IN THE SUPREME COURT OF GIBRALTAR
Claim No. 2018 ORD 091

BETWEEN

NICHOLAS PETER CRUZ
Claimant/Respondent

-and-

(1) SAMANTHA BARRASS
(2) PETER TAYLOR
(3) FINANCIAL SERVICES COMMISSION
Defendants/Applicants

Desmond Browne QC with Greg Callus and James Montado (instructed by Isolas LLP) for the Applicants

Julian Santos with Darren Martinez (instructed by Hassans) for the Respondent

JUDGMENT

YEATS, J:

1. The Gibraltar Financial Services Commission ("the Commission") issued a press release on the 26 October 2016 concerning the collapse of Enterprise Insurance Company plc ("Enterprise"). This action, which is in its early stages, is a claim in defamation arising from the publication of the press release. This judgment relates to applications made by the defendants for strike out, summary judgment and/or a stay.

2. Enterprise is an insurance company established in Gibraltar which wrote insurance business in the United Kingdom and other EU

countries. The claimant, and respondent to this application, is Nicholas Peter Cruz. Mr Cruz is a Gibraltar lawyer who was a non-executive member of Enterprise's board of directors from the 10 November 2003 until the 21 September 2016 (and its non-executive chairman as from the 1 October 2014). The defendants/applicants are: Samantha Barrass, who at the material time was the Chief Executive Officer of the Commission; Peter Taylor the Commission's Director of Legal, Enforcement and Policy; and the Commission itself.

3. Enterprise was placed in provisional liquidation on the 25 July 2016 on account of its insolvency. Frederick White of Grant Thornton was appointed as the provisional liquidator. Mr White prepared a report for this court dated the 21 October 2016 in anticipation of a hearing which took place on the 26 October 2016. A press release was issued by the defendants on the date of the hearing upon the court making an order for Enterprise's liquidation. It was published on the Commission's website (where it remained at the time of the hearing) and, according to the claimant, to a large number of publishees including local and international media outlets. The claimant says that the press release made serious and damaging allegations against him including, amongst other things, that there was reason to believe that he had misled the Commission about Enterprise's true financial position and that he had failed to run it in a sound and proper manner. Furthermore, in the Note to Editors which accompanied the press release, there is a reference to offences under the Financial Services (Insurance Companies) Act 1987. This the claimant says implies that there are reasonable grounds to suspect that he is guilty of a criminal offence.

4. The claimant's claim is for damages (including general, special and/or aggravated damages), interest on the special damages and for an injunction restraining the defendants from further publishing the allegations and requiring them to remove the press release from the Commission's website. The claim form and particulars of claim were issued and served by the claimant on the 30 November 2018. An

extension of time for the filing of a defence was then agreed. On the 30 January 2019, the date by which a defence ought to have been filed, the defendants issued the application notice with which we are now concerned. The defendant applicants seek the following principal relief:

i. That paragraphs 14(w) and 14(x) of the particulars of claim be struck out in their entirety pursuant to CPR r 3.4(2)(a) because they disclose no reasonable grounds for pleading "malice" or "bad faith";
ii. Summary judgment be entered in favour of the defendants pursuant to CPR r24.2 because:
    a) The defendants enjoy an immunity pursuant to s.19(1) Financial Services Commission Act 2007 and there is no real prospect of the claimant proving bad faith; and/or
    b) The publication of the press release by the defendants on the 26 October 2016 was an occasion of Qualified Privilege and there is no real prospect of the claimant proving malice.
iii. [In the alternative], that the claimant's claim be struck out pursuant to CPR r3.4(2)(b) because it represents an abuse of process; and
iv. [In the further alternative], that the proceedings be stayed pursuant to CPR r3.1(2)(f) until the conclusion of the investigation being conducted on behalf of the third defendant into the collapse of Enterprise and to avoid prejudice to the investigation.

5. In a defamation action a claimant must prove that the defendant has published a statement to third parties which refers to him. The statement must be 'defamatory' in that it must have an objective tendency to lower the recipient's estimation of the claimant. A defendant can rely on a number of defences, for example, that the statement made is true or that the statement was 'honest comment' – meaning that the words were comment and not fact and the maker honestly believed what he was saying. There are other defences, such as absolute privilege (which includes statements made in parliament which can never be the subject of a defamation action) and qualified privilege. In addition, a publisher may enjoy an immunity from a defamation claim pursuant to statute. It is the qualified privilege defence and statutory immunity which are relevant for the purpose of these applications.

6. A defendant in a defamation action can rely on a qualified privilege defence where, on the grounds of public policy and convenience, the law allows a publisher to make a statement. Qualified privilege can take different forms. In this case it is submitted that it is either the traditional common law qualified privilege (which arises on an occasion where there is a common interest between the publisher and the publishee), or the *Reynolds* type qualified privilege, which is a privilege which can attach to a publication to the world at large if it is in the public interest. (*Reynolds* qualified privilege derives from the House of Lord's decision in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.) Importantly however, a defence of qualified privilege is defeated if a claimant shows that the defendant publisher acted maliciously when making the statement.

7. The statutory immunity which is relevant to this case is that afforded by section 19(1) of the Financial Services Commission Act 2007 ("the FSC Act"). This reads as follows:

> *"Neither the Commission nor any member of the Commission, nor any officers or servants of the Commission, nor any person to whom the Commission's powers have been delegated, shall be liable in damages for anything done or omitted in the discharge or purported discharge of any powers or functions conferred on the Commission by this or any other Act or regulation unless the act or omission is shown to have been in bad faith."*

As can be seen, on the face of section 19(1), the immunity would not apply if the claimant shows that the act (in this case the statements made in the press release) were made in bad faith.

8. This short overview of the law, potential defence and/or bar to the claim serves to introduce the relevance of malice and bad faith to the applications being made by the defendants. It is the defendants' case that the references to malice and bad faith in the particulars of claim ought to be struck out. This then leaves them able to rely, even at this early stage, on the qualified privilege defence and/or the immunity

afforded by section 19(1) of the FSC Act and apply for summary dismissal of the claim. Not so says the claimant. In summary, the parties' submissions as to how the applications should be taken is the following:

i. Firstly, I must determine whether paragraphs 14(w) and 14(x) of the particulars of claim should be struck out. The defendants say that these two paragraphs set out the claimant's case on malice and bad faith. That pleadings of malice and bad faith need to be tested against a number of indicators (for example that the pleading is not a 'mere assertion'). In this case Mr Desmond Browne QC, who appeared for the defendants, submitted that once I do this it will lead me to the conclusion that the pleadings of malice and bad faith should be struck out because they do not disclose reasonable grounds for pleading these. The claimant on the other hand says that paragraphs 14(w) and 14(x) are actually paragraphs that deal with his plea for aggravated damages. That a pleading of malice or bad faith is ordinarily made in a reply if a relevant defence (or immunity provision) is relied on. In any event, Mr Julian Santos, who appeared for the claimant, submitted that the paragraphs, even if they are taken as setting out the claimant's case on malice and bad faith, do indeed disclose grounds for pleading so. (The parties were agreed that no consideration of evidence was required in relation to the strike-out application. The focus is on the statement of case alone.)

ii. The summary judgment applications only fall for consideration if I strike out paragraphs 14(w) and 14(x). If they are not struck out then I must simply go on to consider the defendants' application for the claim to be struck out as an abuse of the process of the court. However, if these two paragraphs of the particulars are struck out then Mr Browne's position is that the court should deal with the summary judgment applications but only on a consideration of whether,

as a matter of law, qualified privilege and statutory immunity apply. That there would be no need to consider any evidence as malice and bad faith would no longer be in the equation following the strike-out and the evidence in the case would therefore be an irrelevance. If qualified privilege and/or statutory immunity apply as a matter of law then that would be the end of the matter. Mr Santos however submitted that this case was not apt for a summary judgment application because of the extensive evidence the court would have to consider. In any event, he submitted that qualified privilege and statutory immunity do not arise as matters of law. Alternatively, he submitted that if I were to strike out paragraphs 14(w) and 14(x) then I should be allowing the claimant an opportunity to amend his particulars of claim as the evidence clearly supports his allegations that the defendants had acted maliciously and in bad faith.

iii. The application for strike out of the claim as an abuse of the process of the court only follows if the preceding applications fail. It is said that the claim is an abuse of process on the basis of three separate but overlapping limbs. The first is 'collateral purpose', where the defendants say that the claim has been brought for an improper purpose. The second is 'warehousing' of the claim where it is alleged that there has been an unjustifiable delay before the issuing of the proceedings. The third is based on the rule in *O'Reilly v Mackman* – that it is an abuse of process to bring a private law action in relation to a claim which should have properly been brought by way of judicial review proceedings.

iv. Finally, if the claim is not struck out in its entirety, the defendants seek a stay of these proceedings until the conclusion of a regulatory investigation into Enterprise's affairs being carried out by inspectors appointed by the Commission. The report is expected by the end of April 2020.

Malice and bad faith as legal concepts

9. The law on malice was reviewed by Lord Diplock in *Horrocks v Lowe* [1975] AC 135 HL. There, in the context of a defence of qualified privilege in a defamation action, it was said that the defence is available unless the claimant is able to show that there was a dominant improper purpose on the defendant's part. Three basic propositions emerge from his lordship's speech as to how a dominant improper purpose is established. The most basic form is if it is proved that a defendant did not believe the truth of what he published. Secondly, if the publication of a statement is made recklessly, in other words without considering or caring as to its truth, then a defendant is treated as having made such a statement knowing it to be false. Thirdly, if a defendant has misused the occasion of the publication of a statement (for example in order to obtain an advantage unconnected with the purpose for which the privilege exists) then a qualified privilege defence cannot be relied upon even if the defendant believed the statement to be true. Malice is said to be tantamount to dishonesty – see *Duncan & Neill on Defamation* (4th Edition, 2015) at paragraph 19.17.

10. As to bad faith, Mr Santos referred me to *Street v Derbyshire Unemployed Workers Centre* [2005] ICR 97, an employment rights case where Auld LJ, when analysing the relationship between malice and bad faith, said the following at paragraph 57: "*...because of what, depending on the facts, may often be the higher threshold necessary for the proof of malice in defamation than the bad faith in this legislation.*" However, he was happy for the court to rely on *Webster v Lord Chancellor* [2016] QB 676 which is authority for bad faith being a similar concept to malice. I also observe that in *Saad v Southampton University Hospitals Trust (EAT)* [2019] ICR 311 Judge Eady QC, when referring to a victimisation provision in the UK Equality Act 2010 which protects the giving of false evidence or

information if it is not given in bad faith said the following at paragraph 47:

> *"The tribunal is simply required to find whether that evidence, information or allegation is true or false; if false, it must then determine whether it was given or made by the employee in bad faith. And that must mean that it has to determine whether the employee has given the evidence or information or allegation honestly: to paraphrase Auld LJ in Street (para 41), absent other context, bad faith has a core meaning of dishonesty."*

In my judgment this is the approach which should be taken with the bad faith provision in section 19(1) of the FSC Act. Bad faith has a core meaning of dishonesty.

11. Mr Santos also relied on *Webster* for two further propositions (the court quoting from a decision of the Federal Court of Australia). The first, that bad faith can be inferred from the evidence. The second, that demonstrating that the publisher acted recklessly is sufficient - although this was qualified in a later case of the same Australian court where it was said that the test was a subjective one: "...[*the*] *inquiry is directed to the actual state of mind of the decision maker. There is no such thing as deemed or constructive bad faith.*"

The six causes for concern

12. Underpinning the defendants' case that they were misled by the directors of Enterprise is what has been referred to as the 'six causes for concern'. I include a short summary of the defendants' position on these for context and make it plain that in doing so I am not expressing any view on the evidence. The claimant says that some of these issues were known by the Commission and had been approved and others are being misrepresented.

13. Solvency Margins. Prior to Enterprise's collapse the Commission knew that Enterprise would have difficulty meeting regulatory solvency levels which were due to be increased on the coming into

force of certain EU regulations. (Regulatory solvency refers to margins of assets over liabilities which EU solvency regulations require insurance companies to maintain.) However, in June 2016 the Commission became aware that Enterprise had actually become balance sheet insolvent. On the 19 July 2016, Enterprise confirmed that its liabilities exceeded its assets in amounts estimated at between £11.9 million and £18.9 million. This resulted in the application for the provisional liquidation being made to this court. When Mr White completed his report on the 21 October 2016 he reported that the insolvency was in fact estimated by him at approximately £100 million. The Commission therefore says that it appears that it had been misled as to Enterprise's true financial position.

14. Enterprise Insurance Group Services Ltd. The Commission had approved a 'triangular model' as the structure within which Enterprise was to operate. Enterprise would run the insurance business and pay a percentage of its gross written premiums to a related company for marketing and services. The services company would in turn use these monies to repay funds advanced by the group's holding company to Enterprise. (The effect of this structure was that Enterprise would not itself hold any debt.) The first defendant says that in the course of the provisional liquidation the Commission became aware that the services company was not actually providing meaningful services but was simply being used to pay dividends to Enterprise's directors that could not be paid out of Enterprise directly for regulatory reasons. (A claim has in fact been instituted by Mr White, as Enterprise's liquidator, against the claimant and twelve other former directors of Enterprise for breach of their common law and fiduciary duties in relation to payments made to the services company.)

15. Letters of Comfort. In November 2015, the claimant signed two letters on behalf of the family trusts of the two beneficial owners of Enterprise. (The claimant's trust company, of which he is a director, was the corporate trustee of these family trusts.) The letters, confirming financial support for Enterprise, had been provided to EY

who were Enterprise's auditors. When these 'letters of comfort' were called upon by the provisional liquidator, the reply on behalf of the claimant was that they were of no legal or moral effect.

16. Roadside policies. One of the possible regulatory breaches identified by Mr White is the writing of some 10,000 unauthorised roadside assistance policies. Whilst an application for the writing of this business had been made by Enterprise, the Commission say that they had not approved it.

17. Icebreaker. Enterprise had underwritten a group of policies relating to an investment scheme named 'Icebreaker'. It was in fact a tax avoidance scheme (on the part of the insured persons not Enterprise) the nature of which meant that there could be a potential 100% recoverability liability if claims were made. In the provisional liquidator's report Mr White made a provision in the sum of £19.5 million to cover these potential claims alone.

18. Oxford Blue Gastro Pub. In February 2015, Enterprise had discussed with the Commission a possible investment in a pub. The Commission had refused permission. However, the defendants say that notwithstanding this refusal, funds raised on the issue of a bond in Germany by Enterprise's holding company had been used to purchase the pub. The prospectus for the bond had indicated that the funds raised would be used to meet Enterprise's regulatory solvency margins.

19. I turn to the first of the applications.

Application for strike out of paragraphs 14(w) and 14(x) of the particulars of claim

20. A preliminary point in the strike out application is whether the application has been made prematurely. It is said for the claimant that pleadings of malice are normally made in a reply once a defendant raises qualified privilege in its defence. (The same would apply to a

pleading of bad faith if and when statutory immunity is relied on by a defendant.) This is based on paragraph 2.9 of Practice Direction 53 of the CPR (set out at 53PD.21) which provides as follows:

> *"If the defendant contends that any of the words or matters are honest opinion, or were published on a privileged occasion, and the claimant intends to allege that the defendant acted with malice, the claimant must serve a reply giving details of the facts or matters relied on."*

21. Mr Santos further relies on *David v Hosany* [2016] EWHC 3797 (QB). On this point, but in the context of a summary judgment application, HHJ Moloney QC, sitting as a judge of the High Court, said the following at paragraph 37:

> *"Normally one would not expect this subject to be in issue so early in an action; express malice is generally pleaded in a Reply, if the Defence has raised an issue of qualified privilege or honest opinion calling for rebuttal. Here no Defence has yet been served, and therefore no Reply. There is some brief reference to malice in Paras 11 and 12 of the PoC, apparently in anticipation of such a defence and also in Para 34, in relation to exemplary and punitive damages. But the case on malice is not fully particularised."*

The learned judge was observing that the general course was for express malice to be pleaded in a reply once qualified privilege is raised in a defence. It does not of course mean that this cannot be pleaded in the particulars of claim. It may well be that a claimant chooses to do so in anticipation of the defence being pleaded. Furthermore, I do not consider that the Practice Direction in any way creates a hard and fast rule that a pleading of malice can only be pleaded in the reply. I read it as meaning that if it is not pleaded in the particulars of claim and the defence is raised, then it must be pleaded in the reply.

22. In any event, Mr Santos argued that paragraph 14 of the particulars of claim relates to the claimant's claim for general and aggravated damages. It is not a pleading which was necessarily meant to

foreshadow a defence of qualified privilege. The paragraph opens with the following:

> *"[14] By reason of the Defendants' publication of the Press Release, the Claimant has not only suffered serious and substantial harm to his character and professional and personal reputations, but has also been caused very great hurt, distress and embarrassment. In addition to relying on the presumption of damage, the Claimant will rely on the following facts and matters in support of this contention, and in support of his claim for general and aggravated damages."*

It then goes on to set out 27 sub-paragraphs which include sub-paragraphs 14(w) and 14(x). These provide as follows:

> "[w] *In publishing the defamatory allegations in the Press Release the first and second defendants (and therefore the third defendant) were acting maliciously and/or with reckless indifference as to their truth or falsity. The claimant will rely on the following facts and matters in support of this contention*: ..."
>
> [There are then 11 further sub-paragraphs.]

As to paragraph 14(x), this provides as follows:

> "[x] *The defendants' conduct prior to and in the aftermath of their publication of the Press Release has been extremely high-handed and aggressive, and evinced clear ill will towards the claimant. The claimant will rely on the following elements of the defendants' conduct towards him, which has only served to aggravate the injury caused to his feelings by their publication of the Press Release, in support of his claim for aggravated damages (as well as his contention as to the first and second defendants' state of mind):*
>
> [There are also 11 sub-paragraphs to 14(x).]

23. These clearly are pleadings relating to the claim for aggravated damages. Indeed, paragraph 14(x) does not even expressly refer to or use the term 'bad faith'. Mr Browne however submitted that they are, in effect, the claimant's particulars of malice and bad faith and that a reference by the claimant at paragraph 4 of his witness statement of the 12 April 2019 confirms this. I agree that paragraph 14(x) contains

allegations in the nature of bad faith allegations. However, the claimant does not in his witness statement say that his case on malice and bad faith is contained in these two paragraphs of the particulars of claim. The claimant states: "*Given the wide-ranging nature of the applications, which require me to defend my entire case on malice and bad faith, it is necessary for me to set out the full background and history to my claim.*" This refers to his witness statement and the evidence in support - not the particulars of claim. That said, it did not appear to me that Mr Santos at the hearing gave any further examples of what he could include in a potential reply. Even when he took me through the evidence in the context of a potential amendment of the particulars of claim in the event of a strike out, nothing which he raised indicated that there were further allegations to be made. The matters which he raised would be covered by the particulars of claim as presently drafted although obviously these could be set out differently.

24. The point was also made for the defendants that in a case where a statute provides immunity to a defendant provided there is an absence of bad faith, the claimant must plead and prove particulars of the bad faith alleged (*Melton Medes v Securities and Investments Board* [Ch. 1993 M No 7433] and *Webster v Lord Chancellor* [2015] EWCA Civ 742 being relied on). Mr Browne submitted that this must be done in the particulars of claim. Absent bad faith there is a bar to the claim proceeding and the claimant must therefore overcome that bar. In support, Mr Browne highlighted that the defendants' solicitors had made it clear that qualified privilege and statutory immunity would be relied on when they replied to the claimant's letter before action. As such, the claimant was on notice and should have pleaded his alleged particulars of malice and bad faith in the particulars of claim. Two issues arise. Firstly, I do not in these cases find authority for the proposition that the pleading must be in the particulars of claim and that a claimant must anticipate and deal with, in that opening statement of case, any legal or procedural bar available to a defendant. In my judgment, it is for the latter to raise the bar in its pleaded

defence. Secondly, in this case, whether or not the defendants can actually rely on statutory immunity irrespective of the bad faith proviso is very much in dispute. (The argument is based on the fact that section 19(2) of the FSC Act provides that the immunity contained in section 19(1) shall not apply to the exercise by the Commission of powers contained in section 10(2). That section includes the power to publish 'papers' and 'literary matter'. If, as the claimant will seek to argue, the press release is a 'paper' or 'literary matter' then neither the Commission, nor possibly the first and second defendants, would enjoy an immunity pursuant to this statute.) In the circumstances, it is entirely reasonable for the claimant to wait for the bar to be raised before providing his answer to it.

25. In any event, the application is to strike out the particulars of malice made in paragraph 14(w) and those of bad faith said to be made in 14(x). Whether the assertions are made in the context of a plea of aggravated damages or in anticipation of a qualified privilege defence (or in reliance of statutory immunity) is to a degree immaterial. I must consider the application as there are rules regarding the pleading of malice and bad faith which the defendants say the claimant has fallen short on. If the application fails then the point is academic. If I do strike out these paragraphs then the effect on the claim and whether or not the particulars can be amended or malice and bad faith re-pleaded in a different form in the reply could be the subject of further analysis.

26. I am asked by the defendants to apply what I will refer to as six 'indicators' to the pleadings in order to determine whether they disclose reasonable grounds for pleading malice. (The indicators are therefore also relevant to bad faith.) These are whether an allegation in the particulars of claim: (i) is a mere assertion; (ii) is not more consistent with malice than with its absence; (iii) fails to identify the knowledge of an individual; (iv) fails to meet the test of 'intrinsic malice' in *Turner v MGM*; (v) fails to meet the test of relevance to motive at the time of publication; and/or (vi) it contains an

impermissible plea that material will become available through disclosure. Of course, these have to be looked at through the prism of the test for strike out contained in CPR 3.4(2)(a). This provides as follows:

> *"(2) The court may strike out a statement of case if it appears to the court –*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim."*

The test is commonly formulated as being one where the court should be certain that the claim is bound to fail before granting an application to strike out a pleading. I shall discuss the six indicators before looking at the relevant paragraphs of the particulars of claim.

27. That a pleading of malice must contain more than a simple assertion is not in dispute. This principle derives from *Seray-Wurie v Charity Commission* [2008] EWHC 870 (QB) where Eady J at paragraph 35 stated as follows:

> *"It is necessary, in effect, for a claimant to demonstrate that the person alleged to have been malicious abused the occasion of privilege, for some purpose other than that for which public policy accords the defence. Mere assertion will not do. A claimant may not proceed simply in the hope that something will turn up if the defendant chooses to go into the witness box, or that he will make an admission in cross-examination."*

The learned judge, having observed that an allegation of malice is tantamount to dishonesty, referred to the remarks made by Lord Hobhouse in *Three Rivers DC v Bank of England* [2001] 2 All ER 513 that a claimant "*must have a proper basis for making an allegation of dishonesty in his pleading.*" Furthermore in his dissenting judgment (dissenting on the facts) Lord Millett set out a proposition as to how fraud or dishonesty should be pleaded. I agree with Mr Browne that it would be appropriate to apply this to pleadings of malice. At paragraph 186 his lordship stated: "*There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.*"

28. Secondly, it is also common ground that an allegation must be more consistent with malice than with its absence. In *Telnikoff v Matusevitch* [1991] 1 QB 102, Lloyd LJ at 120E said:

> *"If a piece of evidence is equally consistent with malice and the absence of malice, it cannot as a matter of law provide evidence on which the jury could find malice... If there are no pieces of evidence which are more consistent with malice than the absence of malice, there is no evidence of malice to go to the jury."*

Like the parties at the hearing, I shall refer to this as the *Telnikoff* test.

29. The disagreement is as to whether alleged instances of malice are taken individually or can be looked at cumulatively when applying the *Telnikoff* test. In *Turner v MGM Ltd* [1950] 1 All ER 449 at page 455 Lord Porter said:

> *"...each piece of evidence must be regarded separately... each particular instance of alleged malice must be carefully analysed, and, if the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances."*

30. In a more recent case of *Huda v Wells* [2017] EWHC 2553 Nicklin J, referring to *Turner v MGM,* at paragraph 73 said:

> *"Each particular has to raise a 'probability of malice' and each particular has to be 'more consistent with the existence of malice, than with its non-existence'"*

I am therefore asked by Mr Browne to look at each individual particular and apply the *Telnikoff* test to that allegation without considering any cumulative effect.

31. Mr Santos took a different position. You do not look at each pleading in isolation. He relied on *Komarek & anor v Ramco Energy PLC & ors* [2002] EWHC B (QB). At paragraph 56, Mr Justice Eady said:

> *"Findings of malice are indeed very rare. Nonetheless, I find myself quite unable to say with confidence at this stage that no jury, properly directed, could interpret the totality of the conduct, conversations and documents as consistent with bad faith."*

32. He also referred me to *David v Hosany* where at paragraph 39 Judge Moloney QC said:

> *"In determining the answers to these questions the trial judge will have to take account all the relevant circumstances, including the parties' messages before and after the incident (some of which should not perhaps be read at face value) and their prior and subsequent conduct, as well as the judge's assessment of their oral evidence and general credibility. Importantly, these matters will have to be assessed cumulatively. To tackle the malice points one by one as the Defendant seeks to do, and say that each alone is no proof of malice, may well be inappropriate."*

33. It seems to me that I must follow *Turner*. Not only should this court pay particular deference to a House of Lords decision but the rationale as set out by Lord Porter is clear. Instances of alleged malice must be considered separately. Of course, what this means in practice may not be as simple. Context cannot be ignored when we look at distinct allegations. As will become evident when I look at the particulars themselves, the underlying allegation made by the claimant is that the defendants were fully aware of Enterprise's financial position at all times and had been very involved in its management. His case is therefore that it is dishonest of them to say that the causes for concern led them to believe that they had been misled and that Enterprise had not been run in a sound and proper manner. Where relevant this underlying theme must be taken account of in the individual and separately considered allegations that are made. For example, when the claimant alleges that information provided by the second defendant to Lloyds Bank caused the bank to ask the claimant to resign from its board of directors, such an allegation must be read with this underlying theme in mind. In other words, the allegation would be that despite the second defendant being dishonest as to the

Commission having been misled, he provided information to Lloyds Bank which caused the bank to ask the claimant to resign from its board. It seems to me that this is the approach that I should take.

34. The third indicator is based on *Monks v Warwick District Council* [2009] EWHC 959 (QB). A corporation can only be responsible vicariously, so an individual has to be identified. Mr Browne submits that it is therefore wrong to rely on the alleged knowledge of individuals who are not themselves responsible for the publication. A claimant must make a sufficiently particularised case against an individual employee of the defendant who is alleged to have had the relevant malicious state of mind and to have been responsible for the publication. Mr Browne also referred me to a footnote at paragraph 19.22 of *Duncan & Neill on Defamation* 4th Edition (2015) which referred to *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523 and which sets out the following quote: "*A company's mind is not to be assessed on the totality of the knowledge of its servants.*"

35. Constructive knowledge is not enough – see *Milne v Express Newspapers* [2005] 1 WLR 772. So, it is irrelevant that the position with regards to certain issues could have been clarified by the defendants before publication if questions had been asked of the claimant, for example with the Icebreaker scheme, where the claimant says that Enterprise had established that it would have no liability towards the policy holders. (Enterprise having obtained an opinion form leading counsel that no claim by the policyholders could properly be made as the scheme was for tax avoidance and not investment.)

36. In relation to the question of identifying the individuals who had the knowledge and involvement, Mr Santos submitted that the opening statement in paragraph 14(w), namely that it is the first and second defendants who were acting maliciously and/or with reckless indifference satisfies the technicality in this argument. In other words he has identified the individuals. The remaining paragraphs are simply

paragraphs setting out facts which support the assertion either by statement of fact or implication. I do not quite agree. Every individual allegation needs to be made on the basis that it can be demonstrated that the defendant against whom the allegation is made had the requisite knowledge.

37. The fourth indicator is the meaning and tone of the words themselves: Do the statements contained in the press release meet the test of 'intrinsic malice' as set out in *Turner v MGM*? In that case, Lord Porter, at page 455, observed: "*It is true that grossly exaggerated language may be evidence of malice*..." This is subject to the words of Lord Dunedin in *Adam v Ward* [1917] AC 309 where at page 330 he stated: "*...when considering whether the actual expression used can be held as evidence of express malice no nice scales should be used.*" The court should therefore be hesitant in holding the language of the publication as being, of itself, evidence of potential malice. Indeed, Mr Browne referred me to *Khader v Aziz & ors* [2010] EWCA Civ 716 as an example of how quite strong defamatory words do not necessarily give rise to the probability of malice. Considerable licence is allowed to defendants when interpreting meaning and tone. The authors of *Duncan & Neill on Defamation* say at paragraph 19.19:

> "*It is important to emphasise, however, that, though the language used by the defendant may provide evidence that he was actuated by malice, he is allowed a wide latitude.*"

38. Mr Browne also submitted that the court must guard against the claimant creating an extravagant meaning only to then attack it and claim that, importing such an extravagant meaning, the court can infer that the statement was made maliciously. I accept this, but, for the purposes of the strike-out application, I must have regard only to the claimant's pleaded meaning unless it is grossly exaggerated.

39. The fifth indicator is where the allegation relates to post publication conduct. The conduct would have to meet the test of relevance at the

time of publication. I quote from *Duncan and Neill on Defamation* at paragraph 19.21:

> "...*subsequent conduct is only material to the extent that it may throw light on the defendant's state of mind at the date of publication. Furthermore, a failure by the defendant to apologise or retract even when it is clear that he was mistaken, though unwise, may be evidence of stubbornness rather than of malice at the date of the original publication.*"

40. Mr Santos referred me to *Qadir v Associated Newspapers Ltd* [2012] EWHC 2606 (QB) as authority for the proposition that where a defendant has published an allegation which a claimant later brings to his attention is false, the continued publication can be construed as evidence of malice. The point in that case was however narrower. Tugendhat J found that the defendant had acted maliciously in relation to the continued publication but that finding of malice did not extend to the original publication.

41. In this case there is a continuing publication by the Commission of the press release on its website. Allegations of malice post-publication could apply to that continuing publication.

42. The sixth indicator is whether the particular is simply an impermissible plea that material will later become available through disclosure or cross-examination. Particulars of malice and/or bad faith, like allegations of fraud, need to be pleaded and particularised. Support for this can be found in the words of Eady J in *Seray-Wurie v Charity Commission* which I have quoted above at paragraph 27.

43. But, as I have already highlighted, this is all subject to the strike-out test and procedure. For present purposes I must accept what is said by the claimant in the pleading. I do not look at the evidence. In *Saeed & anor v Ibrahim & ors* [2018] EWHC 3 (Ch) Chief Master Marsh, in what is a useful reminder of how an application of this nature should be approached, said:

> *"It will be rare that an applicant under rule 3.4(2)(a) will be entitled to rely upon [witness statements prepared for the trial] to make out that the statement of case does not show reasonable grounds for bringing the claim. An application will usually succeed or fail by reference only to the content of the statement of case. If conclusions have to be drawn for evidence, Part 24 is the appropriate rule to use."*

In this context 'rare' must mean cases in which a dispute may be easily resolved without conducting a mini trial – which would not be the case here.

44. I turn now to look at paragraphs 14(w) and 14(x) of the particulars of claim. These run to 27 numbered paragraphs and sub-paragraphs over 11 pages. It serves no purpose to recite them all fully in this judgment. If I do not set a particular paragraph out fully on account of its length, I will summarise its contents. The quote and/or summary will be set out in square brackets. I will then apply the relevant indicators to the allegations.

45. Paragraph 14(w): ["*In publishing the defamatory allegations in the Press Release the First and Second Defendants (and therefore the Third Defendant) were acting maliciously and/or with reckless indifference as to their truth or falsity. The Claimant will rely on the following facts and matters in support of this contention.*" It then lists sub-paragraphs (i) to (xi).]

The complaint is that this is a 'mere assertion'. Whilst of course it is, it is simply introducing the sub-paragraphs which are relied on to substantiate the assertion made by the claimant. It is not, in itself, a particular of malice.

46. Paragraph 14(w)(i): [In this paragraph the claimant asserts that the Commission had been heavily involved in the management of Enterprise's solvency position. That the Commission was micro-managing Enterprise and that a number of officers of the Commission had intimate knowledge of Enterprise's finances, workings and structures. The paragraph then concludes with: "*In the circumstances,*

the defendants could not genuinely have believed that their claim that the claimant had seriously, significantly and consistently misled the Commission as to Enterprise's financial position was true."]

The defendants say that this paragraph is not more consistent with malice than with its absence (the *Telnikoff* test) and that it fails to specifically identify the knowledge of the first or second defendants.

Firstly, the first defendant is actually identified as one of the persons conducting the supervision of Enterprise. The particular also refers to a memo prepared by Norman Ritchie, an officer of the Commission, and which was exhibited to the second defendant's witness statement in the application for the provisional liquidation, which evidences the extensive involvement of officers of the Commission. The second defendant is also therefore said to have the required knowledge.

If the Commission's officers were as intricately involved with the supervision and management of Enterprise as the claimant alleges and were aware of its financial position then, if that position was not misrepresented, I agree with Mr Santos that it is arguable that the first and second defendants could not have believed they were misled. Consequently, saying that they had could give rise to a probability of malice.

47. Paragraph 14(w)(ii): [That the Press release relied on "*serious contraventions*" referred to in Mr White's report as a basis for saying that they had been misled but that the facts behind any alleged regulatory breach were in fact known to the Commission].

This is said to fail the first three indicators. Firstly, I do not see how this can be said to be a mere assertion. The paragraph alleges that the defendants' contention that serious issues had come to light as a result of the provisional liquidator's report is inaccurate as, according to the claimant, these issues were known to the defendants previously. Secondly, am I certain that this allegation is bound to fail the *Telnikoff*

test? I must answer this in the negative. If the claimant is able to prove that the defendants were aware of the matters complained of by Mr White but chose to say or imply that they were not and had therefore been misled, then that is an allegation which could be more consistent with malice than with its absence. As to the individuals' knowledge, my observation in paragraph 46 above applies.

48. The defendants say that the following two paragraphs fail the *Telnikoff* test.

Paragraph 14(w)(iii): [That the defendants failed to meet the claimant in the weeks and months after the order for the provisional liquidation of Enterprise despite the claimant making himself available to assist with their inquiries.]

Paragraph 14(w)(iv): [That the defendants only gave the claimant one day's notice of their intention to commence a formal investigation and did not give him time to address the matters raised by the defendants before the press release was published.]

I agree with Mr Browne's submissions. Declining to speak to the claimant or not allowing the claimant time to address matters before the press release was published are not, of themselves, allegations which are more consistent with malice than with its absence. These two sub-paragraphs do not support a plea of malice.

49. Paragraph 14(w)(v): ["*When publishing the Press Release, the defendants decided to include the gratuitous, unexplained and acutely damaging references to criminal offences under the Insurance Act in the Press Release.*"]

I understand the claimant's position that a reference to the possible commission of a criminal offence was unnecessary. Is it more consistent with malice than with its absence and does it meet the test of intrinsic malice? Whilst it is clear that publishers are allowed

considerable licence and, in the words of Lord Dunedin, 'no nice scales should be used', in assessing whether the actual words spoken support a finding of intrinsic malice, it seems to me that I cannot ignore that the first and second defendants are professionals in a position of authority in the financial services regulator. What they say carries more weight than if the same statement were made by a lay person. The claimant's argument that the inclusion of the reference to the offences prescribed by the Financial Services (Insurance Companies) Act 1987 implies that there are grounds to suspect that the claimant is guilty of a criminal offence is not one which is bound to fail. At the time the statement was made the Commission had not conducted any investigation. Consequently, it is open to the claimant to argue that including the reference to criminal offences could be more consistent with malice than with its absence and that it evidences malice.

50. Paragraph 14(w)(vi): [That the defendants were aware that the press release would damage the claimant's reputation and the statements made therein should therefore only have been made after the investigation was conducted and after the claimant had explained his position.]

Mr Browne in his skeleton argument relies on *Milne v Express Newspapers* [2005] 1 WLR 772, a case on bad faith, where the English Court of Appeal held (at paragraph 50) that bad faith "*requires an inquiry into what facts were in a person's head, not into what facts ought to have been in his head...*". Whilst I accept the proposition, the allegation being made by the claimant is that the defendants were aware not that they should have been. Whether the claimant has evidence of this, or it is simply an inference he is drawing, remains to be seen. However, at this stage I must go on what is stated in the pleading. Making serious and damaging statements in the absence of an investigation could be more consistent with malice than with its absence – particularly if the claimant's assertion that the defendants were being dishonest about having been misled is factored in.

51. Paragraph 14(w)(vii): [That the publication of the press release was in contravention of the Commission's 'Enforcement Process' (providing for publication at the end of the process) and its 'Publication Policy'.]

This assertion is said to fail the *Telnikoff* test. I agree that operating outside of usual procedures is not necessarily malicious (see *Webster v Lord Chancellor*). However, if the underlying theme of the defendants' alleged dishonesty is taken into account, then it could arguably amount to conduct supporting malice.

52. Paragraph 14(w)(viii): [That the publication "*went far beyond a neutral and dispassionate announcement of the commencement of an investigation.*" The investigation had just commenced and it was therefore inappropriate to make accusations of that nature.]

For the reasons set out in paragraph 49 above, I disagree with the defendants that, at this stage, this allegation fails the second and fourth indicators.

53. Paragraph 14(w)(ix): [That it was 'astonishing' that the defendants published the allegations in the press release, particularly that the claimant had "*seriously, significantly and consistently misled the Commission*" and had potentially committed a criminal offence when the claimant had worked very closely with the Commission's officers for many months.]

Whilst I am not certain that it is helpful for a pleading to be expressing outrage or indignation, for the reasons set out in paragraphs 46 and 47 above, these allegations, if true, would support a finding of malice.

54. Paragraph 14(w)(x): [That the defendants have not apologised or retracted their allegations despite extensive explanations and information having been supplied to the defendants by the claimant's solicitors.]

Whilst the defendants are right to say that post-publication conduct does not necessarily speak to what was known at the time of publication, here the press release continued to be published on the Commission's website. It was not removed despite extensive explanations having been provided. This could support a finding of malice insofar as the continued publication is concerned.

55. I will take Paragraph 14(w)(xi) and sub-paragraphs (a) to (c) together:

Paragraph 14(w)(xi) [That "*the defendant's actions were motivated by an intention to avoid inescapable criticism of themselves.*" The claimant then relies on sub-paragraphs (a) to (c).]

Paragraph 14(w)(xi)(a): ["*The Press Release, which claimed that the Third Defendant was 'consistently misled', [was] based on little or no evidence, and at the commencement of an investigation.*]

Paragraph 14(w)(xi)(b): ["*The Commission's imposition of Temporary Measures Enforcement Paper dated May 2017 and the exhibits thereto which contained:...*" The sub-paragraph then refers to various paragraphs in the Paper relating to comments by the authors of the Paper as to: the need to protect the reputation of Gibraltar; that the competence of the Commission as regulator had been called into question; that articles in the international press express criticism of the Commission; and that there was concern as to how the Commission could not have known that Enterprise was so insolvent.]

Paragraph 14(w)(xi)(c): ["*Comments to the media by the First and Second Defendants which demonstrate their keenness to avoid any blame for the failure of Enterprise (which continues to this day), including:...*" The sub-paragraph then lists four different occasions on which either the first or second defendants gave interviews to the press and quotes excerpts of what they said.]

Mr Browne referred me to another passage in *Saad v Southampton University Hospitals Trust* as a reply to the claimant's position that the first and second defendants were more concerned with their reputation than with the truth of what was being said in the press release. At paragraph 50, the learned judge said: "*motivation can be part of the relevant context in which the tribunal assesses bad faith, but the primary focus remains on the question of the employee's honesty.*"

Avoiding criticism is not of itself malicious. However, avoiding criticism relying on a basis known to be false must be. That the second defendant had only been working at the Commission for a short time is not a factor to take into account in this exercise. Loyalty is not exclusive to long-term employees.

As to whether this meets the test of relevance to motive at the time of publication, it seems to me that it does. The allegations arguably evidence what the motive for publication of the press release was.

56. Paragraph 14(w)(stand-alone concluding paragraph): ["*The claimant reserves his right to rely on further evidence as to the first and second defendants' motives and states of mind that may emerge from disclosure.*"]

This is not technically a particular of malice. It is inconsequential. If anything does emerge from disclosure then the claimant, if so advised, will have to deal with it accordingly by making an application to amend his particulars of claim or otherwise.

57. Paragraph 14(x): ["*The defendants' conduct prior to and in the aftermath of their publication of the Press Release has been extremely high-handed and aggressive, and evinced clear ill will towards the claimant. The claimant will rely on the following elements of the defendants' conduct towards him, which has only served to aggravate the injury caused to his feelings by their publication of the Press*

Release, in support of his claim for aggravated damages (as well as his contention as to the first and second defendants' states if mind). "]

This is simply an introductory paragraph and my observations at paragraph 45 above apply.

58. Paragraph 14(x)(i): [That at a meeting on the 21 July 2016, in which the application for appointment of a liquidator was discussed with the first and second defendants, they refused to agree the appointment of Enterprise's proposed liquidator and instead insisted on proposing Mr White to the court, despite Mr White being the liquidator of a company which owed substantial monies to Enterprise.]

Whilst I understand that the claimant and others in the Enterprise board may have been dissatisfied with the Commission imposing Mr White upon the process, the appointment was approved by the court with no objection being presented on behalf of Enterprise. I cannot see how this allegation meets the *Telnikoff* test. This paragraph does not support an allegation of bad faith.

59. Paragraph 14(x)(ii): [That the claimant was a non-executive director of Lloyds Bank (Gibraltar) Limited and "*...was forced to resign from his position... following communications between a representative of the Commission (specifically the claimant understands, the second defendant) and Lloyd's Bank as to the announcement that the defendants intended to make [in the Press Release].*"]

Mr Browne submits that this is the clearest case of 'mere assertion' on the claimant's part. That the claimant implies that the bank acted on information without pleading explicitly what that was.

It seems to me that the claimant is saying that the second defendant advised the bank as to the matters that were to be raised in the press release prior to it being published. If so, and having regard to the claimant's basic proposition that the defendants were being dishonest

in making the statements they published in the press release, this would support a finding of bad faith on the second defendant's part.

60. Paragraph 14(x)(iii): [That by letter of the 25 October 2016 the defendants demanded that the claimant resign from all of his positions at eight regulated entities despite no adverse findings against him having been made. The defendants relied on the alleged discrepancy between Enterprise's positon as reported to the Commission in July 2016 and that reported on conclusion of the three month provisional liquidation period when it had been insolvent and managed by Mr White for that time. The claimant also complains of the "*unjustified aggressive tone*" adopted by the defendants in their correspondence.]

Again it seems to me that if the claimant can prove that the first and second defendants were fully aware of Enterprise's financial position and were involved in its micro-management, then making demands of the claimant as alleged could be more consistent with bad faith than with its absence. Whether the tone of the letter itself evidences bad faith would be a matter for trial.

61. Paragraph 14(x)(iv): ["*Sub-paragraph 14(w) above is repeated.*"]

The claimant relies on the particulars of malice as support for allegations regarding the defendants' high-handed manner and aggression (bad faith). My conclusions as to the entirety of paragraph 14(w) therefore apply to this sub-paragraph.

62. Paragraph 14(x)(v): [That the defendants increased "*the drama and publicity*" around the press release by holding a news conference where the press release was read and where the second defendant made further damaging remarks.]

The news conference took place on the same day as the publication of the press release. The press release was read out and further similar comments about being misled and the incompetence of the directors

are said to have been made. The conclusions I reach in paragraphs 46 and 47 above must also apply to this paragraph.

63. Paragraph 14(x)(vi): [That the first and second defendants handled the Commission's investigation with a disregard for procedural fairness and natural justice, requiring the claimant to address this through his solicitors, via appeals to this court and via third parties. Further, the first defendant said in an interview that she had decided not to involve herself directly in the investigation because of her involvement in the aftermath of the collapse but failed to say that she had only agreed to this following representations made on the claimant's behalf.]

In *Webster v Lord Chancellor,* at paragraph 32, Sir Brian Leveson quoted with approval from the Federal Court of Australia case of *Minister for Immigration v SBAN* [2002] FCAFC 431. In that case it was said that: "*There is no such thing as deemed or constructive bad faith...Illogical factual findings or procedural blunders along the way will usually not be sufficient to base a finding of bad faith.*" Sir Brian continued (at paragraph 34): "*Thus, errors of approach such as are criticised in this case do not constitute prima facie evidence of want of good faith without there also being evidence of ulterior motive of which, here, there is none.*"

I would not demur from this reasoning. However, in this case the claimant is saying that the defendants' acted dishonestly - as has been observed when conducting the analysis of the pleadings. If this is taken into account, then acting with procedural unfairness could arguably support the allegation of bad faith.

That said, it would amount to post-publication conduct and would only therefore support bad faith in relation to the continuing publication of the press release on the Commission's website.

64. The defendants say that the following two paragraphs fail the *Telnikoff* test and in any event amount to post-publication conduct:

Paragraph 14(x)(vii): ["*On 5 May 2017 the first and second defendants made an unjustified, underhand and extremely aggressive attempt to force Sir Peter Caruana KCMG QC to withdraw as the claimant's lawyer.*"]

Paragraph 14(x)(viii): [That following the referral by the claimant of the procedural irregularities in the Commission's investigation to HM Attorney General and the Minister for Financial Services, the Commission's lawyers made a "*thinly veiled threat*" that the claimant was thereby waiving confidentiality in the investigation.]

I do not agree with the submissions made on behalf of the defendants. In my judgment both of these allegations could, if proven, satisfy the *Telnikoff* test and would amount to bad faith on the defendants' part. The first of these, if accurately reported by the claimant, could indeed be labelled as "*an extraordinary episode*" - as Mr Santos described it. They do however relate to post-publication conduct and would therefore only be relevant as an allegation of bad faith in respect to the continued publication of the press release.

65. The same complaint (failure to meet the *Telnikoff* test and post-publication conduct) is made by the defendants in respect of the following two paragraphs:

Paragraph 14(x)(ix): [That the Enterprise Special Committee wrongfully attempted to remove the claimant from the board of Aquarius Trust Group entities. Without having made any findings the committee made serious accusations against the claimant and "*menacingly stated*" that the hearings would be held in public (subject to the claimant's right to apply for a private hearing).]

Paragraph 14(x)(x): [That the 'Enforcement Paper' prepared by the second defendant's department included statements which "*demonstrated the defendants' clear pre-judgment of the claimant,*

and resolve to ensure that he was punished with 'meaningful consequences' for his 'unacceptable behaviours'."]

The defendants' submissions on these two paragraphs (as set out in their written submission) concern an analysis of the evidence on the contents and purpose of the Temporary Measures paper. I must look at the statement of case alone. Do the particulars support an allegation of malice? On the face of it, are these allegations more consistent with bad faith than with its absence? It seems to me that if the defendants are pre-judging the claimant and making these types of accusations against him then this can support the allegation of bad faith. (As I have observed in relation to a number of paragraphs, the claimant's position that the defendants were acutely aware of how Enterprise had been managed, runs through all these allegations.) The defendants are however correct that these relate to post-publication conduct.

66. Paragraph 14(x)(xi): ["*The second and third defendants interfered with the proper management of ATG by improperly withholding consent and authorisation in relation to the restructuring by the claimant of the board of ATG.*" – which the claimant was doing in order to mitigate his losses brought about by the damage caused by the press release.]

An assessment of whether this particular meets the *Telnikoff* test can only be carried out by analysing the evidence. What reasons were relied on for the refusal of consent? Was the defendants' conduct reasonable in the circumstances? It may be that the evidence is such that bad faith can properly be inferred. I am therefore unable to deal with this sub-paragraph at a strike-out application stage. That said, any finding of bad faith would only relate to the on-going publication of the press release.

67. I have therefore concluded that only a few limited paragraphs do not support an allegation of malice and/or bad faith. Consequently, there are particulars of malice and/or bad faith contained in paragraphs

14(w) and 14(x) which the claimant can rely upon at trial. The effect is that the applications for summary judgment on the grounds that the defendants issued the press release on an occasion of qualified privilege or that they enjoyed immunity by virtue of the FSC Act do not fall for consideration. As has been discussed above, they are wholly dependent on the particulars of malice and the particulars said to constitute bad faith being struck out.

Application for claim to be struck out as an abuse of process

68. It is the defendants' case that this defamation claim has been brought with an improper motive. That it is not for the vindication of the claimant's good name but rather his aim is to disrupt the regulatory investigation being carried out on the Commission's behalf and that this constitutes an abuse of the process of the court. This is of course strenuously denied by the claimant. Mr Santos indeed added that the fact that this application had been made by the defendants would be relied on by the claimant in further aggravation of his damages. The claimant is an officer of the court and an accusation of this nature is particularly offensive.

69. The application is made pursuant to CPR 3.4(2)(b). This provides as follows:

> *"(2) The court may strike out a statement of case if it appears to the court –*
>
> ...
>
> *(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."*

70 As stated in the introduction to this judgment, the defendants base their application on three separate but overlapping limbs. The first is that the claim is brought for a 'collateral purpose', and that this makes it an improper purpose. The second is that there has been an unjustifiable delay before the issuing of the proceedings and that it has now been brought for an ulterior motive – referred to as 'warehousing' the claim. The third is based on the rule in *O'Reilly v Mackman* – that

it is an abuse of process to bring a private law action in relation to a claim which should have properly been brought by way of judicial review proceedings.

70. The first two of these limbs can be taken together. There is a useful passage in *Gatley on Libel and Slander* 12th Ed (2013), at paragraph 30.47, where the authors deal with both collateral purpose and delay. They observe that in order for proceedings to be stayed as an abuse:

> *"...it is necessary that the court's processes should be misused to achieve something not properly available to the claimant in the course of properly conducted proceedings. Two distinct categories have been noted: cases where a collateral advantage is sought which is beyond the scope of the action, and cases where the proceedings have been conducted 'in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation..."*
> *"A claimant can be expected to wish his action to be heard as soon as possible in order to clear his name and where a claimant has delayed in prosecuting a libel action and can give no valid explanation for his delay, the court may infer that his motive for the delay is not a proper one and constitutes an abuse of the process..."*
> *"The court will 'need strong evidence that the plaintiff was in fact seeking something beyond the protection and vindication of his reputation before the court could stay his action as an abuse of process'..."*

71. *Crawford Adjustors Ltd v Sagicor Insurance Ltd* [2014] AC 366 was a case before the Privy Council involving a claim brought, in part, on the tort of abuse of process. There the court determined that if a claimant's intention is to go to trial on the relief sought then the tort is not committed even if there is also a purpose outside of the scope of the action. At paragraph 63 Lord Wilson said:

> *"If the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall – or some other disadvantage to the defendant or advantage to himself – by use of the proceedings otherwise*

than for the purpose they are designed, then his purpose is improper."

72. Mr Santos also referred me to English Court of Appeal cases of *Broxton v McClelland* [1995] EMLR 485 and *Wallis v Valentine* [2003] EMLR 8. The relevant principles are taken from the judgment of Simon Brown LJ in the former case and which were adopted in the latter. I quote the summary of these set out in *Duncan & Neill on Defamation* Fourth Edition at 32.29:

> "*...an action is only an abuse if the court's processes are being misused to achieve something not properly available to the claimant in the course of properly conducted proceedings, either by seeking some collateral advantage, or by using the proceedings not to vindicate a right but to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted proceedings.*"

In addition, Simon Browne LJ stated:

> "*Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial.*"

73. Mr Browne highlighted that since the enactment of the English Defamation Act 1996 the limitation period for claims of this nature was now one year in England. Between 1980 and 1996 the limitation period had been three years and prior to that it was six years. (Six years is the limitation period which applies to these types of claims here in Gibraltar.) The principal policy consideration for shortening the time within which claims are to be brought is obvious – the purpose of bringing a defamation action is to obtain an expeditious vindication of reputation. Mr Browne suggested that the limitation period had not been reviewed in Gibraltar because defamation actions are not common and the policy makers must not have applied their minds to the considerations which have informed the changes in England. That may well be the case but the limitation period here remains at six years. A litigant is entitled to rely on the law as it applies

to him. Of course, as swift vindication is a claimant's principal motivation in any defamation claim, unexplained delay may give rise to an inference that the claim has been brought for an improper purpose. (In *Grovit v Doctor* [1997] 1 WLR 640, the House of Lords dismissed an appeal by a plaintiff whose case had been struck out as an abuse when he had failed to take steps in the proceedings over a period of some two years.)

74. It is accepted by the claimant that in the period of approximately two years between the publication of the press release and the sending of the letter before action on the 1 October 2018, he had not expressly stated that he was to bring defamation proceedings against the defendants. Throughout this time he was of course in constant exchanges with the Commission, both through his solicitors and personally, dealing principally with his opposition to the temporary measures imposed by the Commission and with aspects of the procedure which was to be followed in the regulatory investigation. The defendants' complaint is in effect two-fold. Firstly, the claimant has not properly explained the delay in bringing the claim if he does have a genuine intention to vindicate his reputation; and secondly, the timing of the institution of proceedings coincides with the final stages of the regulatory investigation, suggesting therefore that the proceedings have been brought to cause disruption to the investigation.

75. In her first witness statement the first defendant says as follows at paragraph 82:

> "*The claim is brought at a time when the investigation currently being conducted by the inspectors appointed by the Commission has reached an advanced stage and, I believe in anticipation of the claimant being interviewed in that process. The inference which arises is that it is being brought for the purpose of disrupting that investigation and deflecting the Commission from undertaking its statutory function of ensuring that the Enterprise matter is properly investigated.*"

She explains why the claim would be disruptive in her second witness statement where she says at paragraph 33(d):

> *"...the timing of this action is less about the claimant's personal patience and fortitude, and more about a concerted effort by the directors under investigation to influence that investigation, or at least obtain disclosure about its fruits by bringing collateral defamation proceedings."*

76. The second defendant deals with this same point in the following way at paragraph 62 of his first witness statement:

> *"Having not challenged the investigation (which is ongoing) or the Temporary Measures by way of judicial review as threatened, and by having withdrawn his appeals against the appointment of inspectors, it now appears the claimant seeks to refight his battles with the Commission in the guise of a defamation claim. I do not think it is correct to say that he is bringing these proceedings simply to vindicate his reputation, years after the publication in question. These proceedings are a collateral attack on the ongoing investigation, which should not be allowed."*

77. There is however no evidence from the inspectors as to whether they consider the bringing of this claim to be disruptive to their investigation. The claimant's evidence is that in May 2018 he advised them that he would take action to protect his reputation but that this did not provoke any reaction from them, adverse or otherwise.

78. Furthermore, the claimant's position is that there is no evidence supporting the assertion by the defendants that this claim has been brought for an improper purpose. This is a submission with which I agree. There is nothing in the evidence of the defendants, the salient parts of which I have quoted above, which would show a basis for making the allegation. The claimant says that he has throughout the process expressed his support for the regulatory investigation being conducted. He explains in his first witness statement that bringing the claim has four purposes: restoring his reputation and vindicating his name; obtaining damages (including in respect of special damages which he says are substantial); obtaining an injunction; and ensuring

that others do not have to go through a similar experience. There is nothing in the defendants' evidence that causes me to believe that this is not his primary purpose. There is no question of "re-fighting battles" as is suggested by the second defendant. The claimant had to take steps, by threatening judicial review proceedings and by issuing appeals to this court, to ensure procedural fairness, and these matters were settled to his satisfaction. If the claimant's principal motivation was to derail the investigation, the claim would well have been issued earlier.

79. As to delay, Mr Santos highlighted that the claimant did refer to the "severe prejudice" that had been caused by the press release in a letter from Messrs Peter Caruana & Co to the first defendant dated the 25 November 2016. He did not admittedly refer to the bringing of defamation proceedings as such. The claimant has nevertheless explained why he delayed the bringing of this action for some two years. In letters dated the 1 October 2018 and 28 November 2018 from his solicitors Messrs Hassans, the claimant explained why he is issuing the proceedings. In particular, in the second of the said letters his solicitors say as follows:

> *"...our client is confident that the investigation will establish that the allegations [made in the Press Release] were without substance. For this reason, our client had originally resolved not to commence proceedings until the investigation had been carried out and the findings published..."*
> *"Our client cannot be expected to wait indefinitely for the investigation, which has now been running for over two years since its announcement and over 20 months since the appointment of the investigators, to be completed while his reputation remains severely tarnished..."*
> *"...while our client was prepared to wait for a reasonable time so that the investigation could be completed before commencing proceedings in defamation, he simply cannot afford to wait any longer to repair his reputation."*

The claimant's explanation that he was hoping for vindication by the regulatory investigation is, in my judgment, perfectly plausible.

80. The defendants also complain about apparent co-ordination between the claimant and another Enterprise director, Andrew Flowers, who has also issued defamation proceedings. Mr Flowers is represented by the claimant's law firm. He issued defamation proceedings against Mr White on the 21 December 2018 (Claim No. 2018-ORD-100) and against the defendants in this action on the 4 April 2019 (Claim No 2019-ORD-034). The defendants say that the claimant and Mr Flowers avoided bringing Mr Flowers' second claim to the defendants' attention prior to or at the adjourned hearing of these applications in May 2019. The suggestion is that the claimant and Mr Flowers were attempting to have their respective actions proceed separately thereby creating significant and expensive litigation for officers of the Commission to have to deal with. The second defendant, in his witness statement dated the 28 August 2019 made in the Flowers action, also suggests that the attempt to avoid bringing that action to light at the time was to "*avoid giving substance to the allegation of co-ordination.*" However, the adjournment of the May 2019 hearing forced them to serve the proceedings. (In the event, the Flowers' defamation action was served and near identical strike-out and summary judgment applications to those being considered by me here were made by the defendants. The parties in that action then agreed to be bound by my conclusions in the applications being considered in this judgment.)

81. For his part, Mr Flowers, in his witness statement dated the 11 September 2019 in action 2019-ORD-034, says that he was trying to avoid serving his proceedings because he was concerned about adverse costs orders. He was trying to obtain after the event insurance for the claim and was waiting for the outcome of this application before deciding whether or not to go ahead with his own claim.

82. It seems apparent that there has been an extent of co-ordination between the claimant and Mr Flowers. However, there is no basis to find at this stage that Mr Flowers' motive in holding back was for anything other than the reasons he has given. The fact that he agreed

to stay the applications made by the defendants to dismiss his claim pending the resolution of these applications supports his evidence.

83. In a submission which is very much related to the above, the defendants say that the claimant has breached the rule in *O'Reilly v Mackman* [1983] 2 AC 237. This is premised on the argument that the claimant is seeking to re-fight battles regarding the purported unfair way in which the Commission issued the Temporary Measures paper and set up the investigation initially. If so, apart from being an improper collateral purpose, they are matters which should have been brought by way of a judicial review and not in a private law action.

84. Unsurprisingly, this was not an argument that was developed by Mr Browne at the hearing to any significant degree. The claimant does of course have a number of grievances related to the procedural unfairness on the part of the Commission which he says he was subjected to and prays these in aid in his claim. These he says were resolved and are no longer extant. This now is a defamation action arising from the publication of the press release. That he relies on these grievances in support of his defamation claim does not offend the rule in *O'Reilly v Mackman*.

85. In my judgment this is not a case, let alone a clear and obvious one, in which a claimant should be deprived of his right to bring his action to trial. The defendants' application that it be struck out as an abuse of the process of this court is therefore dismissed.

Stay of proceedings

86. As the claim is not struck-out or summarily dismissed, I move to consider the stay sought by the defendants. The basis for the application is that the defendants say that the claim will prejudice the regulatory investigation being conducted into the affairs of Enterprise if both proceed in parallel. In particular, it is said that if the Commission has to file its defence (which will include its case

justifying the statements made in the press release) this will result in the claimant being provided with information which he would not otherwise have had before he is interviewed. In the draft order accompanying the application notice, the defendants sought a stay to the 1 October 2019 or further order. By the time of this hearing, that would of course have been of no effect. At the hearing, Mr Browne indicated that the order sought would be for a stay to the 1 May 2020 or further order.

87. *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd & ors* [2012] 2 CLC 279 is a case where a stay was granted in a claim seeking declaratory relief where there were related regulatory proceedings in the United States. Andrew Smith J found that there was a risk of interference with the regulatory proceedings to which the claimant's affiliate was subject. However, it involved very unusual circumstances - as was recognised by the learned judge when granting the stay. In setting out the general principles he said, at paragraphs 75 and 79:

> *"[75] As was confirmed by the Court of Appeal in Reichhold Norway ASA v Goldman Sachs [2000] CLC 11, the court has an inherent jurisdiction ... to stay an action pending determination of foreign litigation or arbitration proceedings related to the action but between different parties, although the jurisdiction should be exercised only in 'rare and compelling circumstances'."*
> *[79] I do not, however, think that the duplication of proceedings and the reduced risk of inconsistent decisions in themselves amount to unusual and compelling circumstances justifying a stay..."*

(The point was made by Mr Santos that the investigation being carried out on behalf of the Commission is not a 'proceeding' as such, but I do not consider that I have to deal with this distinction.)

88. The principles had also been summarised in the earlier defamation case of *Wakefield v Channel Four Television Corporation & ors* [2005] EWHC 2410 (QB). Eady J stated as follows:

"[10] ... There is discretion for the court to stay proceedings having regard to other parallel proceedings, including for example, disciplinary proceedings before a domestic tribunal, if the justice of the case requires it. There are no presumptions.
[11] It also accepted that the burden lies upon the applicant seeking a stay to demonstrate, through cogent evidence, that there are sound reasons for a stay in the circumstances of the particular case.
[12] It is clearly necessary to have regard to Article 6 of the European Convention and to the obvious significance of taking any step which impinges upon a litigant's right to have issues determined by a court of competent jurisdiction within a reasonable time.
[13] There may well be instances in which it would be right to grant a stay, and the most obvious example would be where the parallel proceedings are going to be determinative of the issues in the litigation to be stayed (or at least a significant proportion of them) or otherwise to render a trial unnecessary (or significantly less expensive).
[14] It is not by any means essential for a party resisting a stay to demonstrate that he or she will suffer any specific prejudice (beyond the delay itself): see e.g. the citation from Steedman v BBC above.
[16] ... in Fallon v MGN Ltd [2005] EWHC 1572 (QB), a case in which I was invited to stay defamation proceedings until the outcome of police enquiries was known. I was not prepared to speculate on the extent to which there would be overlapping issues. I referred to "... the need for the court to make any such judgment on the basis not of hunch or guesswork but in the light of the fullest information possible". I am not convinced that, with allegations so multifarious and grave, it is appropriate to make a judgment on this application on the basis of even an informed guess."

89. In a witness statement dated the 30 January 2019, the first defendant said the following in support of the application for a stay:

"[86] The Inspector's investigation is ongoing ... the investigation will necessarily consider the concerns expressed in the Provisional Liquidator's report and the conduct of Enterprise's directors including their communications with the Commission.
[87] I believe that it is self-evident that there will be very grave difficulties if the claimant's case is permitted to continue at the same time as the investigation.
[88] In particular, the Commission would be forced to set out its defence of justification (that the words complained of were substantially true) before the time that the investigation had

concluded which would place the Commission in an impossible position. It would be forced to choose between excluding from its defence any material arising from the investigation: that is manifestly unfair. Alternatively, it bases its response on all the material presently available to it (including material gathered in the investigation to date); that would risk prejudicing the investigation by providing the claimant with an illegitimate insight into the current status of the investigation before it has concluded. This would offend against the obvious necessity for those being investigated not to have general access to the fruits of the investigation until it is completed."

90. In her second witness statement of the 26 April 2019, the first defendant reiterated that serious prejudice would be caused if this action were to continue at the same time as the investigation. She made the following points: Firstly, that the interviews of the claimant were to take place during the second half of 2019. (At the hearing I was advised that these were now taking place in December 2019 and I therefore expect them to have been conducted by now.) Secondly, she would expect the inspectors only to provide a core bundle of documents to the claimant ahead of the interviews. Thirdly, she is aware that the inspectors have carried out a "*very substantial and detailed internal analysis based primarily on the contemporaneous documents*." It would prejudice the investigation if the claimant were to obtain disclosure of that analysis before being interviewed. Again, that stage has now passed. Fourthly, the same point is made with regards to disclosure of the inspectors' analysis should the defendants have to set out justification in their defence. Fifthly, she suggests that once the first set of interviews are conducted and the information is analysed, a further round of interviews may be required by the inspectors. At the hearing Mr Browne raised a further issue. That once the inspectors prepare their conclusions, these need to be considered by the Commission who will need to decide on recommendations. It is only when that takes place that no further prejudice could arise. This point is not however addressed in the evidence.

91. The claimant wants this claim to proceed. The effect of a delay brought about by a stay would be to deprive him of the vindication

which he is seeking. Furthermore, the press release remained on the Commission's website. The investigation commenced 3 years ago. It has taken a significant time for the investigators to be in a position to interview the claimant. It is not unrealistic to assume that a stay would have to extend beyond the end of April 2020.

92. The burden is on the party seeking the stay and any such application must be based on cogent evidence. The court has a discretion as to whether to grant a stay but it should only do so in unusual or compelling circumstances. As observed by Mr Santos, there is no evidence relied on by the defendants other than that of the first defendant which I have outlined. The inspectors have not themselves set out their views on whether the investigation would be prejudiced by the progress of this action. The concerns expressed by the first defendant are insufficient to lead me to conclude that there are unusual or compelling circumstances to order a stay. The application for a stay of proceedings is therefore dismissed.

Conclusion

93. I have dismissed the defendants' application that paragraphs 14(w) and 14(x) of the particulars of claim be struck out. My finding that a limited number of the sub-paragraphs do not disclose reasonable grounds for pleading malice or bad faith has little practical effect. The applications for strike-out of the claim as an abuse of the process of the court and for a stay are also dismissed.

94. I shall hear the parties as to costs and the case management directions that I should make.

Liam Yeats
Puisne Judge

31 January 2020