Neutral Citation No: [2002] EWHC 2342 (QB)

Case No: HQ02X00625

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 November 2002

Before :

THE HONOURABLE MR JUSTICE GRAY

Between :

Ms Susan CLARKE — **Claimant**
- and -
Mr Roger DAVEY — **Defendant**

Mr Justin RUSHBROOKE (instructed by **Reid Minty, Solicitors**) for the Claimant
Ms Heather ROGERS (instructed by **Reynolds Porter Chamberlain, Solicitors**) for the Defendant

Hearing dates: 4 & 5 November 2002

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.

.....

The Hon. Mr Justice Gray

Mr Justice Gray :

The application

1. This is an application to dismiss or strike out this slander action. There are two alternative bases for the application: the first is that the action has no real prospect of success and there is no other compelling reason why the case should be disposed of at a trial, so that there should be summary judgment for the defendant under CPR Part 24.2. The second is that the action has no realistic prospect of success and there is no reason why it should be tried, so that there should be summary judgment in favour of the defendant pursuant to section 8(2) of the Defamation Act, 1996. Under each limb of the application, several discrete reasons are advanced why the claim is doomed to failure.

The parties

2. The claimant, Ms Susan Clarke, is a freelance solicitors' clerk/paralegal of some twenty years' experience. She is also a freelance journalist who has spent some time as a court reporter. That experience is said to have engendered a particular interest in the criminal law. Until 1 March 2001 she worked for a firm of solicitors named David D. Lewis ("DDL").

3. The defendant, Mr Roger Davey, is a barrister of some twenty-four years' call. He practises principally in the criminal field. At the material times he was regularly instructed by DDL.

4. Ms Clarke claims damages for slander and an injunction in respect of words allegedly spoken by Mr Davey to Mrs Avril Munson at her home in Devon on 17 April 2001. Mrs Munson was at that time facing serious criminal charges. There is a hotly contested issue, not only as to what was said by Mr Davey at that meeting, but also as to how the meeting came about. Ms Clarke had been actively involved in working on Mrs Munson's defence in the criminal trial until she left DDL. Mr Davey had been retained to act on behalf of Mrs Munson as her trial counsel.

Jurisdictional issue

5. Before coming to the facts in more detail, I should deal with what Mr Rushbrooke for Ms Clarke calls a jurisdictional question. It relates to the interaction between CPR Part 24 and section 8 of the Defamation Act 1996. As I have indicated, the application is made under both those heads. But Mr Rushbrooke points to CPR Part 53(2) (a), which is in the following terms:

> "An application for summary judgment under Part 24 may not be made if (a) an application has been made for summary disposal in accordance with the Act and that application has not been disposed of..."

Mr Rushbrooke concedes that the test under Part 24 and section 8 is the same, namely whether the prospect of success for the claim is real or realistic as opposed to merely fanciful. But he submits that the sub-rule just quoted requires that Ms Rogers for Mr Davey must elect between the two procedures.

6. Ms Rogers responds that the vice at which Part 53(2)(a) is aimed is the prevention of sequential applications, generating unnecessary additional cost. There is, she says, nothing to prevent a party making concurrent applications under Part 24 and section 8.

7. Since it is agreed that in the present case it makes no practical difference which procedure is followed, I will say no more than that, at least in cases where it is the defendant who is applying to strike out the claim against him, it appears to me that the right course is for the application to be made solely under Part 24. Nothing is achieved by relying in addition on section 8. The wording of Part 53(2)(a) does suggest that an application under Part 24 may not be made where an application under section 8 has been made and has not been dealt with (as in the present case). Ms Rogers was in my view right to elect to make this application under Part 24.

The facts

8. I have already recorded the fact that Mrs Munson retained DDL as her solicitors in the criminal proceedings against her. DDL instructed to act as counsel in her case Roger Davey and Stephen Morley. Mrs Munson was legally aided in the proceedings. The criminal trial which was expected to last for some months was fixed to commence on 17 September 2001 (later postponed to 08 October 2001).

9. In about February 2001 relations broke down between David Lewis, the principal in DDL, and Ms Clarke. In late February or early March 2001 Ms Clarke informed Mrs Munson that she would no longer be working for DDL. According to Mrs Munson, Ms Clarke tried to persuade her to take her case away from DDL. Mrs Munson asserts that she pointed out to Ms Clarke that this would leave her without legal representation. Ms Clarke then approached another firm, Nicholas Adams & Co, who appeared to be willing in principle to take on Mrs Munson's case.

10. Since Mrs Munson was legally aided, permission from the court was required for her legal aid to be transferred from DDL to Nicholas Adams & Co. On 30 March 2001 Mrs Munson wrote to the court and to both firms of solicitors to indicate that she wished to obtain the consent of the court to the transfer of her legal aid. It was not proposed that there should be any change of counsel. It is common ground that, given the anticipated duration of the criminal proceedings, the court would be concerned to ensure that the proposed change of legal representation would not put the trial date in jeopardy.

11. On 06 April 2001 His Honour Judge Coleman, who was to be the trial judge, ordered that the case be listed for a mention before him. The mention was to be attended by

Mrs Munson (so that she could explain why she wanted to instruct new solicitors), by her junior counsel (Mr Morley) and by a representative of DDL. DDL opposed the application to transfer Mrs Munson's legal aid and wished to retain her as their client. It is asserted on behalf of Mr Davey, but denied on behalf of Ms Clarke, that the Judge also indicated that Mr Davey should be in the precincts of the court when the application was made.

12. It was against that background that Mr Davey went to see Mrs Munson at her home in Beer in Devon on 17 April 2001. There is, as I have said, a dispute why that meeting took place. The case for Mr Davey (advanced in witness statements made on his behalf by Ms Meryl Evans, a partner in the firm of solicitors acting for him) is that he had heard that Ms Clarke would not be carrying out work for DDL in the future and was concerned that Mrs Munson's decision to change solicitors should have been made on an informed basis and without pressure. According to Mr Davey, he discussed the matter with Mr Lewis and they agreed that Mr Davey should meet Mrs Munson without Mr Lewis attending. The purpose of the meeting was to enable Mr Davey to confirm to the Judge, if asked, that the decision of Mrs Munson to change solicitors was her own decision and that she had been properly advised. According to Mr Davey, he went to see Mrs Munson in his professional capacity in order to give her legal advice.

13. The case for Ms Clarke as to the purpose of the meeting is wholly different. She asserts that Mr Davey's objective in meeting Mrs Munson was to ensure that she kept DDL as her solicitors and did not, as Ms Clarke was proposing, transfer to Nicholas Adams & Co. Although it is accepted on behalf of Ms Clarke that Mr Davey was going to continue as trial counsel even if new solicitors were appointed, it is alleged that Mr Davey was anxious to ensure that Mrs Munson stayed with DDL. Mr Davey had a long-standing professional relationship with Mr Lewis, the sole partner in DDL, who was concerned that his firm should not lose the remuneration from a lengthy criminal trial.

14. Only Mrs Munson and Mr Davey were present at the meeting on 17 April 2001. There is a dispute about/as to what was said by Mr Davey on this occasion. According to the Particulars of Claim, Mr Davey said the following about Ms Clarke:

> "The reason for the second order is that Susan [Ms Clarke] has repeatedly telephoned the Court. She has upset the staff and all her calls were reported to the Judge...
>
> Part of my task at the mention is to be *amicus curiae*. In that capacity I have a duty to warn the court of anything which might possibly upset the apple-cart... My duty to the court involves advising the Judge of various matters:
>
> ...Susan is commencing proceedings for libel against McCluskey's new solicitor.

> The McCluskey affair is definitely going to appeal and it involves serious complaints against Susan personally. He is alleging that she pressurised him to pursue a false defence...
>
> You are proposing to leave a solicitor of many years' standing and entrust your defence to a new solicitor in a firm where the only person with in-depth knowledge of the matter is Susan. But I shall be challenging this on two grounds. Susan does not in fact have in-depth knowledge of the case... and against a solicitor of many years' standing what precise legal qualifications does Susan have? Why does she describe herself as a "senior clerk"?...
>
> Apart from McCluskey there have been numerous other complaints made against Susan by clients and witnesses.
>
> In the course of one case in which she was involved the Judge summoned me to his room to complain about her behaviour in Court and enquire of me in precisely what capacity she was there...
>
> Susan does have a strong personality and it is quite possible that she would pressure on a defendant to give a false defence. It is also possible that she has held herself out as a solicitor and has thereby deceived her clients..."

15. By a letter which bears the same date as the meeting Mrs Munson wrote to Ms Clarke to tell her of the discussion she had had with Mr Davey. Included in that letter is a list of points which, according to Mrs Munson, Mr Davey had told her that he felt he would under be a duty to the Court to advise the Judge about. Reliance is placed on behalf of Mr Davey on the fact that there is no mention in that letter of some of the allegations which Ms Clarke contends were made about her at the meeting. In particular, there is no mention in Mrs Munson's letter that Mr Davey told her that McCluskey was alleging that Ms Clarke pressurised him to pursue a false defence at his criminal trial. Nor is there any reference to Mr Davey having said that it was quite possible that Ms Clarke would put pressure on a defendant to give a false defence and also possible that she had held herself out as a solicitor and thereby deceived her clients.

16. It is accepted on behalf of Ms Clarke that those allegations against her are not to be found in Mrs Munson's letter. However, she asserts that Mrs Munson telephoned her on 17 April immediately following her meeting with Mr Davey and retailed to her the additional allegations not to be found in her letter. Reliance is also placed on a letter written by Ms Clarke to Mr Davey's Head of Chambers on 19 April 2001, in which she alleged that Mr Davey had made some wilder allegations not all of which were contained in Mrs Munson's letter. In her witness statement made for the purpose of these proceedings Mrs Munson denies having told Ms Clarke of these additional allegations.

17. In the event the mention before Judge Coleman did not take place because Mrs Munson decided to keep DDL as her solicitors. Nicholas Adams & Co, to whom Ms Clarke had felt it to be her duty to send a copy of Mrs Munson's letter of 17 April 2001, decided not to employ her as a paralegal. Mr Davey represented Mrs Munson at the criminal trial. At the close of the prosecution evidence he made a successful submission that there was no case for her to answer.

The grounds of the application

18. It is asserted on behalf of Mr Davey that the action should be struck out or dismissed on the following grounds:

i) that Ms Clarke has no real prospect of proving that certain of the words complained of were spoken by him;

ii) that such words as were spoken are not capable of bearing some or all of the defamatory meanings pleaded;

iii) that the subject matter of the action is absolutely privileged or in the alternative immune from suit;

iv) that the occasion on which Mr Davey spoke the words complained of is protected by qualified privilege and that Ms Clarke has no real prospect of establishing the contrary or that Mr Davey was actuated by malice;

v) that Ms Clarke has no realistic prospect of establishing the element of damage required to establish the cause of action in slander.

vi) That the claim is an abuse of the process.

19. I shall consider those grounds individually. But first it is necessary to summarise the approach which should be taken to an application of the present kind in a defamation action where there is a right to trial with a jury.

The approach to Part 24 applications in defamation cases

20. It is common ground that the words "no real prospect of success" direct the court to see whether there is a "realistic", as opposed to a "fanciful", prospect of success: see *Swain v. Hillman* [2001] 1 AER 91 per Lord Woolf MR at 92j. He went on to say at 95b:

> "Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the

> need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the Judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily".

21. Despite some initial doubts, it is now clear from the authorities that Part 24 applies to defamation actions. But care needs to be taken in circumstances where it is sought to deprive a party from having a disputed issue of fact determined by a jury. In *Alexander v. Arts Council of Wales* [2001] 1 WLR 1840, where the issue was raised at the trial after several days' evidence whether there was sufficient evidence of malice to be considered by the jury, May LJ at paragraph 37 described the approach to be taken in the following terms:

> "There are of course a variety of possible circumstances in libel cases in which issues of law may arise for decision by the Judge. In so far as questions of this kind properly depend on an evaluation of evidence so as to determine material questions of disputed fact, these are matters for the jury. But, as Mr Milmo accepted in the present appeal, it is open to the Judge in a libel case to come to the conclusion that the evidence, taken at its highest, is such that a jury properly directed could not properly reach a necessary factual conclusion. In those circumstances, it is the Judge's duty, upon a submission being made to him, to withdraw that issue from the jury. This is the test applied in criminal jury trials: see *R. v. Galbraith* [1981] 1 WLR 1039, 1042 C. In my view, it applies equally in libel actions. It is in substance the test which the Judge set himself to apply in the present case".

22. In the same case, however, Lord Woolf CJ made reference at paragraph 56 of his judgment to section 69 of the Supreme Court Act, 1981, which provides that, where the court is satisfied that there is in issue a claim in respect of libel or slander, the action shall be tried with a jury unless any of the statutory exceptions apply. Lord Woolf held that the wording of the section entitled a judge to determine an issue of fact if he was not satisfied that there was any issue about it which called for a determination by the jury.

23. In *Spencer v. Sillitoe* [2002] EWCA Civ 1579 Buxton LJ sought, as he put it, to draw these two strands in *Alexander* together. At paragraphs 23-24 he said:

> "Bearing in mind the emphasis placed on the right to jury trial in section 69 and the analogy drawn by this court in *Alexander* with the criminal practice in *Galbraith*, the question in a case such as the present comes down to whether there is an issue of fact on which, on the evidence so far available, the jury could

> properly, and without being perverse, come to a conclusion in favour of the claimant.
>
> That question has to be answered against the background of the great respect that is paid to a jury's assessment of witnesses after seeing and hearing them, and hearing them cross-examined. It is unlikely that a Judge will be able to find that a witness will necessarily be disbelieved by a jury; or that for a jury to believe him would be perverse; when he has not actually heard that witness give evidence and be cross-examined: unless, of course, there is counter evidence that plainly demonstrates the falsity of the witness's evidence, as opposed, in this case, to rendering it, in the Judge's view, implausible".

24. In the same case Simon Brown LJ expressed himself as follows:

> "With some hesitation I too agree that the appellant is entitled to have that factual issue decided by a jury. I hesitate in reaching this conclusion because, in common with the Judge below, I regard the claimant's case on the facts as singularly unconvincing and as highly likely to fail at trial. All the probabilities appear to me to favour the respondents. ... All that said, I do not think that the court's Rule 24 power properly extends to denying a claimant the chance of persuading a jury, albeit against all the odds, that his account of a meeting is the truth and his adversary's is not. Were the jury in this case actually to find for the claimant, I do not think that this court could then strike down their verdict as perverse...".

25. That approach had also adopted by the Court of Appeal in *Wallis v. Valentine* [2002] EWCA Civ 1034, where the decision of the Judge to give summary judgment in favour of the claimant was upheld because "for a jury to hold that they were satisfied that [the defendant] was lying, and the other witnesses as well, flies in the face of reality and would be perverse" (see paragraph 21).

26. Further guidance is to be derived from the judgment of Eady J in *Bataille v. Newland* [2002] EWHC 1692 (QB). At pp6-7 he said:

> "First, it seems that I should address the primary facts relied on by the claimant for establishing the second defendant's responsibility for the publication of the 12th January letter. The burden is on the claimant to establish those facts at trial. At this stage, I should make all assumptions in favour of the claimant so far as pleaded facts are concerned.
>
> Again, in so far as evidence has been introduced for the purpose of the present application, I should assume that those facts will be established, save in so far as it can be demonstrated on

> written evidence that any particular factual allegation is indisputably false.
>
> The next question is whether, on the facts assumed, a properly directed jury could draw the inference for which the claimant contends. In this case, of course, the inference is that the second defendant was, in some sense, a participant in the publication of the letter. I should only rule out the case against the second defendant if I am satisfied that a jury would be perverse to draw that inference... If the defendants case is so clear that it cannot be disputed, there would be nothing left for a jury to determine. If, however, there is room for legitimate argument, either on any of the primary facts or as to the feasibility of the inference being drawn, then a Judge should not prevent the claimant having the issue or issues resolved by a jury. I should not conduct a mini trial or attempt to decide the factual dispute on first appearances when there is the possibility that cross-examination might undermine the case that the second defendant is putting forward".

27. I shall endeavour to follow the approach indicated in the cases to which I have referred.

Proof of publication

28. As is apparent from paragraphs 15 and 16 above, the issue is whether at their meeting on 17 April 2001 Mr Davey made to Mrs Munson the allegations about Ms Clarke which are pleaded in the Particulars of Claim but which are not to be found in Mrs Munson's letter written on the day of the meeting. Both Mr Davey (through his solicitor) and Mrs Munson deny that any allegations other than those contained in her letter were made about Ms Clarke and they were the only two people present at the meeting.

29. But, as I have recorded, it is the evidence of Ms Clarke that Mrs Munson did tell her by telephone immediately after the meeting that Mr Davey had made the additional allegations about Ms Clarke. In a letter of 19 April 2001 to the Head of Mr Davey's Chambers Ms Clarke refers to "wild allegations" having been made by Mr Davey, not all of which are contained in Mrs Munson's letter. Whilst that letter can be described as self-serving, it does show that Ms Clarke was very shortly after the events in question giving an account which is consistent with her present case. It is further submitted on behalf of Ms Clarke that there is evidence that the account which Mr Davey now gives of his conversation with Mrs Munson is untruthful: at the time of the internal Chambers inquiry into his alleged misconduct, Mr Davey accepted that Mrs Munson's letter gave an accurate account of his meeting with her, whereas his case now is that, contrary to what is said in the letter, he did not tell her (for example) that his task at the mention before Judge Coleman would be to be the *amicus curiae*. The evidence of Mr Davey as to what he said to Mrs Munson is therefore said to be

unreliable. As for Mrs Munson herself, the suggestion is that for perhaps understandable reasons she has changed her story.

30. The question which I have to ask myself is whether a finding by the jury that Mr Davey did make the additional allegations about Ms Clarke which are not to be found in Mrs Munson's letter would be perverse. I cannot say that it would be. I think the prospect of Ms Clarke succeeding on the issue as to publication is better than merely fanciful.

The defamatory meanings

31. Ms Rogers on behalf of Mr Davey does not dispute that the words allegedly spoken by him at the meeting on 17 April 2001 were capable of being defamatory of Ms Clarke. But she contends, in relation to the meanings pleaded at paragraph 21.2, 3 and 5, that his words are not capable of bearing the meaning that Ms Clarke was guilty of the misconduct there referred to or even that there were reasonable grounds to suspect her of such misconduct. In relation to the meaning pleaded at paragraph 21.1 Ms Rogers submits that the words used are not capable of conveying the meaning that Ms Clarke's telephone calls prejudiced Mrs Munson's interests in the mind of the Judge. Accordingly it is contended that the court should exercise its power under CPR Part 53 PD 4.1 to rule that in the above respects the words are incapable of bearing the pleaded meanings.

32. The principles according to which the court should decide whether words are capable of bearing the meaning imputed to them are not in dispute. They are summarised by Sir Thomas Bingham MR in *Skuse v. Granada* [1996] EMLR 278 at 285-7. There is no need for me to repeat them here.

33. Mr Rushbrooke argues that, although Mr Davey expressed himself in terms of allegations and complaints and possibilities, the accumulation of imputations against Ms Clarke would convey to the reasonable listener that she was guilty of the misconduct referred to. I do not agree. I consider that, read as a whole, the words said to have been used by Mr Davey fall short of imputing guilt. I do, however, accept that his words are at least capable of bearing the meaning that there were reasonable grounds for suspecting Ms Clarke of the misconduct referred to in paragraphs 21.2, 3 and 5. As to paragraph 21.1, I consider that Mr Davey's alleged reference to Ms Clarke's repeated telephone calls having been reported to the Judge is capable of conveying by inference to the reasonable listener that as a result the interests of her client had been prejudiced in the mind of the Judge.

Absolute privilege/immunity from suit

34. In paragraph 1 of the Defence it is pleaded that the words complained of were spoken by Mr Davey in the course of his duties as counsel during a professional meeting for the purpose of giving legal advice in relation to a court hearing due shortly to take

place. In those circumstances it is alleged that the occasion of the publication of the words was protected by absolute privilege and/or immunity from suit. In my view in the present context the privilege and the immunity claimed come to the same thing.

35. Ms Rogers contends that the factual premise for the privilege is established by the evidence. The argument rested upon the witness statements of Ms Evans, setting out Mr Davey's evidence. Particular reliance was placed upon the fact that the words were spoken by a barrister to his client in connection with ongoing criminal proceedings in which he was instructed, in particular, the forthcoming "mention" of the case directed by the court. Reliance was also placed on a letter of 6 April 2001 from the court which directed the mention and on a fax or letter dated 8 April 2001 in which Mr Davey tells Mr Lewis of DDL of his proposal to visit Mrs Munson in order to assist her and to ensure that she has arrived at an informed decision about her legal representation. In those circumstances, it is contended, in reliance on *More v. Weaver* [1928] 2 KB 520 and paragraphs 13.3-4 of the 9th Edition of *Gatley*, it is clear that the occasion was plainly absolutely privileged and that the prospect of Ms Clarke establishing the contrary is fanciful.

36. *More v. Weaver* is indeed on the face of it authority for the proposition that communications between a solicitor and client upon the subject on which the client has retained the solicitor and which are relevant to that matter are absolutely privileged. I have been taken through the authorities both before and after *More v. Weaver* was decided in 1928. As to the antecedent authorities (*Royal Aquarium and Summer and Winter Gardens Society Ltd v. Parkinson* [1892] 1 QB 431; *Watson v. M'Ewan* [1905] AC 480 and *Munster v. Lamb* [1883] 11 QBD 588), they appear to establish that the scope of absolute privilege is limited to statements made in the course of judicial or quasi-judicial proceedings, statements contained in documents made in such proceedings and statements made by a witness to the client and solicitor in preparing a case for trial. They also establish that the courts should be slow to extend the scope of the privilege. (This cautionary note was also sounded by Devlin LJ in the later case of *Lincoln v. Daniels* [1962] QB 237). It will be apparent straightaway that *More v. Weaver* represented a radical widening of the ambit of the privilege. In a number of the subsequent authorities considerable doubt is cast on the correctness of the decision in *More v. Weaver*. I refer in particular to *Minter v. Priest* [1930] AC 558 and to the speeches in that case of Lord Buckmaster (p570), Viscount Dunedin (p575) and Lord Atkin (p586) and to the judgment of Brooke LJ (with whom Nourse LJ and Sir Brian Neill agreed) in *Waple v. Surrey County Council* [1998] 1 WLR 860.

37. Doubted though it may have been, *More v. Weaver* has not been expressly overruled and it is binding on me in the present context unless it can be shown that there is a real prospect of establishing either that it has been impliedly overruled by subsequent authority or that the present case can be distinguished on its facts.

38. There appears to me to be a realistic prospect that Ms Clarke would be able to establish at trial that *More v. Weaver* can no longer stand in the light of subsequent authority. *Saif Ali v. Sidney Mitchell* [1980] AC 198 was concerned with the question

whether a barrister's immunity from suit for the conduct and management of a case in court should extend to advice given out of court. All the speeches in that case deal extensively with the authorities on the scope of the defence of absolute privilege in actions for defamation against lawyers. They appear to proceed on the assumption that the considerations which come into play in that context are comparable. Whilst I recognise that there are distinctions to be drawn between liability in negligence and liability in defamation, it seems to me that there is a real, as opposed to a fanciful, prospect that the trial judge in the present case would regard *Saif Ali* as laying down the limits not just of the scope of a lawyer's immunity from suit for negligence but also by parity of reasoning the limits of the availability of the defence of absolute privilege in defamation claims.

39. In *Saif Ali* Lords Wilberforce, Diplock and Salmon (at pp215, 224 and 232 respectively) all quote with approval the following words of McCarthy P in *Rees v. Sinclair* [1974] 1 NZLR 180 at 187:

> "I cannot narrow the protection to what is done in court: it must be wider than that and include some pre trial work. Each piece of before trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application that is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated".

40. If, as I believe there is a real prospect that Ms Clarke would establish at trial, the scope of absolute privilege is correspondingly limited, she has in my judgment a better than fanciful prospect of establishing, even on Mr Davey's account, that the defence of absolute privilege is not available. In arriving at that conclusion I have not overlooked the recent cases (*Taylor v. SFO* [1999] 2 AC 177; *Mahon v. Rahn* [2000] 1 WLR 2150 and *Darker v. Chief Constable of the West Midlands Police* [2001] 1 AC 435) which extend the scope of the immunity from suit enjoyed by investigating authorities and to which I was referred by Ms Rogers. Those cases do not, however, appear to me to be in point.

41. But I have also concluded, having been taken through the evidence in great detail, that there is a real prospect that Ms Clarke would succeed at trial in establishing that the principle apparently established in *More v. Weaver* does not assist Mr Davey on the facts of the present case. Mr Rushbrooke suggested that *More v. Weaver* can be distinguished because it concerns a solicitor whereas the present case is about a barrister. I cannot accept that suggestion. But Mr Rushbrooke advanced as a further ground for distinguishing *More v. Weaver* the circumstances under which, according to Ms Clarke's case, the meeting between Mr Davey and Mrs Munson came about (which I have already recorded in summary form in paragraph 13 above). On an

interlocutory application of this kind, I should be guarded in what I say about the facts. Suffice it therefore to say that I am persuaded that there is evidence on which a jury could find, without being stigmatised as perverse, that Mr Davey, either on his own initiative or at the behest of Mr Lewis, engineered the meeting with Mrs Munson, not in order to give her legal advice, but in order to deploy a series of spurious reasons why she should continue to retain DDL as her solicitors. In arriving at that conclusion I am influenced, amongst other things, by contemporaneous documents including Mr Davey's fax to Mr Lewis of 12 March 2001; Mr Lewis's letter to O'Keeffe's of 4 April 2001; the letter or fax allegedly sent by Mr Davey to Ms Clarke on 8 April 2001; Mr Davey's letter or fax to Mr Lewis of the same date; and Mr Lewis's letter to Mr Davey dated 18 April 2001.

42. If the jury were so to find, there is in my view a real prospect that, despite *More v. Weaver*, the trial Judge would rule that the occasion was not protected by absolute privilege.

Qualified privilege and malice

43. Communications passing between a solicitor or barrister and his or her client will invariably be protected by qualified privilege. Mr Rushbrooke nevertheless submits that no such privilege attaches to Mr Davey's communications to Mrs Munson on 17 April 2001 because of the reasons why and circumstances under which he alleges that their meeting on that occasion came about. But it seems to me that, even if Mr Davey did not visit Mrs Munson in order to give her legal advice in his capacity as a barrister, there was a shared common interest in the subject matter of their discussion sufficient to establish that the occasion was protected by qualified privilege. The fact that Mr Davey may have had an ulterior motive for going to Devon goes to malice and not, in my opinion, to the existence of the privilege. I see no real prospect of the trial Judge being persuaded to rule that the occasion of the visit was not protected by qualified privilege.

44. But there remains the question of malice. For Mr Davey it is contended that there is no real prospect of Ms Clarke proving malice on the part of Mr Davey, so that the defence of qualified privilege is a complete answer. But I have already found that there is evidence from which a non-perverse jury could find that the purpose of the visit was not to give legal advice or otherwise protect the interests of Mrs Munson but rather to persuade her on spurious grounds to remain a client of DDL. That would amount to an improper motive on his part, especially given his position as Mrs Munson's Counsel. In the circumstances I cannot agree that there is no real prospect of the charge of malice being established at trial.

Proof of damage

45. The claim being in slander and there being no allegation of special damage, it is necessary for Ms Clarke to establish either that the words spoken by Mr Davey impute a crime for which she can be made to suffer imprisonment or that his words were

calculated to disparage her in any office, profession or calling carried on by her at the time of the publication (see section 2 of the Defamation Act 1952). She would also succeed under the common law rules as to damage insofar as the words were spoken of her in the way of her office, profession or calling etc. (see *Gatley* at paragraph 4.2).

46. An allegation that Ms Clarke brought pressure to bear on clients to put forward false defences in criminal proceedings would amount to attempting to pervert the course of justice which is an offence punishable by imprisonment. But, according to paragraph 4.9 of *Gatley*, "words which do not definitely charge a crime, but impute a mere suspicion that the plaintiff has committed a crime... are not actionable without proof of special damage". Although I have not been referred to the cases cited in the footnotes to that paragraph, it would appear, in the light of my earlier ruling on meaning, that the slander is not actionable *per se* because there is no imputation of actual guilt of a criminal offence.

47. Is there a real prospect that Ms Clarke will succeed in establishing that the words used by Mr Davey disparaged her in the way of her profession or calling either as a solicitors' clerk or as a journalist? (Insofar as it may be necessary, I grant permission to Ms Clarke to amend the Particular of Claim so as to allege that the words disparaged her in her capacity as a journalist). In my view such a prospect does exist. There was some discussion as to the meaning of "disparage" but I am in little doubt that the words Mr Davey is alleged to have used do disparage Ms Clarke. I do not accept that Ms Clarke is debarred from taking advantage of section 2 of the Defamation Act either by reason of the fact that at the time of publication she had left DDL and had not yet found new clerical work or by reason of the fact that Mr Davey's words related to her work as a solicitors' clerk and so could not be disparaging of her as a journalist. I was not referred to any authority supporting so restrictive a construction of section 2.

48. Ms Rogers further submitted that the words must be looked at the in the context in which they were spoken, including the fact that Mrs Munson has confirmed that what was said did not alter her opinion of Ms Clarke and the fact that Mrs Munson is said to have been aware of all but one of the matters raised by Mr Davey. But in my judgment there is a real prospect that it would be accepted at trial that the word "calculated" in section 2 is to be construed as meaning "likely" in an objective sense, so that Mrs Munson's subjective reaction and state of mind would be irrelevant.

Abuse of the process

49. The question remains whether, even if the claim in slander is otherwise viable, it should nevertheless be struck out or dismissed as being an abuse of the process. The essence of the argument of Ms Rogers that the court should take this course is that the claim is devoid of merit or substance: the slander was published to only one person, Mrs Munson, and she did not think the worse of Ms Clarke because of what she was told by Mr Davey. The raft of factual disputes which would arise if the matter were permitted to proceed to trial would involve an inordinate use of court time and would be disproportionate. There is no threat to repeat the words complained of. It is also

said to be relevant that the case would be bedevilled by problems of legal professional privilege. Even if Ms Clarke were to succeed, the damages would be trivial. In support of her contention Ms Rogers drew attention to *Wallis v. Valentine* (already cited) and to the reference in paragraph 26 of the judgment of Sir Murray Stuart-Smith to the disparity in that case between the costs and the likely award of damages.

50. But it appears from *Broxton v. McClelland* [1995] EMLR 485 at 497-498 that, in order for an action to amount to an abuse of process, it must be established that the claimant is seeking to achieve by the litigation an improper collateral advantage. It does not appear to me to follow from the fact that damages for any injury to reputation might be very modest (because Mrs Munson did not think the worse of Ms Clarke) that Ms Clarke must be seeking a collateral advantage. It is in any case by no means beyond the realms of possibility that she might recover a significant sum by way of aggravated damages. That of course depends on the view taken of the evidence by the jury at trial. As for the concern about legal professional privilege, it seems to me to be clear beyond doubt that (whether or not she appreciated it at the time) Mrs Munson has waived privilege. I do not accept that this action constitutes an abuse of the process.

Conclusion

51. For the above reasons the application is dismissed, save to the extent that I have held otherwise in paragraphs 33, 34 and 46 above.