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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* 11/09/2014

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

SIR GERRY LOUGHRAN

Plaintiff;

-and-

CENTURY NEWSPAPERS LIMITED

Defendant

Before: Morgan LCJ, Coghlin LJ and Weir J

MORGAN LCJ (giving the judgment of the court)

[1] The plaintiff is a former head of the Northern Ireland Civil Service and was Permanent Secretary of the Department of Enterprise, Trade and Investment ("DETI") between 1991 and April 2000. The defendant is the publisher of the News Letter, a daily newspaper. Both parties appeal various aspects of two interlocutory judgments given by Mr Justice Gillen on 13 November 2013 ("the First Judgment") and 25 February 2014 ("the Second Judgment") in the context of proceedings commenced by a High Court Writ of Summons issued on 10 October 2012 by which the plaintiff claimed damages, including aggravated and exemplary damages, for libel in respect of words published or caused to be published by the defendant in articles entitled "Retired top civil servants involved" and "Call in PSNI over suspected fraud, say MLAs". Mr Ringland QC appeared on behalf of the plaintiff with Mr McMahon. Sir Edward Garnier QC appeared on behalf of the defendant with Mr Scherbel-Ball. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] On 29 November 2011 the Northern Ireland Audit Office Comptroller and Auditor General published a report entitled *DETI: The Bioscience and Technology Institute* ("the NIAO Report"). On 18 January 2012 the Northern Ireland Assembly Public Accounts Committee ("PAC") met to consider the NIAO Report. PAC produced a report entitled *Report on the Bioscience and Technology Institute* ("the PAC Report") and on 21 May 2012 sent it to the press. These reports concerned the Bioscience and Technology Institute ("BTI") which had been set up in 1998 as a not-for-profit company to provide a cutting edge building for new biotech companies to use as a base. It had purchased a building in 2005 which was then repossessed by the bank leading to a loss of public funds.

[3] On 21 May 2012 the PAC Report was sent to the press with a press release and a memo of corrections to be read in conjunction with specified pages. There was an embargo on use of these materials until 00:01hrs on 23 May 2012. On 23 May 2012 the News Letter published articles on pages 8 and 9 of its print edition. The articles contained material and comment based on extracts from the PAC Report including the minutes of proceedings relating to the PAC Report and the minutes of evidence which was ordered to be published by PAC.

[4] The headline of the article across the centre of pages 8 and 9 ("the First Article") was "Call in PSNI over suspected fraud, say MLAs". The First Article contained a large number of criticisms of the BTI, Invest NI, and officials of DETI for their alleged incompetence and mismanagement of the project. It did not refer to the plaintiff by name but made reference to "'the most senior officials' in the department" and "the most senior officials responsible".

[5] To the immediate right of the First Article was a smaller article ("the Second Article") entitled "Retired top civil servants involved". The Second Article drew attention to the fact that the plaintiff had been Permanent Secretary in DETI up until April 2000 and had been "named in the ..... Report because of ... involvement with the BTI project". Pages 8-9 contained two further articles entitled "Private investor was the one asking the awkward questions" ("the Third Article") and "Science project promised much".

[6] On the same day as the articles were published in the print edition of the News Letter, the First and Second Articles (together with the Third Article) were published in verbatim identical form on separate pages of the News Letter's website at www.newsletter.co.uk ("the Online Articles").

[7] In addition, on 23 May 2012 the newspaper's political correspondent and author of the Articles published a tweet on his Twitter account ("the Tweet") which read:

> "Top Belfast doctors and two former heads of the civil service involved in saga which MLAs suspect involved fraud: newsletter.co.uk/news/local/call-in-PSNI-over-suspected-fraud-say-mlas-1-3871176".

On receipt of a complaint on 24 May 2012 from the plaintiff's solicitor, the defendant deleted the Online Articles and the Tweet without admission of liability.

The History of the Proceedings

[8] By his Writ of Summons issued on 10 October 2012 the plaintiff claimed damages for libel in respect of words published by the defendant in articles entitled "Retired top civil servants involved" and "Call in PSNI over suspected fraud, say MLAs". The plaintiff submitted that it was abundantly clear from the PAC Report that the plaintiff's involvement in the matters considered by PAC was minimal and there was no suggestion that he was suspected of fraud or involved in the many failings that characterised the project. On 25 October 2012 the respondent entered an Appearance.

[9] On 17 January 2013 the plaintiff served a Statement of Claim in respect of the Articles and the Tweet. On 25 February 2013 the defendant served a Defence asserting statutory qualified privilege and/or common law reporting privilege and denying that the Tweet was capable of referring to the plaintiff. On 21 May 2013 the plaintiff amended the Writ (having been granted permission by Mr Justice Gillen by order dated 16 May 2013) to include the claim in respect of the Tweet. On 31 May 2013 the plaintiff served an Amended Statement of Claim to advance the case that the Tweet identified the plaintiff because the Tweet readers would also have read the Articles. On 21 June 2013 the defendant served an Amended Defence denying that the Tweet was capable of referring to the plaintiff. On 16 July 2013 the plaintiff served a Reply to the Amended Defence which included the allegation that the publications were malicious.

[10] On 20 August 2013 the plaintiff served an Amended Statement of Claim to allege two further defamatory meanings. On 6 September 2013 the plaintiff issued a summons for permission for these amendments which was dealt with in the Second Judgment. On 19 December 2013 the plaintiff issued another summons for permission to further amend the Statement of Claim to include particulars alleging that the Online Articles and Tweet referred to and were understood to refer to the

plaintiff and to amend the plaintiff's Reply, in respect of malice, to the defendant's amended Defence. On 24 January 2014 the plaintiff further amended the Statement of Claim in relation to the alleged identification of the plaintiff by twitter followers.

The Applications and the Decisions of the Learned Trial Judge

[11] Section 15 of the Defamation Act 1996 ("1996 Act") provides that the publication of any report or other statement mentioned in Schedule 1 to the Act is privileged unless the publication is shown to be made with malice. The section does not apply to the publication to the public, or a section of the public, of matter which is not of public concern and the publication of which is not for the public benefit. Schedule 1 of the 1996 Act includes at paragraph 7 a fair and accurate copy of or extract from matter published by or on the authority of a government or legislature anywhere in the world.

[12] On 16 September 2013 the defendant issued a summons seeking an Order that the question be tried as a preliminary issue of whether the publications complained of were as a matter of law fair and accurate copies or extracts of matter published by or on the authority of the Northern Ireland Assembly and were therefore protected by statutory qualified privilege pursuant to section 15 of the Defamation Act 1996 and Schedule 1, paragraph 7; or, alternatively, were protected by qualified privilege at common law. The summons also sought a ruling consequent to the determination of the preliminary issue that such of the words complained of by the plaintiff which the judge determined were not protected by qualified privilege were incapable as a matter of law of referring to the plaintiff and/or bearing the defamatory meanings alleged by the plaintiff. The entirety of the submissions have been concerned with statutory qualified privilege only.

[13] The learned judge determined that the First Article in its entirety attracted the statutory protection of qualified privilege. He was satisfied that no reasonably minded jury properly directed could conceivably come to any other conclusion but that the report as set out in the First Article was fair and accurate. He recorded that he found no evidence of intermingling of extraneous material with the material for which privilege was claimed, no over-embellishment of the extracts from the PAC Report, no excessive commentary, no misleading headline or any other feature of the First Article that would serve to deprive it of qualified privilege. Discrepancies adverted to by Counsel for the plaintiff were, in the learned judge's opinion, minor inaccuracies which fell well within the ambit of editorial discretion and could not be said by any reasonable member of a jury to amount to a critically different text from that contained in the PAC Report. The First Article did not name the plaintiff and there was nothing outside conventional and acceptable editorial discretion in the fact

that the First Article did not expressly state that the plaintiff was only employed as Permanent Secretary of the DETI until April 2000. Further, only a perverse jury could conclude that the contents of the First Article were not in the public interest or of public benefit. A report of this nature dealing with misfeasance in the realm of public funds was self-evidently a matter of public concern and published for the public benefit.

[14] The learned judge concluded that the combination of the First and Second Articles amounted to a hybrid publication attracting the principles set out in Curistan v Times Newspapers Ltd [2008] 3 All ER 486. Whilst the First Article was protected by statutory qualified privilege, the Second Article was not so protected. The correct approach to determining the meaning of the non-privileged part was to separate it from the privileged part and interpret it in its own terms. However, the privileged material formed part of the context in which the non-privileged material was to be interpreted. If, however, the plaintiff were able to show that the newspaper was adopting the privileged material as its own statement then it could rely upon the contents.

[15] As regards the Online Articles and Tweets, the learned judge stated that the same principles applied. However, the parties had raised different arguments in relation to these publications which included the defendant's submissions that the plaintiff must establish by fact or inference that the relevant articles had been read by a relevant number of persons within the jurisdiction. The learned judge recorded that the plaintiff bore the burden of proving that the words complained of were read or seen by a third party. He considered that it was too early, at this preliminary stage, to ascertain what the facts proven by the plaintiff would be and so rejected the defendant's submission that he should rule at this stage that there was no basis for any claim arising out of the Online Articles and Tweet.

[16] Consequent on the learned judge's determination relating to qualified privilege, the defendant sought a ruling striking out the allegations of malice contained in the plaintiff's proposed amended Reply. On 6 September 2013 the plaintiff, pursuant to Order 20 Rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980, sought by way of a summons and affidavit leave to further amend his statement of claim and also indicated an intention to bring an application to amend his Reply served in response to the defence although no summons had been issued for that application.

[17] The learned judge concluded that the defendant's application must fail. The overriding objective of Order 1 Rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980 must not eclipse the continuing and vital role of juries

absent circumstances where only a perverse jury could find for the plaintiff. Whether the defendant was actuated by malice in the instant case was essentially a question of fact for the jury provided always that there was evidence from which the malice could be reasonably inferred. The critical question was whether there was any evidence, taken at its highest, on which a jury properly directed could properly infer that the defendant or its servant or agent knew that what was intended to be said in the publication relied on was false or that they had a reckless indifference as to the falsity. The learned judge considered that it was essentially a matter for the jury to determine whether the reliance of the plaintiff on the NIAO Report was without merit. The jury would have to decide whether on the one hand it would be absurd to expect the defendant's journalists to read what it contended was an entirely separate and lengthy government report and evaluate the two reports together or whether, as the plaintiff contended, the NIAO Report underlay the PAC Report and it would be equally absurd to contend that the journalist would have failed to read at least the chronology in order to get a timeline in respect of the plaintiff's limited involvement or, having read it, he could have made the publications he did concerning the plaintiff. In sum, the learned judge concluded that he was at this stage unable to conclude that no jury, properly performing its task and properly directed, could justifiably uphold a finding of malice.

[18] The learned judge acceded to the plaintiff's application to amend the Statement of Claim and the Reply although not without some hesitation because of the number of amendments to the pleadings and the delay. He concluded that it was in the interests of justice to permit the amendments to ensure that the plaintiff obtained a fair trial and that the defendant was fully apprised of the case it had to meet. The trial was some time off so there was no injustice to the other party that could not be compensated in costs particularly where the omissions were not fuelled by any deliberate attempt on the part of the plaintiff to gain a tactical advantage.

The submissions of the parties

[19] The plaintiff submitted that the learned trial judge was wrong to assess in isolation whether the contents of the First Article attracted statutory qualified privilege. He accepted that in isolation the First Article could constitute a fair and accurate report of the PAC report. He submitted, however, that the correct approach was to examine all of the articles as a whole. The learned trial judge had correctly concluded that the combination of the First and Second Articles amounted to a hybrid publication. He then went on to find that the correct approach to determining the meaning of this hybrid publication was to separate the First Article, being privileged, from the non-privileged part which should be interpreted on its own terms. The learned trial judge was wrong to exclude the First Article as part of

the hybrid publication that was to be examined, was wrong to identify it as only part of the context and was wrong to conclude that the contents of the First Article could only be relied upon where the plaintiff was able to show that the newspaper was adopting the privileged material.

[20] The defendant contended that the Judge was correct to rule that a jury would be perverse to determine that the First Article was anything other than a fair and accurate summary or report of the PAC Report which was indisputably for the public benefit on a matter of public concern. The First Article was a paradigmatic example of what must be protected by statutory qualified privilege. The Judge correctly dismissed the plaintiff's complaints as amounting to "minor inaccuracies" and correctly ruled that the First Article could not be said by any reasonable member of a jury to amount to a critically different text from that contained in the Report.

[21] In respect of the online publications and the Tweet the learned trial judge repeated this finding in relation to the First Article which was criticised by the plaintiff for the same reasons. He determined, however, that it was open to the plaintiff to adduce evidence at trial from which the inference may be drawn that substantial publication of the contents of both articles had taken place in the context of the online and Tweet publications. For that reason he concluded that he should not at this stage accept the submission that there was no basis for any claim arising out of those publications.

[22] The defendant submitted that the judge erred in not finding that the online publications (which were identical to the hard copy publications, save for the Tweet) were also protected by qualified privilege as a matter of law. It was submitted that although he recognised that the same principles applied to the online publications at paragraphs 38 and 41 of the First Judgment, he did not address or give any reasons why he did not reach the same conclusion in respect of these online publications. The First Article was reproduced verbatim online. On any account, the privilege afforded to the hard copy article must apply to the online publication. The Tweet itself was clearly a fair summary of the PAC Report, and did not name the plaintiff. We consider that the learned trial judge applied the same principles at paragraph 41 of his judgment and that no question of inconsistency arises on this issue.

[23] In respect of the finding on malice the defendant submitted that the judge erred in permitting the plaintiff's case to be put before a jury. At paragraph 18 of the second judgment he relied upon the wrong test for a case of malice to proceed to trial. He failed to consider at all the requirement for the plaintiff to plead and establish a prima facie case that the defendant's dominant motive for the publications was malicious. The plaintiff did not even plead this. Moreover, the

plaintiff's case on malice substantially repeated the allegations of unfairness and inaccuracy which the learned trial judge had completely rejected in his first judgment. The pleading of malice was irreconcilable with the first judgment and could not be sustained. The judge also erred at paragraph 30 of the second judgment in permitting the plaintiff to rely on matters in support of his case on malice which were simply not pleaded. That was plainly impermissible. An allegation of malice must be clearly and properly pleaded. This was a pleading of malice which could not be sustained and which the court had a duty not to permit to be advanced to trial.

[24] The judge also further erred by not applying the appropriate test for malice in the context of the contemporaneous reporting by a newspaper of legislative publications. In such situations, the newspaper has a social and moral duty to publish the allegations to its readers. Malice cannot be established by an examination of whether the newspaper believed the allegations to be true or false or was reckless to the truth. The newspaper had no knowledge of the truth or falsity of the substance of the PAC Report. An enquiry into its knowledge of the truth or falsity of the allegations completely undermines the basis of this particular occasion of privilege. Where there is such a duty to report, malice can only be established by proof that the newspaper's dominant motive was to injure the Appellant, not to inform its readers of the contents of the PAC Report.

[25] The plaintiff submitted that the learned trial judge had applied the correct test in determining that he should leave the issue of malice for the trial. He concluded at paragraph 29 of the second judgment that the issue which the judge or jury may have to determine is whether it constituted merely carelessness or negligence for the defendant not to read the NIAO Report or whether it was such an obvious failure to make available enquiries from the available documentation that it suggested that the defendant was consciously indifferent to the truth or falsity of the subsequent publications. Recklessness as to the truth or falsity of the statement was in law the same as actual knowledge. The plaintiff also submitted that his primary case in malice was that the defendant, and in particular Mr McBride, did read the PAC Report and the letter of 21 May 2012 clarifying that the plaintiff was employed as Permanent Secretary until April 2000 and therefore knew that the only material event that occurred in the course of the plaintiff's tenure was the offer of funding contained in the letter of 21 December 1999 and knew that the allegation of fraud or suspected fraud against the plaintiff was false.

[26] In the alternative the defendant submitted that the judge erred by permitting the plaintiff to amend his Statement of Claim to introduce a new and distinct cause of action in respect of the Tweet based on an innuendo reference as to his identity.

This new claim was introduced well after the expiry of the limitation period and indeed after the original trial window. It was based on substantially new and controversial facts. The judge erred in not recognising this and in permitting this new cause of action to be introduced.

[27] The plaintiff submitted that his amendment in respect of the Tweet did not introduce a new case based on a reference innuendo amounting to a distinct separate cause of action. He contended that the cause of action was damages for libel in respect of the Tweet. Reference or identification was one of the matters that must be proved to establish the cause of action. The fact pleaded in respect of reference did not constitute a new cause of action.

Consideration

Statutory Qualified Privilege

[28] In order to deal with this issue it is necessary to identify the basis upon which the plaintiff makes his claim. The articles in question are spread over two facing inside pages of the defendant's newspaper. There is a heading in bold type "Call in PSNI over suspected fraud, say MLAs" over both the First Article and the Second Article. The subheading over the Second Article is "Retired top civil servants involved". There were two further related articles on the same two pages but for the purpose of this issue they are not material.

[29] The plaintiff broadly accepts that the First Article is a fair and accurate report of the PAC report. It noted the committee's suspicion of fraud and a deliberate cover-up. It described the case as "one of the starkest examples of incompetence and mismanagement that this committee had ever examined". It noted that the committee said it would be difficult to overstate just how badly this project was handled both by the funding bodies and by the BTI board itself and that the committee noted a catalogue of negligence and ineptitude the nature and extent of which could only be described as staggering.

[30] The First Article did not mention the plaintiff. The Second Article refers to the plaintiff and one other former senior civil servant. It says that the plaintiff went on to become head of the civil service and had been permanent secretary of DETI until April 2000. It then referred to two entities of which the plaintiff was chairman.

[31] The plaintiff's case is that the reference to the plaintiff under the heading and subheading set out at paragraph 28 above gave rise to the meaning that the plaintiff was responsible for the deficiencies and suspicions outlined in the PAC report when one read the two articles together. The defendant's submission is that the First

Article is protected by the statutory privilege under section 15 of the 1996 Act and therefore cannot be taken into account. The plaintiff's answer to this is that the manner in which the plaintiff was named introduces extraneous material or alternatively that the defendant has adopted the allegations in the report in respect of the plaintiff so that in either case the privilege is lost.

[32] As the learned trial judge found this was a hybrid report consisting of the summary of the PAC report in the First Article which *prima facie* fell within section 15 of the 1996 Act and the newspaper's additional commentary in the Second Article. In Curistan v Times Newspapers Ltd [2008] EWCA Civ 432 the Court of Appeal in England and Wales addressed the applicable principles in a case of this kind. In that case the defendant published a newspaper article reporting that a Member of Parliament had alleged in Parliament that the claimant had laundered money for the IRA. The article also reported that in response to those allegations the claimant had made a false claim about his company accounts. Among the issues arising in that case were whether the reportage of the newspaper in relation to the accounts was extraneous matter as result of which the report was no longer fair and accurate and whether the newspaper had adopted the remarks of the Member of Parliament.

[33] In this case there is no dispute between the parties that unless the plaintiff can establish that there was extraneous matter in the hybrid report as a result of which the report was no longer fair and accurate or that the newspaper had adopted the remarks within the PAC report the First Article was protected by qualified privilege under section 15 of the 1996 Act. It could not be taken into account in those circumstances in determining the meaning of the hybrid report. The position is different where the extraneous material affects the fairness of the report. The principle was set out in characteristically robust terms by Lord Denning in Dingle v Associated Newspapers Ltd [1964] AC 371 at 411.

> "If a newspaper seeks to rely on the privilege attaching to a parliamentary paper, it can print an extract from the parliamentary paper and can make any fair comment on it and it can reasonably expect other newspapers to do the same. But if it adds its own spice and prints a story to the same effect as the parliamentary paper, and garnishes and embellishes it with circumstantial detail, it goes beyond the privilege and becomes subject to the general law. None of its story on that occasion is privileged. It has "put the meat on the bones" and must answer for the whole joint."

As Arden LJ pointed out in Curistan that proposition is also supported by the remarks of Kirby J in Chakravarti v Advertiser Newspapers Lrd (1998) 193 CLR 519 at paragraph 153.

> "Excessive commentary or misleading headlines which amount to commentary run the risk of depriving the text of the quality of fairness essential to attract the privilege."

[34] There is a measure of ambiguity about the issue which the learned trial judge was asked to decide in relation to statutory qualified privilege. On the basis of the submissions made before us there was really no issue between the parties about the fact that the First Article on its own was protected by section 15 of the 1996 Act. It also seems clear that the learned trial judge examined the question of extraneous material because at paragraph 33 he found no evidence of intermingling extraneous material, embellishment, commentary or misleading headline which would deprive the First Article of qualified privilege. That would suggest that he was making a final determination on the issue of statutory qualified privilege in the context of the First and Second Articles. As against that at paragraph 37 of his judgement he suggested that if the plaintiff was able to show that the newspaper was adopting the privileged material at its own statement then he could rely upon the contents of the First Article. That paragraph appeared to leave open, therefore, the possibility that the plaintiff could establish adoption in which case, of course, the privilege would be lost.

[35] In order to determine the question of whether there was extraneous material which affected the fairness and accuracy of the report the first step is to recognise that the First Article did not specifically refer to the plaintiff. It is the plaintiff's case that the PAC Report did not identify him as responsible for the failings identified within the report. That is an issue to be determined at trial. The plaintiff maintained that the Second Article had the effect of identifying him as bearing that responsibility. We accept that such an interpretation was arguable and we also agree that if that interpretation is correct then the Second Article had arguably introduced extraneous material affecting the fairness and accuracy of the coverage of the PAC report. If the plaintiff's case was accepted at trial we consider that the privilege under section 15 of the 1996 Act from which the First Article would otherwise have benefitted would be lost. In those circumstances we do not consider that the issue of statutory qualified privilege can be determined at this stage and allow the plaintiff's appeal on that issue.

[36] Finally, we note the observations in Curistan in respect of the concept of adoption. We consider that the matter was helpfully addressed by Laws LJ at paragraph 88 and we agree with his analysis.

> "Some care is I think needed in considering the concept of adoption, discussed by Arden LJ at paras 37-40. In a sense the publisher who embellishes parliamentary speech may be said to have adopted it: by "putting the meat on the bones" he has made the allegation his own. But I think it is misleading to characterise such a case as one of *adoption*. Rather than adopting what was said, the publisher has produced a critically different text. Since what he has produced cannot be said to be a fair and accurate report of parliamentary speech, the law gives him no shield of qualified privilege. That is the whole analysis of the case; no recourse to any such idea as adoption is required."

Malice

[37] Malice only arises in the event that the claim in qualified privilege succeeds. The standard of proof of matters of dishonesty, bad faith and malice in civil proceedings remains the balance of probabilities. There is, however, a cautious approach to the evidence required to establish such matters. The rationale can be found in a number of places and in relation to dishonesty and bad faith was set out by Lord Hobhouse in Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1.

> "The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden—the balance of probabilities—but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out."

[38] In respect of a pleading of malice in defamation proceedings a helpful analysis of the approach was given by Eady J in Henderson v London Borough of Hackney [2010] EWHC 1651 (QB).

> "33 It has been confirmed by the Court of Appeal in Telnikoff v Matusevitch [1991] 1 QB 102 and in Alexander v Arts Council of Wales [2001] 1 WLR 1840 that, in order for a claimant to succeed in proving malice, it is necessary both to plead and prove facts which are more consistent with the presence of malice than with its absence. This is one of the reasons why, in practice, findings of malice are extremely rare.
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> 34 It is thus reasonably clear, as a matter of pleading practice, that allegations of malice must go beyond that which is equivocal or merely neutral. There must be something from which a jury, ultimately, could rationally infer malice; in the sense that the relevant person was either dishonest in making the defamatory communication or had a dominant motive to injure the claimant. 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: see Duncan and Neill on Defamation at para 18.21.
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> 35 It is not appropriate merely to plead (say) absence of honest belief, recklessness or a dominant motive on the defendant's part to injure the claimant. Unsupported by relevant factual averments, those are merely formulaic assertions. It is certainly not right that a judge should presume such assertions to be provable at trial. Otherwise, every plea of malice, however vague or optimistic, would survive to trial. It would be plainly inappropriate to move towards such an unbalanced regime, since it would tend to undermine the rights of defendants protected under Article 10 of the European Convention on Human Rights."

[39] In answer to this the plaintiff relied on the decision of Tugendhat J in Qadir v Associated Newspapers Ltd [2013] EMLR 15. That was a case in which the

newspaper published a report of court pleadings alleging fraud against the claimant. There was evidence that the newspaper was aware that the claimant disputed the allegations but it asserted that he had declined to comment. The judge concluded that the claim in qualified privilege in respect of the article consequently failed because of intermingling. A second article purported to be an account of the court hearing in which it was suggested that the claimant had been guilty of fraud. The report failed to mention an intervention from the judge indicating that there was no evidence whatsoever of any fraud on the part of the claimant. Again the claim in qualified privilege failed.

[40] The learned trial judge then considered the question of malice in the event that he was wrong on qualified privilege. He declined to strike out particulars alleging actual knowledge and recklessness which he held amounted to the same thing. There is in our view nothing controversial about this. In that case there were specific averments in relation to factual matters to support the assertions.

[41] The pleaded particulars of malice in this case are set out at paragraph 3.6 of the reply to the defendant amended defence as amended on 19 December 2013. It is asserted at paragraph 3.6(b) that Mr McBride, a journalist for whom the defendant was responsible, published or caused to be published the words knowing they were false or recklessly not caring whether they were true or false. The particulars thereafter seek to sustain that assertion.

[42] The first particular is that Mr McBride received correspondence from DETI on 21 May 2012 to be read in conjunction with the PAC Report which clarified that the plaintiff was Permanent Secretary until April 2000. We accept that this was neutral. The second particular notes that the article entitled "Retired Top Civil Servants Involved" correctly records that the plaintiff was Permanent Secretary until April 2000. That again was neutral.

[43] The third particular says that even a cursory consideration of the Report or the chronology of main events at Appendix 3 to the NIAO Report prepared by the Comptroller and Auditor General would have revealed that the only material event that occurred in the course of the plaintiff's tenure was a letter of 21 December 1999. The NIAO Report was published approximately 6 months prior to the PAC Report. In substance this is an allegation that is equally consistent with carelessness or lack of enquiry. In the fourth particular the plaintiff asserts that the misrepresentations as to content and meaning indicate that Mr McBride had clearly read the Report. There are, however, no particulars to indicate what precisely it was about the content and meaning which gave rise to the inference. We do not accept, therefore, that this particular advances the plaintiff's case in malice.

[44] The fifth particular asserts that Mr McBride knew that the allegations did not constitute a fair and accurate and that the allegations against the plaintiff were untrue or that he was reckless. These are mere assertions. The sixth particular is that there has been no offer of apology. The learned trial judge correctly indicated at paragraph 20 of his second judgement that failure to apologise is not sufficient to ground malice. The final particular merely indicates an intention to amend.

[45] Applying the legal principles set out above we consider that these particulars do no more than raise matters which are either equivocal or merely neutral. We do not accept that they are sufficient to raise a case that the defendant was dishonest or had a dominant motive to injure. Accordingly, we strike out the pleading in malice.

Amendment

[46] The defendant contends that the amendment in respect of the Tweet by way of a claim in innuendo introduces a new cause of action with the introduction of substantially new facts after the expiry of the limitation period. We accept the submission that the claim in innuendo constitutes a new cause of action (see Grappelli v Derek Block (Holdings) Ltd [1981] 1 WLR 822). Article 73 of the Limitation (Northern Ireland) Order 1989 makes provision for amendment by way of the introduction of new claims.

> "73. - (1) For the purposes of this Order, any new claim made in the course of any action is to be treated as a separate action and as having been commenced-
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> (a) if it is a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
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> (b) in relation to any other new claim, on the same date as the original action.
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> (2) Except as provided by Article 50, by rules of court, or by county court rules, neither the High Court nor any county court may allow a new claim within paragraph (1)(b), other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Order which would affect a new action to enforce that claim.
>
> For the purposes of this paragraph, a claim is an original set-off or an original counterclaim if it is a claim made by

way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

(3) Rules of court and county court rules may provide for allowing a new claim to which paragraph (2) applies to be made as there mentioned, but only if the conditions specified in paragraph (4) are satisfied, and subject to any further restrictions the rules may impose.

(4) The conditions referred to in paragraph (3) are the following-

(a) as respects a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action…"

[47] Order 20 Rule 5 RCJ make provision for amendment in the circumstances set out in Article 73(4)(a) of the 1989 Order. The learned trial judge concluded that the amendment arose out of the same facts or substantially the same facts as the matters already in issue. We see no basis upon which to interfere with that conclusion and we consider that he was perfectly entitled to exercise his discretion in the manner that he did in relation to the application to amend. The appeal on that issue is, therefore, dismissed.

Conclusion

[48] For the reasons given we have allowed the plaintiffs appeal on the issue of statutory qualified privilege which should proceed to trial. We have allowed the defendant's appeal on the issue of malice and struck out that plea and dismissed the defendant's appeal in relation to the amendment.