, and the evidence of one witness for each side. The witness for the claimant is Andrew Whitney, a director of the company and its sole shareholder. The defendant has called evidence from Philipp Schneider, the author of the Notice. Herr Schneider had an interpreter available to him in case of need, but he understands English very well and speaks it quite fluently. He had hardly any need to refer to the interpreter.

9. The bulk of the documentation consists of communications between the parties, together with financial documentation of the claimant. But the documents also include three emails from other suppliers of the claimant ("The Three Emails"), sent in response to the Notice. The defendant relies on The Three Emails as hearsay evidence in support of its defence of justification. The emails are said to show that the companies that sent them had also encountered payment problems with the claimant. That is denied by the claimant, which has procured emails of rebuttal or qualification from each of the three companies concerned.

The facts

10. The claimant company was incorporated in 2005. Mr Whitney joined in 2007 as an employee. He describes the company as "an operation to provide helicopter and airplane charter solutions for a variety of situations" including "flight solutions for corporate entertaining", but the "key and fundamental element to our business" has always been the provision of ambulance flights. The claimant does not own aircraft but charters them in.

11. Companies carrying on business in this way are known as "brokers". It was the evidence of both Mr Whitney and Mr Schneider that it is a notorious fact in the aviation business that a substantial number of aviation brokers have gone bankrupt, leaving some aviation companies out of pocket.

12. Three personnel of the claimant were directly involved in the relevant events. Besides Mr Whitney there were Colin Milne, the claimant's "Quality Care Commissioner", and Adam Franks, then the company's Finance Director. Neither of these others gave evidence.

13. At the material times the claimant operated three bank accounts with NatWest: a sterling business account, a US dollar account, and a Euro account. There is evidence, which I shall consider later, that the claimant also had access to credit via three credit card accounts, two with American Express ("Amex") and one Barclaycard account.

14. The defendant was established in 1991 and operates from Cologne airport. Its primary business is the provision of private charter air ambulance flights. Mr Schneider explained that the defendant's clientele consists primarily of wealthy individuals and insurance companies. That is not a surprising customer profile for a company providing Learjets. Mr Schneider further explained that the defendant's Air Ambulance business does not generally deal with public authorities, as in mainland Europe the costs of repatriating ill individuals are paid by insurance companies not the state.

15. To a large extent the relevant dealings between the claimant and the defendant are a matter of undisputed record. The first contact between the two was on 1 June 2012, when Mr Schneider sent Mr Whitney an email introducing the defendant company and its Air Ambulance service. Mr Schneider was at the time responsible for the Air Ambulance service, having recently taken over that role after a team of personnel left the defendant to join another company.

16. Mr Schneider's initial email ("the Introduction Email") was accompanied by promotional material and the defendant's standard terms and conditions. These provided by clause 9 that invoices were "due and payable net, without deduction, in advance after receipt." Interest of 1% per month was chargeable if the charterer was in default of payment.

The March Flight

17. Nothing seems to have come of the Introduction Email at the time. But in March 2013 the claimant chartered a jet from the defendant to fly a 6-month-old baby from Dublin to Gdansk, on behalf of the Health Service Executive of Ireland ("HSEI"), which is the equivalent of our NHS. The approach was first made late at night on 14 March. Agreement was reached swiftly, on 15 March 2013, via an exchange of emails and one or more phone conversations between Colin Milne and Philipp Schneider. A price of €13,160 was agreed. The claimant provided an American Express card as pre-authorisation. Mr Milne wrote "I will send confirmation of the bank transfer later".

18. The claimant invoiced HSEI on 15 March 2013, on terms that the balance was due immediately. The flight passed off successfully on 16 March 2013. The defendant issued its invoice on 20 March 2013 specifying a due date of 3 April. By May 2013 payment had not been made. Mr Schneider had to chase for payment. Mr Whitney's explanation for this, in his oral evidence was that "I think we were waiting for the HSE to pay us, but I also think the invoice is incorrect." It does appear that the invoice was for some €940 more than had been agreed. Payment was made thereafter.

The July Contract

19. On the morning of 9 July 2013 Colin Milne emailed the defendant seeking a quote to fly a 73 year-old sedated male from Skopje Macedonia to Bristol, "this weekend or sooner". Natascha Rode of the defendant quoted by return email shortly afterwards:

> *"Cologne the 09-07-2013 11:53:53"*
>
> *Ref: Natascha Rode*
>
> *In accordance to pleasant telephone conversation we hereby send you quotation on following flight with our LEAR 35*
>
> | *Departure:* | *Destination:* | *Flight time:* |
> |---|---|---|
> | *COLOGNE/BONN* | *SKOPJE/ALEXANDE* | *02:15* |
> | *SKOPJE/ALEXANDE* | *BRISTOL* | *03:05* |
> | *BRISTOL* | *COLOGNE/BONN* | *01:15* |
>
> *…*
> *Price: Euro 15.600,00"*

20. It is unclear whether there had been any telephone conversation prior to this. The wording of the defendant's email was, as Mr Schneider explained in his evidence, standard form which could not be edited. It seems however that there must have been some form of telephone negotiation after this quotation because, when the defendant issued its form of written Charter Agreement on 12 July 2013, this provided for a

reduced price of €15,400. The Agreement consisted of a single page, with provision for signature on page 2. At the foot of the first page the Agreement contained the following provision as to payment:

> "**Payment terms:**
>
> Payment prior flight (or according to agreement). Quick Air Jet Charter GmbH cannot be held responsible for delays or diversions due to slots, bad weather or technical problems."

21. The contact name given at the head of the Charter Agreement was that of Andrew Whitney. On page 2 the form required the charterer to "sign, stamp and return by email or fax". Mr Whitney signed it, dated it 12.7.13, and it was returned. There is no evidence of any further contractual discussions at that time, or between 12 July and the time of the flight ("The July Flight") which in the event, took place on Sunday 14 July 2013. It is the claimant's case that the July Flight was carried out on behalf of the Heart of England NHS Trust.

22. On Monday 15 July 2013 the defendant issued its invoice for the July Contract stating "We debit your account for the mentioned flight" with the sum of €15,400. The invoice stated "Due date 07/22/2013", that is to say 7 days after the invoice. Payment of the defendant's invoice was not made on that date. On 22 July 2013 the balances on the claimant's three bank accounts were £24,345, $18,794 and €13,377.

The August Contract

23. On 8 August 2013 Mr Milne emailed the defendant requesting a quote for a mission to fly one patient from Birmingham International to Uzhhorod International, Ukraine, departing Friday 16 August 2013 at 11:00. He added "Please find attached our MEDIF completed by the treating doctor. I need to go back to the Trust with a firm quote as soon as." The claimant's case is that the Trust referred to was, again, the Heart of England NHS Trust.

24. A quotation in similar form to the July quotation was issued by Natascha Rode on behalf of the defendant within the hour. The quote was for €14,000.

25. A written Charter Agreement was entered into on 12 August 2013, using the same standard form as the July Agreement. This was addressed to, and signed and dated by Colin Milne. Again, it seems unlikely that there had been any telephone conversation before the defendant issued its quotation, although the standard form of quotation referred to one. But it seems there must have been some negotiation after the quotation was issued and before the contract ("the August Contract") was concluded: in the written agreement the destination had been altered to Kosice, which is some 100km from Uzhhorod International; and the price had been reduced to €13,500.

26. The payment terms specified in the agreement were the same as those quoted at [20] above.

27. On 13 August 2013 the sum of £15,445 was paid into the claimant's sterling bank account. The claimant's case and the evidence of Mr Whitney, which I accept, is that

this sum came from the Heart of England NHS Trust. It was payment in respect of the July Flight. No payment was made to the defendant at that time.

28. Payment under the August Contract was not made before the flight which took place as agreed on 16 August 2013 ("the August Flight"). On 19 August the defendant issued its invoice for the August Flight which stipulated "Terms of payment net price to be paid immediately". Payment was not made immediately. On 19 August 2013 the balances on the claimant's three bank accounts were £35,184, $7,875 and €490.

Payment

29. On 27 August 2013 Mr Schneider, who by now was an Account Manager/Quality Manager for the defendant, sent an email to Mr Whitney, and to a generic email address of the claimant, seeking immediate payment. The email had a priority level of "Hoch" (High). He wrote,

> "Our accounting department informed us about your outstanding bills with the amount of 15,400 € and 13,500 €. Please find attached the invoices No. 4002009 and No. 4002074 with the explanation of the outstanding balance to be paid immediately."

There was no response.

30. A follow up in similar terms on 6 September 2013 was addressed to Adam Franks, the claimant's Finance Director. It also went to the generic email address. It was also headed with Priority as "Hoch". It asked "Please give us a short message when you have assigned the sum for payment". There was no written response, but Mr Schneider followed up by telephone, as is evident from his further email of Monday 7 October 2013 addressed to TheTeam@flymenow.com and copied to Mr Franks. This email was headed "**FINAL PAYMENT REMINDER**". By now, Mr Schneider was displaying some signs of exasperation:

> "one month ago I have already sent this payment reminder to your account and contacted you twice via phone with our urgent request to follow the agreement of payment."
>
> Court action will be the consequence of your ignoring this mail."

31. Mr Franks replied on the afternoon of Wednesday 9 October 2013, stating:

> "I have spoken to our client and they have confirmed funds will be in our bank account by the end of the week so I will transfer payment of your outstanding invoices over the weekend which I trust you find acceptable."

32. The words "our client", in this context, can only mean the client for whom the July and August Contracts were entered into. On the claimant's case this was in each case the Heart of England NHS Trust, and on 13 August 2013 that Trust had paid the claimant £15,445 for the July Flight. There is no evidence, other than this email, that

the Heart of England Trust had in fact confirmed that funds would be in the claimant's bank account by the end of the week. There is no hearsay notice in respect of the email.

33. The weekend referred to in Mr Franks' email was 12/13 October 2013. At that time the state of the claimant's bank accounts was as follows: There was a balance of $10.43 in the dollar account; the euro account was in credit to the tune of €6,795.03; but there was a credit balance on the sterling account of £21,771.44. No payment was made by the claimant over the weekend or on the Monday.

34. I shall come to Mr Whitney's evidence on these issues later in this judgment. It has not been possible to explore these events with Mr Franks. Mr Whitney explained why in his witness statement:

> "Much of the email exchange was dealt with by Mr Franks; former finance Director of FlyMeNow Limited. Mr Franks left FlyMeNow Limited following discoveries being made about his activities which I considered unacceptable and which necessitated his dismissal. I am therefore not able to produce any evidence from him in this matter due to those subsequent discoveries."

35. The next contact was on Tuesday 15 October 2013. Mr Schneider spoke to Mr Franks by telephone, to tell him that lawyers would be instructed to recover the debt unless he replied by 2pm. Mr Schneider then emailed the claimant's generic address under the heading "**FINAL PAYMENT REMINDER**" and with an indication of High Priority:

> "referring to our todays telephone conversation we are going to mandate a british debt-collecting agency/lawyer, if you do not show your willingness to pay within the next 24 hours."
>
> We are no longer willing to accept your intolerable manner to put ourselves as your creditors off. One month ago Adam told me that he is going to transfer the money to our account, last week he told me that he is going to transfer the money during the weekend. Today I contacted him again and now he told me that you are still waiting for the money of your client.
>
> As I told you, we are no longer willing to accept your delaying tactics.
>
> Kindly note that we are awaiting your reply by email no later than 02:00pm (British time) tomorrow! Court action will be the consequence of your ignoring this mail!"

36. Five minutes before the deadline set by this email Mr Franks replied, referring to a telephone conversation and saying as follows: "… I would like to thank you for your patience. We are trying to resolve the matter as soon as possible which I trust you understand." Mr Franks stated:

> "Please find attached our first payment of €6,400 which we received from our client this morning and I have transferred it to you immediately as promised. Further payments will follow as soon as we receive them."

37. Again, Mr Franks is not available to explain how, if at all, this email can be reconciled with the bank statements in the evidence before me. Those statements show a sum of €6,000 arriving in the claimant's bank account on 16 October 2013, just before the payment out of €6,400. But the figures are not the same, and the claimant has chosen to redact the document to conceal the identity of the source of this payment. There is no evidence that these monies came from the Heart of England NHS Trust, and that seems highly unlikely, not least because the Trust would be expected to pay in sterling as, indeed, it had on 13 August.

38. The claimant's payment of €6,400 was received by the defendant on 17 October 2013. A further payment of €7,000 was made to the defendant on 18 October, from the claimant's Euro account. But that cannot have come from the NHS Trust, not least because no further monies of any kind had been paid into that account meanwhile.

39. In the meantime, the claimant had continued to seek and to receive from the defendant quotations for various flights. The majority of the quotations had however stated that payment in advance was required. Others were silent on the topic. No contracts had been entered into. It was on 18 October 2016 that Markus Salomon emailed Mr Whitney stating that "we will not be performing any flights for you, so please kindly remove us from your lists". The same message was repeated in a subsequent email. But there had been no further contracts between the parties in the meantime.

40. On 31 October 2013 Mr Schneider emailed Mr Franks:

> "we received your partial payments on 17th and 18th of October. Unfortunately you did not inform us about your intention how to proceed.
>
> Please notice that we are still waiting for the final payment in the amount of €15.500. The due date for this outstanding balance is tomorrow!
>
> Unpleasantly we have to inform you that we are going to instigate the enforcement irrevocable on next Monday the 4th of November 2013, 12 noon."

41. This time Mr Franks replied very promptly. He apologised twice, and thanked Mr Schneider for his "support and patience". He gave this explanation of what had taken place: "As promised I made the below payments as soon as we had the cleared funds in our Euro account." This does not tally with the bank statements. Mr Franks went on:

> "I am expecting the balance of €15,500 to be paid in full by the end of next week, 8th November once our client has paid the balance. I greatly appreciate your support and patience."

42. On Wednesday 6 November Mr Schneider chased, asking if the money had already been transferred "to be in our account by Friday". He warned that "enforcement irrevocable" would be instigated at 12 noon on Friday 8 November and that "As a consequence thereof we would also feel called to forewarn all EASA/EU-OPS licensed airliners concerning your payment performance".

43. Mr Franks replied 2 ½ hours after the expiry of the deadline, providing confirmation that "a further €2,000 has been paid into your account leaving a balance of €13,000." He stated that:

> "we are doing everything we can to clear your outstanding balance. We were unfortunate that our client has taken time to pay which we are very grateful for your understanding and support. Of course we will continue to pay the remaining balance as soon as we receive more funds from our client."

44. The Euro account statement discloses the following: The balance from 18 October to 8 November 2013 was €366.54. On 8 November the claimant received a payment of €9,950. It was from this sum that the claimant paid €2,000 to the defendant, in part-payment of the defendant's demands. Most of the remaining monies in the Euro account were paid out later the same day to someone other than the defendant. The claimant has chosen to conceal by redaction the source of the €9,950. There is no evidence that it came from Heart of England NHS Trust, and as before there is good reason to think it did not.

45. On 21 November 2013 Mr Schneider emailed Mr Franks, seeking confirmation as to whether he had transferred the total outstanding amount "to be in our account by tomorrow". He pointed out that "it is not our task to remind you every two weeks to transfer the next partial amount of money. Rather it should be your liability to keep us informed regarding your concept of transferring the outstanding amount!" He made a further threat to "instigate the enforcement irrevocable" this time setting a deadline of noon on Friday 22 November 2013. He reiterated that the defendant would feel called on to forewarn others, and attached "the warning letter which we are going to send out via email tomorrow afternoon!". This letter was in the terms that were eventually published, and constitute the words complained of.

46. This email was copied to two generic FlyMeNow email addresses. It was Mr Whitney who replied just before 6pm on 21 November 2013, in the following terms:

> "Calm down Philipp!
>
> Adam is doing his very best to get you all **monies owed**.
>
> **We could throw our hands up in the air as many Brokers do and say, we haven't been paid, so you are not going to get paid, but no, we are transferring all available monies to you, irrelevant of the situation with our Government client**.
>
> **If you send out an email/letter/threat, you only cause more financial difficulty and worse, you threaten yourself with never getting paid, ever.** Or, perhaps a legal case for slander because the July flight has been paid in full!

> Adam should have advised that we performed a mission last week which we Invoiced €13,990.00 with payment terms set at immediately. My instructions to Adam are to transfer the €13,500.00 owed to you the moment that money arrives into our account.
>
> You must appreciate that we do not want to be in this situation, and we very much appreciate you being as patient as you have been, however threatening us, or wanting to damage our reputation will only make matters worse.
>
> Of course, we are still directing flight requests in your direction and fully appreciate that monies will need to be paid in advance however, your insistence on receiving all monies means that you are currently missing out."

In this and another quotation below I have highlighted in bold some passages which are clearly of some real importance to the central issues in this case.

47. On 30 November 2013 Mr Whitney emailed Mr Schneider this further account of the defendant's position:-

> "We are not using any delaying tactics, this (attached) is the Invoice that is due for immediate payment. The very moment these funds arrive, they will be transferred to you.
>
> **Adam has spoken with the HSE in Ireland on Thursday, who assured that payment is imminent,** I will ask Adam to check with them again on Monday.
>
> As I said in my email, you do whatever you feel that you need to however, understand the consequences for not being patient.
>
> July payment – paid in full."

48. The attached invoice related to a flight carried out by the claimant for HSEI, from Dublin to Milan on 4 November 2013, using a supplier other than the defendant. This flight had no connection with the July and August Flights. This was the first time the claimant had openly stated or suggested in the correspondence that payment of sums claimed by the defendant would be contingent on or derived from sums paid to the claimant pursuant to an unrelated contract with an unrelated third party.

49. The unchallenged evidence of Mr Schneider is that "Therefore I contacted Mr Franks after receipt of this invoice and stated to him that it appeared he was delaying payment of Quick Air's invoice due to non-payment by a different end user client. I told him that if FlyMeNow sent payment following settlement of that invoice then another airline company would be waiting for payment in relation to that flight. I also said that it was very clear that FlyMeNow must have pecuniary difficulties because it seemed that the invoice concerning our two flights had already been paid to FlyMeNow by the end client but that payment had not been sent on to us."

50. On 3 December there was an exchange of emails between Mr Schneider and Mr Franks as follows:

    (1) "please urgently advise if you were able to transfer the outstanding amount or otherwise when you intend to transfer at the latest."

    (2) "I wanted to let you know as soon as I have heard some news regarding payment. I have received confirmation today from our client HSE in Ireland that we will receive payment in our bank on December 23rd. They assure me there will be no further delay. I will of course forward you payment as soon as we receive it. Again I apologise for the delay and thank you for your patience."

51. On 3 December, when these exchanges took place, the claimant did not have any "available monies" in its Euro account, to use the terminology of Mr Whitney's 21 November email. The balance at that stage remained at €336. There was only $10.43 in the dollar account. There was over £20,000 in the sterling account. But no payment was made from those monies.

52. On 4 December 2013 a sum of €12,000 was received by the claimant in its Euro bank account. A further €12,000 was received in that account the following day. The claimant has chosen to conceal by redaction the source(s) of these funds. But on the face of it this would represent "available monies". But none of that was paid to the defendant. The bulk of it was paid out to others on 5 and 6 December.

53. The effect of these transactions was that at the close of business on 5 December there was a credit balance of €16,836. On 6 December that balance was reduced by a substantial payment out, to €3,836. The balance on the dollar account remained at just over $10 on 5 and 6 December, and at the end of the year. Payments out of the sterling account reduced the balance to £181.78 on 5 December, and that remained the balance until 23 December.

54. This was the position at the time when the defendant published the email complained of on 5 December 2013. Mr Schneider's evidence is that "At this point I had lost patience with FlyMeNow and their constant promises of payment which had been broken. On 5 December 2013 I therefore took the action that I had mentioned…"

The Notice

55. The Notice read as follows:-

> *"To Whom It May Concern*
>
> *<u>WARNING</u>: Company you should not deal with!*
>
> *Pecuniary difficulties!*
>
> *Dear Colleagues,*
> *We consider that it is our duty to warn you against doing business with the following company as they are not able to pay outstanding amounts dated from July 2013.*
> *FlyMeNow Limited*
> *The White House*

> *12 Abbotsway*
> *York YO31 9LD*
> *UNITED KINGDOM*
> *www.flymenow.co.uk*
>
> *The FlyMeNow Limited is obviously incapable to pay their outstanding amounts in total. In this particular case for two ambulance flights they booked with our airline company in July and August 2013.*
>
> *Of course and unrequested we are going to inform you as soon as we receive the outstanding amount by the defaulting debtor.*
>
> *Please feel free to contact me for further information regarding this unpleasant issue.*
>
> *Best regards,*
>
> *Philipp Schneider*
> *Quick Air Jet Charter GmbH"*

The Three Emails

56. The Three Emails relied on by the defendant were all received on the day of publication. They are:-

    (1) An email from Adam Minks, the Financial Controller at Blink Ltd, a private airline charter company operating from Blackbushe airport in Surrey. Mr Minks said "I sympathise with you entirely, this outfit cannot trusted". He said that Blink had pursued the claimant through the UK court system for unpaid debts and "We are very cautious about accepting any bookings from them now and categorically insist on payment via credit card before any positioning of crews or aircraft."

    (2) An email from Flex Flight, a Danish airline charter company operating from Roskilde. This said "We have recently done business with them and also we had problems getting our money. However I blocked the amount on their American Express for security."

    (3) An email in German from Bernhard Wallner, Sales Director of Air X Charter Ltd, an airline charter company operating from offices in Malta and Salzburg. Mr Schneider's translation, which was uncontradicted, is that "Mr Bernhard informed me that they had also used FlyMeNow for a charter in May 2013 and had had to wait two weeks until they were paid". Mr Schneider says that since payment in advance is usual in the private charter sector a two week delay is unusual.

The Letter of Claim

57. A letter of claim was sent swiftly, on 6 December 2013. It asserted that the claimant "has the funds available to make any payments that your company alleges are due at

the present moment". The claimant's bank balances at the time were £176.78, $10.43 and €3,836.54. The sterling balance subsequently increased, but the Euro balance reduced. The claimant did not pay the outstanding sums until 23 December 2013. On that date the claimant received a payment in Euros in respect of the "earmarked" HSEI flight of 4 November. Later that day the claimant paid the claimant the remaining sum due, in Euros, out of these monies. That money was received the following day.

58. This payment reduced the balance on the claimant's Euro account to a modest figure. At 31 December 2013 the balances in the bank accounts at that date were £21.73, $10.43 (= c £6.23) and €1,657.96 (= c £1,405). According to the claimant's end of year balance sheet – not filed until much later – the sum held by way of cash at bank and at hand at that time was £23,540. It is common ground that the figures can only be reconciled on the basis that there was physical cash in hand at that time of some £22,000.

Legal Framework

59. For the purposes of this trial, the core principles that apply to the main issues on liability can be shortly summarised:

    (1) For the purposes of defamation law, the natural and ordinary meaning of words is the meaning they would convey to the ordinary reasonable reader.

    (2) The defence of justification is available to a defendant who proves that the natural and ordinary meaning of the words complained of is substantially true.

    (3) The defence of qualified privilege is available where it is for the common convenience and welfare of society that a communication of the kind in question should be given (qualified) protection from liability in defamation. Two categories of situation where the defence is available are:

        (a) where the defendant had a social or moral duty to communicate information on that subject, to someone who had a corresponding legitimate interest in receiving such information; and

        (b) where the publisher and publishee had a common and corresponding legitimate interest in the subject-matter of the communication.

    (4) The defence of qualified privilege is defeated if the claimant proves that the defendant was actuated by a dominant improper motive.

Meaning

60. The classic summary of the right approach to deciding what natural and ordinary meaning the reasonable reader would take from a published statement is contained in paragraph [14] of *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130. So far as relevant this is:

> "(1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an

> implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…" ... "

61. The claimant's pleaded case is that the words complained of bore the following meaning:

> "that the Claimant was in financial difficulties and/or insolvent being unable to pay its debts as they fell due; that the Claimant's financial position was such that it was not safe for any industry party to deal with the Claimant and would be unlikely to be paid by the Claimant in a later deal and was in default of invoices outstanding for payment for a period of many months."

62. The defendant's Warning Meaning is:

> "You should avoid supplying services to the Claimant because it has failed to pay money owed by it to the Defendant. This is because it is having pecuniary difficulties."

63. There is no dispute that these are defamatory meanings. It is common ground and clear in any event that the Warning Meaning is distinct from the Insolvency Meaning, that is to say, the meaning that the claimant was "insolvent being unable to pay its debts as they fell due". It is notable, though, that although the claimant's case contains the Insolvency Meaning, it is not limited to an imputation of that kind. It extends to include alternative and additional imputations, which partly overlap with the Warning Meaning; in particular, it is the claimant's case that the words meant it was "not safe" for others to deal with the claimant, and that the claimant "was in default of invoices outstanding for payment for a period of many months".

64. The meaning that words convey to readers is, for them, very much a matter of impression. The court should have regard to the impression made upon it on first reading. After reading and hearing the arguments of Counsel these first impressions have survived: (1) the Notice clearly did contain a warning to readers not to do business with the claimant, and the gist of the warning was that *it would be financially unsafe to do business with the claimant*; (2) That warning was, on its face, an inference or conclusion from some more specific factual imputations. Those factual imputations were that (a) *the claimant was a defaulter which had failed to pay the defendant sums that had been due and outstanding since July, and (b) the reason for*

that was that the claimant was insolvent, being unable to pay all its debts as they fell due.

65. In summary, the words contain an express warning that the claimant is a "company you should not deal with". The warning is explained: there are "outstanding amounts" from July 2013 and (in the final sentence) the claimant is a "defaulting debtor". The nature of the warning is clear: dealing with the claimant would carry a risk of financial default. True, the "headline" explanation merely says "pecuniary difficulties". But the allegation is one of "default" and the reason is explained: the claimant is "not able to pay". That is clear on its face. But if those words left any room for doubt, it would be removed by the next substantive sentence, asserting that the claimant is "*obviously incapable* to pay".

66. Mr Bennett has ingeniously submitted that there is no imputation of insolvency here because the focus of the wording is on failure to pay for two "particular" flights booked with the defendant, and the final sentence of the Notice concedes that the claimant may pay in due course. In my judgment however there is plainly a suggestion that the claimant's failure to pay the defendant is not an isolated event affecting the defendant alone but rather evidence of an inability to pay generally. The suggestion goes beyond mere "pecuniary difficulties". The imputation is of an "obvious" inability to pay "their outstanding amounts *in total*" (emphasis added). The suggestion is, as the claimant contends, that it cannot pay all its debts as they fall due. That is what explains and, on the face of the Notice, justifies a warning to other companies to avoid dealing with this company.

Justification

67. The defendant relies on the documentary record, and the other evidence summarised above, in support of a contention that the claimant was at all times from July to 5 December 2013 in debt to the defendant to the tune of at least €13,500. It remained throughout in substantial default of its contractual payment obligations to the defendant. The defendant invites the inference from what was said and done, and what was not done, that the reason for that default was an inability to pay. Reliance has been placed on the state of the claimant's bank balances at relevant times. It is acknowledged that there were times at which the total held on deposit was enough to discharge the claimant's liabilities to the defendant, but it is pointed out that this is not what was done with the money. It was paid out to others instead, whilst the defendant was kept waiting for payment. The suggestion is that this must have been because money was due to others, whose demands were considered to be more pressing. The claimant was "robbing Peter to pay Paul". It was fobbing off the defendant with a variety of excuses for non-payment, staving off having to pay these debts, so that it could meet other obligations.

68. The claimant's case, and Mr Whitney's evidence, is that it is "fundamentally incorrect" to state that payment was due in accordance with the defendant's standard terms. It is alleged that an express oral agreement to the contrary was reached. In support of this assertion various arguments are advanced by Mr Whitney. He points out that the flights took off without prior payment, which he suggests means that "on its own case the defendant … must have reached an agreement … to perform the flights given that no payment was made in advance". He asserts that it is his general practice to be "straightforward and always aim to agree terms of payment to reflect

those that we are being paid upon". In closing submissions, Mr Speker conceded that the payments made were late, even on the claimant's best case as to its contractual obligations, but he maintained that this was not a case of prolonged default as suggested by the Notice. Moreover, the claimant contends that it was solvent at all material times. Mr Whitney's evidence is that the claimant is "a company of assets" which "was not unable to pay its bills when they fell due at the relevant time."

69. These rival contentions give rise to two key issues:

(1) Is the defendant right to say that there were sums outstanding throughout? Or was there an agreement giving the claimant time to pay, with the result that it was only in default to a limited extent and late in the day?

(2) If (and to the extent that) the defendant is right, why did the claimant fail to pay? In particular, was the reason that it was unable to pay all its debts as they fell due?

Was there any agreement for time to pay?

70. In my judgment the clear answer is no, for these reasons: the claimant's assertions on this issue are (1) belated; (2) confused and internally inconsistent; (3) at odds with the circumstantial evidence; (4) inherently implausible; (5) unsupported by any contemporaneous documentation; (6) inconsistent with the conduct of the parties; (7) unsupported by any satisfactory oral evidence; (8) contradicted by oral evidence that I find convincing.

71. The issue is primarily one of the law of contract. There might perhaps have been some debate about the applicable law. The defendant's standard terms provided for its contracts to be governed by German law. In cross-examination Mr Schneider gave some evidence as to the need in German law for contractual terms to be documented. But he is not a lawyer, neither party has advanced any case on foreign law, and the issue has been contested on the basis of English law principles. On that basis the question is whether there was any prior agreement that overrode the express provision for "Payment prior flight" contained in the parties' written agreements.

72. The first assertion that there had been any such prior agreement is to be found in the letter of claim of 6 December 2013. This disputed that any sums were due at that date. It was said that the July Flight had been paid for in full. That of course was no answer to a complaint that there had been payment default. As to the August Flight, it was said that "Payment terms of 90 days were agreed by your company with our client." The letter went on to say that "confirmation has been provided … that sums in respect of flights you have referred to will be discharged upon receipt by our client of funds from the relevant company department who is our client's customer."

73. This was self-evidently confused. Even if 90 days for payment had been agreed, that period had expired well before 6 December. It was not alleged in the letter that there had ever been any agreement to accept payment out of funds from "our client's customer". The "confirmation" referred to post-dated the Charter Agreement by several months. In addition, it related to a flight performed nearly three months after the August Flight for an unrelated customer of the claimant.

74. The claimant's case has continued to be confused and confusing. The Particulars of Claim, settled by the claimant's solicitors, stated the case as follows (emphasis added):-

> "In respect of the flight performed on 14 July 2013 the Claimant settled the total sum due to the Defendant by three payments made upon 17 October, 18 October and 11 November."
>
> In respect of the flight performed in August 2013 this was a flight performed on behalf of a Government Department and **accordingly payment terms were agreed to reflect the 90 day payment terms upon which the Claimant would be paid by its client.** Payment terms were **accordingly** agreed specifically such that the Defendant **would be paid the sums due for the performance of this flight upon the Claimant receiving payment from its client.**
>
> The above terms were specifically agreed verbally by Mr Whitney, Director on behalf of the Claimant and Mr Philip Schneider on behalf of the Defendant."

75. This wording does not make clear whether the "payment terms" alleged are 90 days' credit or pay when paid or some combination of the two. Vague and apparently inconsistent terms are not rendered clear and unambiguous by an assertion that they were "specifically agreed". There is another obvious problem with this version of events. The contractual documentation with the Heart of England Trust has not been produced. But the other documents show, and Mr Whitney agreed in cross examination, that the payment terms on which the claimant operated at all material times required their clients to pay immediately. There were "no 90-day payment terms upon which the claimant would be paid by its client".

76. The Reply stated that "it has always been the Claimant's position that payment terms were agreed and agreed to be upon receipt of payment from the Claimant's client." That is not how it was put in the letter of claim or the Particulars of Claim. Nor is it how it was put in Mr Whitney's witness statement which said this:

> "I can recall very specifically that during the conversation I made it plain to Mr Schneider the fact that the flight being booked was for a Government department – the NHS; that payment was agreed at 90 days for us and specifically I agreed payment terms in that respect. That is how I deal with all bookings; I am straightforward and always aim to agree terms of payment to reflect those that we are being paid upon; not withstanding that there may be differences in the currency."

This is a further different version of what was "specifically" agreed. It suffers from the same difficulties as the pleaded case: it is vague and unclear; and an agreement for "payment … at 90 days" would not amount to "terms of payment to reflect those that we are being paid upon".

77. Further, the passage quoted appears to suggest in its final phrase that the agreement was to pay when paid even if this might be disadvantageous due to currency differences or fluctuations. In another part of his statement, however, Mr Whitney described a policy of the claimant, that "if we book in Euros we must pay in Euros and similarly if we sell in Sterling we must pay in Sterling". This does not simply mean, as it would appear to, that the claimant paid in the currency prescribed by the contract. That would be no more than a statement of the obvious. Mr Whitney explained that earlier on he had been "instructed" by someone that the claimant "always waited to make payment for any flight until it has received funds from its client for the flight to ensure FlyMeNow Limited has been paid; but more importantly until it has been paid whether by that client or another in that currency; unless there was an absolute necessity to do otherwise." Mr Whitney did not say in his witness statement that any part of this was incorporated into the July or August Contracts.

78. On 30 November 2016, shortly before the trial, the claimant's solicitors wrote a letter stating: "Our client's position is that the agreement was reached that payment would be made as and when as relevant either our client was paid by its customer assuming that both flights were bought and sold within the same currency; or alternatively when in receipt of relevant currency into its accounts" (sic).

79. The claimant's skeleton argument for trial suggested that the evidence would demonstrate that the claimant imposed two conditions when contracting with companies such as the defendant, both of which were accepted by the defendant: "First, C would not pay D until it was either paid by C's client (which with government parties could be 90 days) and, secondly, and more importantly, C required to have sufficient funds in the same currency it had agreed to pay to a defendant in D's position [ie Euros]".

80. None of the claimant's versions of events stated when the alleged oral agreement had been made. Mr Whitney's oral evidence was confused as to this, and inconsistent with his statement on other points. In cross-examination he said: "After the March flight I had a conversation with Mr Schneider and it was quite clear in that conversation that they would have to accept **at least** 90 days …" (emphasis added). He said "I remember it occurring after the March flight". He then suggested that this had been discussed and agreed before the March flight: "So when we started doing these flights in and out of Ireland I said to Mr Schneider they would have to understand that it could take 90 days." This account falls short of an agreement to allow 90 days. Later, when I asked him questions about this he said that on reflection the conversation had taken place after the first flight.

81. There are three separate strands to the claimant's case on this issue: an agreement to give 90 days' credit; an agreement that the claimant would only be liable to pay when paid; and an agreement to wait until the claimant has been paid by someone (whoever it may be) in the contractual currency of account. These strands of the case are not at all easy to reconcile with one another. They have been put together in various different mixes at different times, with varying degrees of skill and clarity. My conclusion is that none of these things were agreed, either in law or in fact.

82. All three strands of the claimant's case on time to pay are improbable in the particular circumstances. It is improbable that an established jet charter business such as the defendant would give a broker any significant credit, when brokers were notorious for

going bankrupt, and this one was previously unknown to the defendant. Further, Mr Schneider's evidence, which I accept, was that brokers provide only occasional and sporadic opportunities, not the steady stream of work which a company such as the defendant would (naturally) be seeking, to provide a reliable basis for future business.

83. In closing submissions Mr Speker has conceded that an agreement of the third kind would be too uncertain to have legal effect. Under such an agreement the payment obligation might never crystallise. It is in any event close to inconceivable that the defendant would have made an agreement of this kind, in my judgment. There is no evidence worthy of the name that it did, nor is there any credible basis for suggesting that the defendant had any good reason to make such an agreement. No such thing was ever suggested in the contemporaneous correspondence. The conduct of both parties is inconsistent with any such agreement. The defendant pressed for payment promptly. The claimant did not pay. But it did not protest at the claims for payment, complaining that nothing was due until the claimant's Euro account was in funds. What happened was that, unilaterally, the claimant decided that it would prefer to meet its payment obligations to the defendant out of sums received in Euros from third parties, and not otherwise. That is consistent with the policy described by Mr Whitney, but inconsistent with the agreement of the parties.

84. The second kind of alleged agreement is of a highly improbable nature. I accept the evidence of Mr Schneider that the defendant did not know the identity of the claimant's customers. It did not know that the claimant was acting for a public health authority. Such an agreement would therefore have involved the defendant taking credit risks on unknown third parties. I can see no reason why the defendant would have been prepared to do that. Again, the contemporary documents give the lie to this aspect of the claimant's case. In particular, Mr Whitney's "calm down" email of 21 November 2013 represents a clear indication to the contrary. Although Mr Whitney tried to suggest otherwise when cross-examined, this email amounted to an express disavowal of the line "we haven't been paid so you are not going to be paid." Mr Whitney was seeking to portray the claimant as a company that behaved better than that.

85. It is understandable in these circumstances that Mr Speker, instructed recently, has focused his closing argument on the 90-day term. But his client's evidence on this is vague and inconsistent. And again the facts and the documents are against the claimant. If 90 days' credit had been agreed, it would have been the most natural thing for the claimant to say so when pressed for payment. But not a word was said about any such agreement over the many months in which the defendant was pressing for payment. On the contrary, Mr Franks' first response of 9 October referred to "your outstanding invoices". This was less than 90 days after the July Flight, and less than 60 days after the August Flight. Later, less than 90 days after the August Flight, repeated apologies were made for non-payment.

86. I found Mr Whitney to be an unsatisfactory and unreliable witness on this issue, and generally. Not only did his account of events have the flaws already identified. He did not impress me as a witness who was intent on telling the truth. He had committed himself to pursuit of this claim and had thereby put much at stake. He was clearly nervous, and feeling under pressure at times. He drank copious amounts of water when facing difficult questions, and gabbled some of his answers. He sought on several occasions to suggest that the contemporaneous correspondence supported or

was at least consistent with his account of the agreement arrived at, when this was clearly implausible at best. Mr Schneider had no investment that I know of in the defendant company. By contrast to Mr Whitney he gave clear, coherent, measured and credible evidence in a calm and authoritative way. Mr Schneider firmly denied that he had agreed any of the things alleged by the claimant and I accept his evidence.

87. That agreement between the parties was as stated in the Contract, for payment before the flight. The fact that the plane took off before payment was made is explained by the urgency of the medical needs involved, and a degree of trust on the part of the defendant, at that time. The fact that the defendant allowed further time to pay when it invoiced the claimant after the flight had left is evidence of a limited unilateral waiver of its strict contractual rights, but no more than that. It lends no support to the claimant's case.

88. For these reasons I accept the defendant's case, that there was a minimum of €13,500 due and owing to it by the claimant at all times from 22 July 2013 to 5 December 2013. Specifically, I accept the accuracy of the table showing what was due when, which accompanied the defendant's skeleton argument. A copy of that table is Appendix A to this judgment.

89. I add this. In my judgment the claimant has behaved disreputably in advancing its case on this issue, and therefore in pursuing this claim. The statements in the letter of claim were false. The claimant's statements of case presented a false case on this issue, verified by statements of truth signed on its behalf. (It was the claimant's solicitors who signed them). Mr Whitney's witness statement also gave a false account of things, which ought not to have been presented. That also was verified by a statement of truth, signed by him.

90. I have deliberately used the word "disreputably". The claimant's lawyers act on their client's instructions, which are given behind the veil of privilege. I do not know who on behalf of the claimant caused or authorised the claimant's solicitors to say what they did in the letter of claim, whether it was Mr Whitney or someone else. Nor do I know quite how the statements of case (settled by the claimant's solicitors) or Mr Whitney's witness statement came to be framed as they were. These issues were understandably not explored in the evidence. What I do find however is that the case put forward in the letter of claim in December 2013 is one that Mr Whitney knew at the time to be untrue. If he had focused his mind on the content of that letter, as he should have done given his role, he would or should have appreciated that a false case was being put forward.

91. Quite what Mr Whitney's state of mind may have been between that time and the end of this trial it is not easy to determine. But he was accused by Mr Bennett of "inventing" the contractual terms alleged, and I should record my conclusions, which are these. They are based on the contemporary correspondence and Mr Whitney's written and oral evidence. He is ambitious for success, and willing to bend the truth if it suits his purposes. He does not have a very clear idea of what is and is not the truth. He is not a stickler for accuracy; he does not find it easy to see the difference between something that he would like to be true and something that he knows to be true. He does not possess great insight; he does not see himself as others do. In December 2013 he knew that there had been no such agreement as was alleged in the letter before action and has been alleged at this trial. But my clear impression is that Mr

Whitney has engaged in a great deal of wishful thinking in the course of this case. By the time he made his witness statement he may have persuaded himself, and believed, that what he said about these issues was true. I am not prepared to find that he did not. He may also have believed it when he took the oath at the trial, and I do not find otherwise. But I do believe that by the end of his evidence he was aware that what he had been saying was not true. That is why he became so upset that he wept.

Why did the claimant fail to pay on time?

92. My first conclusion on this issue is that the failure to pay represented the implementation of deliberate policies which were highly likely to lead, as they did, to substantial default in timely payment. The claimant did not wish to pay otherwise than from Euros received by it from third parties pursuant to other contracts. It did not wish to pay unless and until (a) it had received enough money in its Euro account to its Euro liability to the defendant and any other current liabilities it had in Euros; or (b) it was placed under such pressure by the defendant that it felt compelled to make some kind of payment to avoid enforcement measures.

93. These were policies to which the claimant adhered throughout the period under examination. It did not pay the defendant when payment fell due. It did not pay when it was paid by the NHS Trust for the July flight. Nor did it pay the defendant out of monies it received from its client, the NHS Trust, for that flight, or the August Flight. It only ever paid the defendant out of sums it received in Euros from other clients, pursuant to other contracts. It had no contractual right to adopt this policy, which it forced on an unknowing and unwilling defendant. Mr Bennett described the claimant's behaviour as treating the defendant like a bank, but it was worse than this. Banks are in the business of lending money, and have a choice about whether to do so.

94. The claimant behaved dishonestly in implementing this policy. By this I do not mean simply that it deliberately failed to discharge its debts, knowing that they were due and payable, though it did do that. What I mean is that the company repeatedly lied to Mr Schneider in order to fob him off. In fairness to Mr Franks I should say again that he was not present to answer the questions that would undoubtedly have been put to him. But in fairness to the defendant I make findings about his conduct. In my judgment:-

    (1) Mr Franks lied in his email of 9 October 2013. He must have intended Mr Schneider to take the words "our client" to mean the client for whom the July and August Flights were performed. He must have intended Mr Schneider to take the "funds" he mentioned to be the funds for both flights. If Mr Franks had any conversation with the Heart of England NHS Trust at this time it cannot have involved the confirmation that he described. The Trust had already paid for the July Flight. No payment was made over the following weekend. It seems likely that there had been no such promise as Mr Franks alleged, nor anything resembling such a promise.

    (2) Mr Franks also lied in his email of 15 October 2013. It was not true that the €6,400 paid to the defendant that day had been paid to the claimant by "our client" that morning. Mr Franks must have known that was not true.

(3) The assertion in Mr Franks' email of 31 October 2013 that the payments of October 2013 had been made "as soon as we had the cleared funds in our Euro account" was false and misleading to his knowledge. I strongly suspect that the same is true of his further claim that he was expecting the balance of €15,500 due to the defendant to be paid in full by 8 November "once our client has paid the balance". The claimant has not disclosed when the NHS Trust paid for the August Flight, nor any details of any promises to pay.

(4) It was not true that the claimant was "doing everything we can to clear your outstanding balance", as Mr Franks asserted on 6 November 2013. He was well aware that this was not true. It was false and misleading to his knowledge to say that the claimant would "continue to pay ... as soon as we receive more funds from our client". That was not the claimant's intention. Contrary to the clear implication of his email, the €2,000 paid by the claimant on 6 November 2013 did not come from funds received from "our client".

95. I am also driven to the conclusion that Mr Whitney lied to the defendant in his email of 21 November 2013. By this time over 90 days had elapsed since the August Flight. No agreement had been made to "pay when paid", and Mr Whitney did not believe that any such agreement had been made. The claimant had not paid when it was paid. It had failed to pay when it was in funds to do so. It was not true that Mr Franks was doing his "very best" to get all monies owed to the defendant, and Mr Whitney must have known it. He must also have known that it was not true that the claimant was transferring "all available monies" to the defendant "irrelevant [ie regardless] of the situation with" the claimant's "government client". It was untrue to Mr Whitney's knowledge to say, as he did on 30 November 2013, "We are not using any delaying tactics". That is exactly what the claimant was doing.

96. The reason for these lies and delaying tactics was a determination to stick by the policies I have identified. The policy of always paying from the Euro account was a simplistic one. It was designed to avoid exchange rate risk in a situation where the claimant's client paid in (say) sterling but the claimant had to pay its supplier in (say) Euros. By never changing sterling into Euros (in this example) the claimant would avoid the risk of a currency depreciation between the time of receipt and the time of payment out. But of course sterling might appreciate against the Euro in the meantime, and the policy also avoided gaining from that. However, Mr Whitney's evidence persuades me that he had been instructed by someone at an early stage in his role at the claimant company that currency exchanges should be avoided come what may, and he had adopted that as a rigid rule.

97. One simple alternative approach that could have been adopted in principle would be to hold foreign currency reserves, acquired at times when exchange rates were favourable. That however was not an option for the claimant. It lacked reserves. Its policies were framed accordingly. That is clear on any view. But it does not follow that the company was insolvent.

98. The bank statements show that the company did not have enough Euros to pay the defendant on 22 July 2013, when payment fell due for the July Flight. But across all its accounts it had enough money to do so. The same is true of 19 August 2013, when payment fell due for the August Flight: the claimant did not have enough Euros to pay that debt, but across its accounts there was enough. The claimant's policies

with regard to payment in Euros are the main reason why it did not pay on time. Mr Bennett has submitted, however, that even if the claimant could have paid the defendant in full at these times it could not have discharged all its other liabilities as well.

99. The submission is not based on any sophisticated analysis of the claimant's management accounts or cash flow. No such analysis has been undertaken. Nor, as far as I can see, could that have been done on the basis of the disclosed documents. Mr Bennett's argument has three main strands. The first is the claimant's own statements in correspondence. These are presented as in substance assertions of inability to pay when due. Alternatively, I am invited to infer from what was said that the company was unable to pay. There is certainly some force in this argument, not least when it comes to Mr Whitney's email of 21 November. That suggested, almost in terms, that if the defendant pressed too hard for payment it would get nothing, as the claimant would enter insolvency.

100. The second strand of argument relies on what appears from the bank statements: that whenever substantial sums came into the claimant's bank accounts, similarly substantial sums were paid out shortly afterwards. Mr Bennett pointed to a number of specific examples of this taking place. In these examples, other creditors were paid in sterling, at a time when the claimant owed Euros to the defendant. Mr Bennett put it to Mr Whitney, and invites me to infer, that this was because the claimant owed money to these others and decided to pay them instead. Having done so, it had no money to pay the defendant. It was unable to pay all its debts as they fell due.

101. Thirdly, Mr Bennett relies on the Three Emails. As to those, I am not persuaded by Mr Speker's submission that they should be ignored altogether as unreliable hearsay evidence. The claimant could have called for the makers to attend for cross-examination. It chose instead to elicit commentary from them by email, and to submit those emails in rebuttal of the content of the three Emails. It is unnecessary to devote much time to this issue, as my conclusions on the Three Emails do not form a decisive element of my reasoning. But I find that they afford some corroboration for the conclusion I have arrived at independently of the emails: that the claimant was keeping others waiting for payment, beyond the due dates. It was ducking and weaving to try to keep itself financially afloat. The rebuttal emails do not wholly contradict the original emails; they are of the kind that one would expect to see from companies who are continuing to deal with the claimant, or hope to do so, and do not wish to become embroiled in this litigation.

102. Mr Whitney conceded in cross-examination that the claimant was operating "on a knife-edge", but he has continued to maintain that the company has been solvent at all times. He referred to the end of year balance sheet position I have mentioned above, and asserted that the company had access to credit. Evidence about these facilities was contained in his first witness statement, and in his oral evidence to me. In his first statement, made in opposition to an application for security for costs, he said this:

> "I also confirm that beyond its cash position, the Claimant was approved for and holds an American Express credit card facility with a £40,000 credit limit; whilst I have the use of another business American Express credit card with a further £40,000 credit limit. This is a separate account to that of the Claimant for my use in connection with the Claimant's business. These reflect the view taken of the

> Claimant by lenders / creditors as does the up to date credit report (see **Exhibit AW4**) but also the available sources of funding."

103. That was the position, according to Mr Whitney, in May 2016. In his oral evidence he maintained that this had also been the position in 2013, and also referred to a Barclaycard facility of £25,000. These were all sterling facilities. His evidence was, therefore, that at the material times the claimant had access to cash and credit in sterling to the tune of some £127,000.

104. The tenor of Mr Whitney's evidence suggested that the second Amex card was a personal one. Nothing was said in the witness statement about the Barclaycard account. No evidence has been produced to show the balances on any of these facilities at the relevant times. I agree with Mr Bennett that disclosure should have been given. I approach Mr Whitney's evidence with caution, for the reasons I have given. And I place weight on his email of 21 November 2013. However, there was no challenge to his witness statement on this topic. And the company clearly did have at least one Amex card in 2013. That is evident from some of the exchanges I have outlined above, including the Three Emails. There is a complication to this aspect of the case: Mr Schneider's evidence is that the defendant was not able to accept payment via Amex at the relevant times, due to a dispute that had arisen. But in the end that is a red herring in my view.

105. Bearing in mind the onus of proof, I conclude that it has not been shown that the claimant was unable to pay its debts as they fell due. I find that it could, if it had chosen to, have paid the defendant by credit card (Barclaycard if necessary). Alternatively, it could have paid one or more of its sterling creditors in that way, and converted sterling into Euros to pay the defendant. It chose not to do any of these things. The reasons certainly included exchange rate risk, and I find that this was the main reason. The reasons may also, I surmise, have included a desire to avoid incurring interest and/or other charges for credit.

106. The claimant's approach was self-evidently a highly dangerous one for it, and for its creditors. It had practically no reserves. It was living from hand to mouth, juggling its various liabilities to keep its bank accounts in credit and to avoid undertaking any exchange rate risk. The company's situation was highly precarious. If anything had gone seriously wrong with a single contract it might have resorted to its credit lines, but come the time the credit card bills needed paying, the business could all have collapsed in a short space of time. It was indeed living on a knife-edge. This way of doing business exposed any company dealing with the claimant to significant financial risk. That much is reflected in what Mr Whitney said on 21 November 2013. However, I have not been persuaded that insolvency was the reason for non-payment of the debts due to the defendant, at the time they fell due. Nor have I been persuaded that the company was in fact insolvent at the time that allegation was made.

107. It is true that at that time the company lacked funds in its bank accounts, sufficient to meet the outstanding liabilities to the defendant. But again the evidence is that it had cash and credit from which it could have met those liabilities. The reasons why it did not resort to those means of payment are the same as those I have identified above.

Conclusions on justification

108. The defendant has not proved that the claimant was insolvent at the time that allegation was made. But it has proved that it was, if not on the brink then very close to being insolvent; and it has proved the substantial truth of the rest of the defamatory meaning conveyed by the Notice complained of. It was financially unsafe to do business with the claimant. It was a defaulter which had failed to pay sums due and outstanding since July 2013. But the reason for that was not insolvency. The case turns out to be one of "won't pay" not "can't pay".

109. Where does that leave the plea of justification? By s 5 of the Defamation Act 1952 it was provided, in summary, that in a case where words contain two or more "distinct charges" a plea of justification can succeed even if not all the imputations are proved to be true. The plea might succeed if "if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges." But this is not a s 5 case. No reliance is placed on the section, and what has happened is not proof of the truth of one or some of two or several distinct imputations. It is proof of a large part of an imputation, coupled with proof of other disreputable facts.

110. Foreseeing this as a possible outcome, Mr Bennett submitted that in that event the defence of justification should be upheld: it is if anything more disreputable for a company to refuse to pay that to be unable to do so. I do not believe that is the right approach in principle. A defence of justification should be upheld if the evidence establishes the substantial truth of the defamatory imputation conveyed. If the evidence does not establish the substantial truth of the defamatory imputation conveyed, but proves its partial truth the right approach is to take that other conduct into account when assessing what damages the claimant ought to receive: see *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 (CA) where Neill LJ said:-

> "There may be cases, however, where a defendant who puts forward a defence of justification will be unable to prove sufficient facts to establish the defence . . . Nevertheless, the defendant may be able to rely on such facts as he has proved to reduce damages, perhaps almost to vanishing point. Thus a defence of partial justification, though it may not prevent the plaintiff from succeeding on the issue of liability, may be of great importance on the issue of damages."

111. If the evidence reveals disreputable conduct of a different kind from that which was alleged in the words complained of, that may also be taken into account. As Neill LJ also said: "... a defendant is also entitled to rely in mitigation of damages on any other evidence which is properly before the court ..." In *Pamplin* itself, the Court of Appeal dismissed an appeal against the verdict of a jury awarding ½ p in damages, on the grounds (among others) that the jury were entitled to conclude that although the truth of the imputation made had not been proved the claimant's conduct as revealed in the evidence showed that he was not deserving of a good reputation.

112. At this stage of the analysis, however, the question for me is not whether the evidence establishes the truth of something as bad as or worse than was alleged in the words complained of. The question is whether, by proving part of its case on justification,

the defendant has established the substantial truth of what it alleged. My conclusion is that it has fallen short. I remind myself that the issue is whether there is a material inaccuracy, and that this is not to be judged too nicely: see Gatley on Libel and Slander 12th ed para 11.9 and cases there cited. But it seems to me that Mr Speker is right to submit that insolvency is a specific and serious imputation, that is considerably graver in nature and likely consequences than an allegation of delayed payment or default in payment. An imputation that it would be financially risky to deal with a company because it is a long-term defaulter on its debts is different from, and distinctly less serious than, an imputation of insolvency.

Privilege and Malice

113. I reject the claimant's case of malice. Mr Schneider had ample grounds for concluding that the reason the claimant was not paying its debts to the defendant was that it was unable to do so. He had not agreed to be paid when the claimant was paid, nor had he made any agreement to wait until the claimant had sufficient Euros. Nothing had been said to that effect before the agreements were made. Against that background, the failure to pay coupled with the words of Mr Franks and, in particular, those of Mr Whitney's email of 21 November 2013, was one of insolvency. I accept Mr Schneider's evidence that he did believe the claimant was unable to pay its debts. For these reasons the claimant's pleaded case of malice cannot be upheld. But Mr Speker has advanced an alternative case.

114. It is rare for a person who positively believes in the truth of what he says to be found to have spoken maliciously. The general rule is, as Lord Diplock said in *Horrocks v Lowe* [1975] AC 135, 150, that "what is required on the part of the defamer to entitle him to the protection of [qualified privilege] is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief.'" But even a positive belief in the truth of what is published may not be enough: "A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true." Mr Speker's primary submission in support of the claimant's case of malice is this is such a case. I do not consider that submission to be well-founded.

115. I do accept that Mr Schneider was annoyed with the defendant. He did not dispute this, and it is quite clear from the correspondence. It is also true that he wanted to persuade the claimant to pay, and that his motivation for publishing the words complained of included a desire to put pressure on the claimant to do so. But as Lord Diplock emphasised in *Horrocks* at 150H-151, the court should be very slow to draw such an inference; and "It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that 'express malice' can properly be found." It might be thought that the aim of procuring payment of debts that were long overdue does not constitute an improper motive. But however that may be, this is not in my judgment a case in which the selfish desire to procure payment was the overwhelming reason for sending out the Notice. The case is one of mixed motives. Mr Schneider had lost patience but he did not act in haste. His state of mind included, genuinely and prominently, a belief that he was under a duty to warn other companies and a desire to issue such a warning. I find that this was his primary motive. He explained this in cross-examination. He knew of other situations where brokers had gone bankrupt,

leaving aircraft providers unpaid, when relevant information had not been shared in advance within the industry. He thought "why don't we share that information?" The defendant "felt responsible to send this out to the industry to make them aware there is a broker, not the first in history, that has a payment problem." To do so, Mr Schneider used a contact list he had obtained from an aviation industry conference.

116. Having said this, however, I do not accept the defendant's case that the publication was protected by qualified privilege on the basis that the defendant did have a social or moral duty to warn other companies, or on the basis that the defendant and the audience had a common legitimate interest in the communication of information about the solvency or otherwise of the claimant. Mr Speker is right to point out that the authorities have taken a cautious approach to information about insolvency. The commercial activity of providing credit information or credit references is generally held to fall outside the law's protection: see *Macintosh v Dun* [1908] AC 390 (PC) (though there may be exceptions to this rule: see *Gatt v Barclays Bank plc* [2013] EWHC 2 (QB)). When it comes to the gratuitous provision of information about credit the authorities recognise a privilege for answers to enquiries about credit, and for communications about credit made via mutual protection associations: see *London Association for the Protection of Trade v Greenlands Ltd* [1916] 2 AC 15. But no authority has been cited in which the court has upheld an argument that a volunteered communication by one private company about another is protected by qualified privilege, on any basis.

117. The root justification for the protection of qualified privilege is "the common convenience and welfare of society". Some factual situations are well-recognised as giving rise, on that basis, to what can be called an "off the peg" privilege. The spontaneous publication by a private company to industry colleagues of credit information about another private company is not one of these factual situations. Outside the well-recognised categories, the availability of privilege depends on a careful examination of all the particular circumstances of the case.

118. Here, the Defence does not disclose the basis relied on for advancing the plea of privilege. But Mr Bennett has argued that the defendant was under a moral duty to warn others: the claimant was playing off one aircraft operator against another so that, for instance, the provider of the aircraft used for the 4 November flight would have to wait for payment until the claimant received Euros from some other transaction. The defendant's fellow aircraft providers had a legitimate interest in knowing about the claimant's behaviour. Alternatively, argues M Bennett, the claimant and the publishees, fellow aircraft operators, had an identical mutual interest in sharing information about the claimant's behaviour.

119. I do not consider that the circumstances here gave rise to any moral or social duty to make the communication complained of. An imputation of insolvency can be devastating to a business. The spreading of false imputations of insolvency is contrary to the public interest. The dangers of indiscriminate publication of credit information by those in business who have had bad experiences with others, or maintain that they have, are obvious. The defendant has no formal role within the aviation industry which places it under any implied obligation to help others. Nor was there any pressing need for it to act for that purpose. Apart from anything else, a mutual protection association exists: the Baltic Air Charter Association or BACA. BACA describes itself on its website in this way: "a worldwide organisation whose

membership is open to those involved within the Aviation Industry, engaged in the chartering and mutual protection of aircraft. The objectives of BACA have and continue to be, to promote the highest standards of professionalism and ethics within the Aviation Industry." There was therefore an alternative conduit by which information, suitably verified, could be passed to those who had a genuine legitimate interest in receiving information about the claimant's creditworthiness.

120. It has to be said, moreover, that little care was taken by Mr Schneider to ensure that the audience he was addressing all had a genuine and present legitimate interest in knowing about the financial position and commercial dealings of the claimant. He took a list from a conference he had attended some considerable time earlier, consisting of generic corporate email addresses. He addressed his email "to whom it may concern". It was inherently likely that this method would bring the information to the attention of a substantial number of people with no existing or likely interest in learning about the claimant's solvency or business conduct. It has not been asserted that this was the only practicable way of communicating with those who did have an interest. It has not been proved that the communication was limited to those who had a proper interest in receiving the information. Nor am I persuaded that the defendant itself had a proper interest in communicating the information. This was not a communication made through a settled structure, under a set of rules, involving mutual assistance. The defendant's interest in making the communication was, in reality, purely self-interest.

Abuse of process

121. In the particulars of justification the defendant pleads as follows:

> "Alternatively, if in fact the reason for non-payment was that the claimant could pay the money but chose not to, the defamation claim ought to fail by reason of the fact that the defendant could not be blamed for reaching the conclusion set out in the words complained of ….
>
> The claimant ought not to be able to achieve vindication in regard to an allegation (inability to pay debts) which it had in fact published to the defendant in order to manufacture an excuse for late payment of a debt. The defendant ought not to be penalised for accepting at face value what it was being told by the claimant."

122. These averments are put forward in the alternative to the defendant's case that the claimant was "not able to pay the relevant amounts from its own funds". A representation of insolvency could be relied on as an admission against interest, or as conduct affecting the appropriate damages; but if the court concludes, as I have, that the claimant was not in fact insolvent it is not immediately obvious how the making of representations to the contrary could afford a defence to liability. It certainly could not support a plea of justification. After discussion about the juridical nature of this argument, Mr Bennett has advanced this as a separate and distinct line of defence under the label of "abuse of process".

123. The nub of Mr Bennett's argument is that if the claimant recovers damages "It will have used the court to obtain a judgment which contradicted the image projected by the [claimant] to the [defendant]. Furthermore, but for the projection of this image, the [defendant] would never have relayed it to the publishees." The right to reputation ought not to be upheld in circumstances where the claimant has brought upon itself the repetition of the allegation complained of.

124. I can see that such an argument might run if a claimant deliberately procured a defamatory publication with a view to suing upon it. If the defence of consent did not avail the defendant, it might be said that the claim for damages was nonetheless an abuse. But this case plainly does not fit into that category, or anything close to it. In my judgment, the claimant is bringing this action to vindicate its reputation of an imputation of insolvency which was false. That, in itself, is a proper use of the court's process. There is no ulterior motive. Mr Bennett's reliance on the words of Simon Brown LJ in *Broxton v McLelland and Another* [1995] EMLR 485, 497–498 at (ii) is misplaced.

Damages

125. In my judgment, the appropriate way in which to reflect the fact that the claimant led the defendant to believe it was insolvent is to take this into account on the issue of damages. It is one of four factors that lead me to the conclusion that the appropriate course in this case is, as Mr Bennett submits, to award only minimal damages. The other three factors are (i) the significant extent to which the defendant has proved the truth of the defamatory meanings of the words complained of; (ii) the claimant's dishonest behaviour in 2013; and (iii) the claimant's disreputable and, ultimately, dishonest conduct of its case, including at this trial.

126. In a libel action brought by an individual, compensation is awarded for injury to reputation and to feelings. The award must provide appropriate vindication. A claimant is entitled to point to a sum of money which clears his reputation. A corporate claimant has no feelings, and can only suffer in its "pocket". It is entitled to a sum in damages that properly reflects the financial loss that has been caused by the publication, and which will vindicate. In most cases special damage cannot be proved, and therefore is not alleged. This is such a case. That does not preclude a substantial award of general damages. The claimant has established that significant reputational harm resulted from the defendant's email, and no doubt that was reflected in financial harm. But this is not a large business. And where partial justification is established the claimant is only entitled to be compensated for damage which the court finds was probably caused by the libellous part of the publication. Here, the partial justification of the words complained of has the effect of substantially reducing what would otherwise be the award. The claimant falls to be compensated as a company that was not insolvent, but had failed to pay its debts to the defendant over many months, was perilously close to insolvency, and was financially risky to do business with.

127. The award would nonetheless have been in the modest five figure range but for the other three factors I have mentioned. A company that is falsely accused of being insolvent would not ordinarily have its damages reduced to a negligible level just because it was in some lesser form of financial difficulty, and had unjustifiably delayed payment of some of its debts. This case, however, is highly unusual. In the process of attempting to prove insolvency, and successfully proving the matters it has

established, the defendant has incidentally proved that the claimant behaved disgracefully in fobbing it off with a series of dishonest excuses. Those are facts which are properly before the court, which ought to be taken into account in mitigation of damages, pursuant to the principle summarised in *Pamplin*. They also fall to be taken into account as directly relevant background context under the *Burstein* principle (*Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 (CA)). These are facts which go to a relevant sector of the claimant's business reputation, and show that it is undeserving of a sum which would appear to the outside world to represent substantial vindication of its reputation.

128. So also do the facts that I have summarised about the way this action has been conducted by the claimant company. It has emerged that a central element of its case was false from the beginning and should have been recognised as such by the company's principal, Mr Whitney. He has given false evidence and, as I find, continued to stand by the original case after he realised that it was false. Those too are disreputable facts that are properly before the court, which logically affect the extent to which the claimant is entitled to the vindication of its reputation through an award of damages. The propriety of this approach appears to me to be supported by the decision at trial in *Joseph v Spiller* [2012] EWHC 2959 (QB).

129. Returning to the claimant's behaviour in causing the defendant to believe that the claimant was insolvent, it seems to me that this is properly considered as evidence of the claimant's own conduct which goes to mitigate or reduce damages. This category of evidence is discussed in the 12th edition of Gatley at paragraph 33.51 and following. The editors express the view that "conduct" in this context "relates in particular (but not exclusively) to activities which can be causally connected to the publication of the libel of which the claimant complains, such as direct provocation..." The present case is perhaps not easily categorised as one of "provocation". The cases cited in the textbook do not appear to include any involving facts akin to those of the present case, nor have any such been cited in argument; but that does not affect the principle. In my judgment, in this case, (a) the claimant's conduct can be properly said to have played a part in causing the publication complained of, and (b) the claimant's conduct in that regard is culpable to a degree that makes it just to reduce damages. This is conduct that is directly related to the sector of the claimant's reputation that was wrongfully damaged by the words complained of, and reduces damages on that account.

130. Bearing in mind all of these factors, I have concluded that the right sum to award is £10.

Injunction

131. Mr Bennett submits that no injunction should be granted. The defendant has always denied that it intends to republish the allegations complained of, and there is no reason to disbelieve it so an injunction need not be granted. I agree.

Conclusions

132. My conclusions can be summarised as follows:

(1) The words complained of bore the Insolvency Meaning, but they also bore elements of the Warning Meaning. Their natural and ordinary meaning was that it would be financially unsafe to do business with the claimant because (a) the claimant was a defaulter which had failed to pay the defendant sums that had been due and outstanding since July, and (b) the reason for that was that the claimant was insolvent, being unable to pay all its debts as they fell due.

(2) A substantial part of the defence of justification has been made out. It was true that it would be financially unsafe for others in the industry to deal with the company; and it was true that the claimant was a defaulter which had failed to pay the defendant sums that had been due for many months. In addition, it has been proved that the claimant was perilously close to being insolvent. By concession, it was "operating on a knife edge".

(3) But it has not been established that the claimant was insolvent, and that this was the reason the company was failing to pay. It chose not to pay on time for reasons of policy when, if pushed far enough, it probably could have done so. Section 5 of the Defamation Act 1952 is not relied on. The facts that have been proved do not prove the full truth of the defamatory imputations published by the defendant. The allegation of insolvency is a material inaccuracy. To that extent, therefore, the defence of justification is not made out.

(4) The claimant's statements and behaviour gave Mr Schneider every reason to believe that the company was insolvent and he did believe it. He acted in the belief that he had a duty to warn others, even if that was not his only motive. So the plea of malice fails. But so does the defence of qualified privilege. The alternative defence of abuse of process is not established. Accordingly, the claimant is entitled to judgment on liability.

(5) However, the claimant is not entitled to any substantial damages. The Notice was very largely true. The claimant lied repeatedly to the defendant about the reasons for non-payment of the defendant's invoices. The claimant thereby behaved disgracefully at the time. It has behaved disreputably and disgracefully since. In addition, its own conduct played a significant part in causing the defendant to publish the untrue allegation of insolvency. My award by way of compensation and vindication is £10.

(6) The defendant denies any intention to repeat the words complained of. There is nothing that could support the claim for an injunction.

APPENDIX

Amounts owed by FlyMeNow to Quick Air

Date	**Pmt due date**	**Pmts by C**	**Balance owed**
22 July	July Flight (15,400)		15,400
16 August	August Flight (13,500)		28,900
16 Oct		6,400	22,500
18 Oct		7,000	15,500
20 Oct – 90 days since 22 July			
8 Nov[1]		2,000	13,500
14 Nov – 90 days since 16 August			
5 Dec Email complained of published			
24 Dec[2]		13,500	0

In the five month period from 22 July to 23 December the C never owed less that €13,500 to the D.

[1] **110 days after 22 July**

[2] **131 days after 16 August**