Neutral Citation Number: [2009] EWHC 1931 (QB)

Case No: HQ09X00597

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 31st July 2009

**Before** :

**Before HIS HONOUR JUDGE MOLONEY QC (sitting as a Judge of the High Court)**

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**Between :**

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| **1. MARATHON MUTUAL LTD** | **Claimants** |
| **2. REGIS MUTUAL MANAGEMENT LTD** | |
| **- and -** | |
| **1. MR DAVID WATERS** | **Defendants** |
| **2. PRIMECARE INSURANCE SERVICES LTD** | |
| **(Trading as Care Home Insurance Services )** | |

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**Mr Lawrence Jones** (Direct Access) for the **Claimants**
**Mr Adam Speker** (instructed by Hammonds LLP) for the **Defendants**

Hearing date: 21st July 2009

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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JUDGMENT

## 1. Introduction

In this action for defamation and malicious falsehood, the Defendants issued an Application Notice on 13 May 2009 for various directions and orders in connection with the Claimants' Amended Particulars of Claim. As summarised below, most of them were straightforward and could be dealt with in the course of the hearing on 21 July 2009, but one raised an issue of principle in relation to which I reserved judgment. It can broadly be summarised as follows: to what extent is it an essential element of the cause of action of malicious falsehood, that the words complained of must refer to the Claimant?

## 2. Background

For the purposes of an application such as this, to strike out the Second Claimant company's claim under CPR 3.4(2) a. and c., the Court does not make findings of fact but assumes in the Claimants' favour that the facts and matters they have pleaded are true. What follows is a chronological summary of their pleaded case, on that basis.

a. The First Claimant, Marathon, is a mutual protection fund specialising in insuring care homes.

b. The First Defendant, Mr Waters, was at all material times until 8 September 2008 a director of Marathon, and therefore familiar with its affairs.

c. The Second Claimant, Regis, was at all material times in the business of managing mutual protection funds, in particular Marathon, in relation to which Regis took a management fee (presumably contractual) of 11.5% of Marathon's income.

d. Following Mr Waters' departure from Marathon in September 2008, he became a director of the Second Defendant, Primecare, an insurance broker also offering insurance services to care homes in competition with Marathon, and trading under the name of CHIS.

e. On or about 3 November 2008, the Defendants sent a circular letter to the members (i.e. customers) of Marathon in the following terms:

"We do not believe Marathon Direct can cater for your best interests, in either the short or long term, without our involvement.

Our reason for this is that Marathon Direct will not be able to achieve the level of income it has achieved with CHIS's involvement and your excess is dependent on the claims cost not exceeding 40% of the contributions made by its members, this will be a far lower financial amount this year than it was last year.

Once this threshold is exceeded your excess would increase to £1500.

We also strongly believe that every client deserves the services of a broker to ensure all claims which should be paid are paid.

We do not believe Marathon Direct will be able to provide you with these core and key elements of service."

f. On 30 December 2008, Mr Waters telephoned a Mr Shepherd, a member of Marathon, and asked him to change over his cover from Marathon to Primecare. When he said he was not going to do so, Mr Waters called him back and said:

a. "I set up that business and the management stole it from me."
b. "Marathon has had a lot of claims come through lately, and if that carries on then Ecclesiastical [Marathon's insurers] are going to pull out, leaving Marathon unable to pay the claims and without any cover themselves."
c. "Marathon has got no reserves at all; if Ecclesiastical pull out they won't be able to cover you."
d. "Ecclesiastical are going to pull out because they have paid out around £2 million in claims for only £1.5 million in premiums."
e. "If Ecclesiastical do pull out, Marathon won't be able to pay any claims, and you will have to go and find another insurer and pay another premium to get someone who will."

g. On 16 February 2009, Marathon and Regis issued these proceedings. They served Amended Particulars of Claim (APOC) on 1 May 2009. On 13 May 2009 the Defendants issued the present Application Notice, and their time for service of Defence has been extended pending the Court's decision on the applications.

**3. Marathon's Defamation and Malicious Falsehood Claims**
a. Marathon claims in libel and malicious falsehood on the letter of 3 November 2008, and in slander and malicious falsehood on the conversation of 30 December 2008.

b. The Defendants have rightly complained in correspondence and by their application that APOC is gravely deficient in form and substance in relation to the pleading of these claims. The Claimants did not seriously contest this part of the Application, and I propose to direct that Marathon re-pleads its case so as to meet the following requirements:
i. It must set out its case separately in respect of each cause of action;
ii. It must in respect of its malicious falsehood claims set out:

- full Particulars of the respects in which the words are false (stating all facts and matters which will be relied on to prove that such is the case, and summarising what it contends to be the true position),
- full Particulars of express malice (specifying whether it is alleged that the Defendants were acting with knowledge of falsity, or recklessly, not caring whether their words were true or false, and stating all facts and matters relied on to prove that, including where relevant particulars of what facts they knew and by what means they knew them)
- and full Particulars of any special damage (pecuniary loss) relied on.
- In each case the Particulars must be such that the Defendants know clearly the case they have to meet, and must have regard to the evidential burden on the Claimants.

iii. In relation to the conversation with Mr Shepherd, no pecuniary loss or other special damage is to be claimed (since on the pleaded facts none could have been caused by those words).

**4. Regis's claims in Malicious Falsehood**
a. Regis does not claim for libel or slander. Its claim is pleaded as set out below:

*"12. The Second Claimant adopts the malicious falsehood claim contained in Paragraphs 11 and 12 of these Particulars" (i.e. Marathon's two claims) "and pleads as follows.*

*13. The Second Claimant's income is linked directly to the income of the companies it manages. Marathon is one of those companies. Accordingly when Marathon suffered damage by way of a fall in business and income as a result of the words complained of . . . the Second Claimant also suffered damage of a reduced income.*

*14. The Defendants were aware that the Second Claimant's loss would be a probable and natural consequence of the words published and spoken."*

b. There follow Particulars of Special Damage referring to Regis's 11.5% management fee from Marathon, and claiming loss of £41, 597-97 on that basis.

**5. The Defendants' Objections to Regis's Claims**

a. Since Regis's claims repeat Marathon's, they are plainly subject to the same pleading criticisms as outlined above, and would at the very least need to be re-pleaded in the same manner.

b. The Defendants, however, take a much more fundamental point against Regis, which gives rise to the live issue on this application. They point out that, whereas Marathon asserts that the words complained of named it, were false in relation to it, were malicious in relation to it, and were intended to cause damage to its business, Regis claims none of these things. It merely asserts that it has a cause of action in malicious falsehood because:
i. Marathon has such a claim;
ii. Regis's income is linked directly to Marathon's, so that it too has suffered loss from the words complained of;
iii. The Defendants were aware that such losses to Regis would be the natural and probable consequence of their words.

c. The Defendants contend as follows. It is essential to a malicious falsehood claim that the words should both refer to the particular Claimant and be false in relation to him. Since these words plainly do not refer to Regis at all, it can have no such claim. The fact that it had suffered loss as a direct and foreseeable consequence of a malicious falsehood against another would not be sufficient to give it a cause of action of its own; so its claims are hopeless and should be struck out.

**6. Regis's Response**

Regis's answer, set out most clearly in written submissions put in with the Court's permission after the hearing to develop the points made there, is that all that is required to found the cause of action is proof of false and malicious words about A, together with an economic association between A and B such that the words also impact on B by causing it economic loss. It is not also necessary for the words to "refer" to B in the sense in which that term is used in defamation proper. Regis places great reliance on the words of Pollock B in Riding v. Smith (1875-6) LR 1 Ex. D. 91(a case in which the words accused the Plaintiff's wife of adultery, but he was permitted to bring a claim for business losses occasioned by people shunning his draper's shop as a result):
*"Where you find that the nature of the words is such that damages would naturally follow from their being uttered, and that damage has arisen, then there is a cause of action."*

**7. Losses Passing through Corporations**

Before addressing the reference issue, I should first deal with one collateral argument relied on by the Defendants. This is the established principle as to damage, set out for example in

Adelson v. Associated Newspapers [2007] EWHC 3028 (QB) (Eady J), that companies are separate legal entities, and that therefore one company cannot recover for losses sustained by another. This principle comes into play, in the defamation context, when one company in a group, perhaps the holding company, sues for losses it has sustained consequent on a libel on another group company. Their separate legal personalities cannot be ignored, and it is necessary to prove that the damage claimed has been suffered by the same company which was libelled. (A similar principle applies to limit claims by individual shareholders for personal losses consequent on damage to a company's share price; see Collins Stewart v. Financial Times [2004] EWHC 2337, relying in turn on Johnson v. Gore Wood [2002] AC 1.) But these principles have no application to a case like the present, where the two Claimants may happen to be companies, but they are not associated by common ownership or shareholding, nor are the losses alleged to have been incurred via that route. Regis and Marathon could, for present purposes, just as easily be two human beings, one drawing a management fee from the other's receipts; their association is contractual, not corporate or proprietary. Furthermore, their losses are separate and distinct, since in any loss of profit claim Marathon would have to give credit for Regis's fee against any damages for net loss of income. For these reasons I do not consider these principles relevant to the present dispute.

**8. Defamation and Malicious Falsehood; the Identification Requirement**

a. Although malicious falsehood is sometimes now described as a species of defamation, and the terms "trade libel", "slander of title" and "slander of goods" are still sometimes used in relation to it, its origins and legal nature remain materially different. Really their main common feature is that both protect against injury occasioned by the publication of damaging words to third parties. Defamation is a tort of strict liability, whose essence is the protection of reputation, and in which damage is presumed. Malicious falsehood is an action on the case, whose key features are proof of falsity, a high level of culpable specific intent, and actual pecuniary loss in consequence.

b. Because defamation protects the reputation, the Claimant must prove "reference", i.e. that at least some of those to whom the words were published were able to identify him as the person defamed by the words complained of. This may be because he is expressly named, or clearly pointed to by other signposts in the words themselves, or because the publishees knew background facts, not stated in the words, which enabled them to identify him by innuendo.

c. Although in many cases of malicious falsehood the Claimant will be named, or otherwise identifiable by the same routes as in defamation, it is not an essential element of the cause of action that he be personally identifiable. In trade libels ("slander of goods") malicious falsehood about a product will entitle its manufacturer to recover, simply because people ceased to buy it, not because they identified him as the maker and shunned him in consequence.

d. At least in such a case the audience will know or can work out that somebody is the manufacturer, even if they do not know who. In cases of "slander of title" the wrong lies in falsely claiming to be the owner of a property, thus causing damage to the real owner's interests without the words themselves necessarily referring, expressly or by implication, to any person other than the defendant himself. As indicated in Clerk and Lindsell (19th edn. 2006) at para. 24-10 n.49, this principle extends beyond proprietary interests to other valuable but intangible matters, such as being boxing champion of Trinidad (Serville v. Constance [1954] 1 All E R 662) or the designer of a successful yacht (Customglass v. Salthouse [1976]

1 NZLR 36); the pretender is liable in malicious falsehood for his false claim, though his words never referred to the true claimant at all.

e. And in some cases, words referring to and identifying one person might give rise to a claim for loss of business by another person not himself specifically referred to. In Riding (supra) Kelly CB gave the example (more persuasive to the modern reader than the actual facts of that Victorian case) of an allegation that one of the shopworkers was suffering from an infectious disease such as scarlet fever, which would operate to prevent people coming to the shop, and thus give the shopowner a claim for loss of business.

f. What, if any, principle emerges from the authorities? In Ratcliffe v. Evans [1892] 2 QB 524, Bowen LJ stated it to be established law *"that an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage"*. This formulation, like Pollock B's in Riding (supra), does not deal with identification, which was not really an issue in that case; but it does emphasise the central importance of the words' tendency to cause damage. In some later cases, for example Kaye v. Robertson [1991] FSR 62, the courts have said that in malicious falsehood the words must be "about the plaintiff", but again identification was not in issue and what is meant by "about" in this context was not further analysed. In Gatley on Libel and Slander (11th edn. 2008) it is stated at para. 21.1that the claimant must show that the words "refer to the claimant or his property or his business"; and it adds at n.2 "… and words may reflect upon the claimant's business in a very indirect way" (citing Riding, supra).

**9. Discussion**

a. As above stated, Regis argues for the Victorian position as apparently stated in Riding and Ratcliffe; it is sufficient if the words are false and malicious, even of someone or something other than the claimant, his business, his goods or his property, provided that they are also calculated to injure the claimant's economic interests through a direct causal route. The Defendants adhere to the more modern, or Gatley position; there must be at least some degree of reference in the words to the claimant himself, his business or his goods, and there is plainly none here.

b. The Defendants advance a floodgates argument against Regis's case; there needs to be some restraint, built into the elements of the cause of action, against a plethora of parasitic claims for secondary economic loss consequent on malicious falsehoods directed at other persons/businesses, and the correct limiting principle, which also has the advantage of defining a cause of action personal to the claimant, is the requirement that the claimant must in some sense be referred to in the words complained of. Otherwise, for example, the suppliers of Business A would be able to claim directly for their economic losses consequent on a malicious falsehood damaging to A's turnover, even though the words had no other relation to them at all. They also remind me of Article 10 of the European Convention on Human Rights, and the consequent need to ensure that the restrictions imposed on their freedom of expression by the law of malicious falsehood are duly prescribed by law and not disproportionate to the purposes towards which the restrictions are directed.

c. Primarily for those reasons, my conclusion on the issue of principle is that the Defendants are essentially correct; the law must require that there be some reference, direct or indirect, in the words complained of to the claimant or to his business, property or other economic

interests, though it is not necessary to go further and establish identification of the claimant in the minds of the publishees.

d. But that decision on principle is not the end of the matter. If that test is applied to the words here, what would be the outcome? Regis itself is plainly not expressly or impliedly referred to. But according to its Particulars of Claim (which I must accept as true for present purposes, without prejudice to the Defendants' right to challenge them at trial) its business is the management of mutual protection funds, in particular Marathon. It appears to me to be arguable that those funds could be viewed as the subject-matter or materials of its business, standing in a position in relation to Regis closely analogous to the goods of a manufacturer or the properties of a landowner. If so, an attack on them might therefore also be an attack on Regis's business. It is a possibility that both sets of words complained of here, relating as they do to allegedly serious commercial problems within a mutual fund claimed by Regis to be managed by it as part of its own business, might thus sufficiently refer to Regis's own business to bring Regis within the wide reference limits applicable to malicious falsehood (whether or not they would also bring it within the narrower limits of the identification requirement of defamation). I therefore decline to strike out Regis as a claimant, and will permit it to apply to re-plead its case in relation to that issue if it sees fit, as well as re-pleading its claims more generally in accordance with the same directions as those given above in relation to Marathon. Whether the Court will give permission for such amendments is a matter to be determined at the next hearing.

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