Neutral Citation Number: [2020] EWHC 2895 (QB)

Case No: QB-2019-001133

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Date: 30 October 2020

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

John Rayner	**Claimant**
- and -	
James Seabourne-Hawkins	**Defendant**

- -
- -

Richard Owen-Thomas (instructed by **Samuels Solicitors LLP**) for the **Claimant**
Emma Foubister (instructed by **RM Legal Solutions LLP**) for the **Defendant**

Hearing dates: 22-23 July 2020

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date of hand-down is deemed to be as shown above.

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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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THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. This is the judgment following the trial of the Claimant's slander action.

Parties

2. The claim concerns a falling out between the Claimant and the Defendant in April 2018, culminating in allegations that the Defendant twice slandered the Claimant. The dispute centres on events at the Marlands Shopping Centre in Southampton at that time. The Defendant's wife, Samantha Seabourne-Hawkins, was running a retail unit, "The Cave" in a larger shop, called "The Loft Ladder", in the Marlands Centre. The Loft Ladder comprised some 8 separate retail units. Mrs Seabourne-Hawkins had rented her unit for around 4 years, selling incense, crystals and giftware.

3. The Defendant worked as a delivery driver for a large company, but he would occasionally work in the shop with his wife. Mrs Seabourne-Hawkins also employed Kristina Kleina in the shop on a part-time basis. Ms Kleina had previously worked in another shop in The Loft Ladder.

4. The Claimant was a regular visitor to The Loft Ladder by April 2018. It appears that he was a manager of one of the other units. From around 2016, the Claimant had struck up a friendship with Ms Kleina that pre-dated Ms Kleina working at The Cave. Their friendship had foundered in April 2018 (see [14]-[21] below).

The pleaded claim

5. The Claim Form was issued on 29 March 2019. It included a claim for damages for "*defamatory statements made verbally in April and July 2018*". Particulars of Claim were served with the Claim Form. The two alleged slanders were pleaded as follows:

    i) the first alleged slander ("the First Slander"):

    > "On 19th April 2018, the Defendant spoke and published of the Claimant, in the presence and hearing to a security guard, Mr Martin Barfoot, and others whose names are unknown to the Claimant, the following words which are defamatory of the Claimant:
    >
    > > 'You need to sort him out because he has sexually assaulted a member of our staff.'

    ii) the second alleged slander ("the Second Slander"):

    > "On 28th July, the Defendant spoke and published of the Claimant, in the presence and hearing to a security guard, called Eileen Gorman and others whose names are unknown to the Claimant, the following words which are defamatory of the Claimant:
    >
    > > 'he is being investigated for interfering with young girls.'

6. The natural and ordinary meaning that the Claimant contends each publication bears is pleaded as follows:

i) the First Slander:

> "… that the Claimant had committed a criminal offence punishable by imprisonment"; and

ii) the Second Slander:

> "… that the Claimant had committed a criminal offence punishable by imprisonment and that there were reasonable grounds to investigate the Claimant for the sexual abuse of children".

7. The Claimant alleges that the First and Second Slanders have caused serious harm to his reputation (as required by s.1 Defamation Act 2013). His pleaded case relies upon the following:

i) the seriousness of the allegations made;

ii) the fact that the Claimant was interviewed by Hampshire Police on 16 July 2018 in respect of the First Slander; and

iii) the fact that the Claimant had a job offer at a florist shop rescinded as a result of the First Slander (see [26]-[31] below).

The Defence Case

8. The Defendant's case in response is as follows:

i) He alleges that, from June 2017, the Claimant had started to display "*unwanted behaviour*" towards Ms Kleina and, on 6 April 2018, he had thrown a watch at her after she had asked him to leave her alone ("the watch incident" – see [17]-[18] below).

ii) He denies speaking the words alleged to amount to the First Slander. The circumstances of the alleged First Slander were:

a) the Claimant was angry about being asked not to speak to Ms Kleina and ran at the Defendant with his fists clenched;

b) a heated conversation took place between the Claimant and the Defendant outside the Loft Ladder; and

c) the Claimant and the Defendant then made their way to the security office at the Marlands Shopping Centre and a security guard, Martin Barfoot, had to calm down the Claimant.

iii) He denies speaking the words alleged to amount to the Second Slander. He accepts speaking to the security guard, and having explained his concerns about the Claimant and his conduct towards his wife and Ms Kleina, but he had said nothing about the Claimant interfering with girls.

iv) As to meaning, the Claimant's meanings are disputed. The meaning of the Second Slander did not allege commission of a criminal offence and was therefore not actionable without proof of special damage and none was alleged.

v) In relation to the Claimant's case on serious harm:

a) the Defendant denies that either Slander caused or was likely to cause serious harm to the Claimant's reputation;

b) there was no causal link between the First Slander and the Claimant's police interview on 16 July 2018; and

c) there was no causal link between the First Slander and the withdrawal of the job offer at the florist shop.

The issues at trial

9. Prior to trial, the parties agreed the issues to be determined by the Court. These were simplified during the trial. At the beginning of the second day of the trial, the Claimant abandoned the Second Slander claim. Rightly, the Claimant recognised that he could not maintain his claim in relation to the Second Slander when both the Defendant and Ms Gorman, respectively the alleged publisher and publishee of the Second Slander, denied that the Defendant had spoken the words alleged, and there were no other witnesses. Following the abandonment of the Second Slander, the parties agreed that the issues to be decided by the Court are therefore:

i) Has the Claimant demonstrated, on the balance of probabilities, that the Defendant made the alleged statement in relation to the First Slander?

ii) If he has,

a) what is the natural and ordinary meaning of the First Slander?

b) has the First Slander caused, or is it likely to cause, serious harm to the Claimant's reputation? and

c) is there a causal link between the First Slander and the Claimant having his job offer rescinded or any other alleged loss/damage?

10. If the Claimant fails to demonstrate (i), then his action will be dismissed. Issues under (ii) only arise if he has established publication of the First Slander.

The witnesses

11. The Claimant relies on the evidence of two witnesses who gave evidence at the trial: himself and Sheryl Dowd.

12. In addition to himself, the Defendant's witnesses at trial were Eileen Gorman, the security guard to whom the Second Slander was allegedly published; his wife, Samantha Seabourne-Hawkins; Ms Kleina; and Ruth Booker.

13. I deal with the evidence of the witnesses when considering the issues I have to resolve below, but there are three matters that I should deal with first:

    i) the history of the relationship between the Claimant and Ms Kleina, because it provides the essential context for the slander claim;

    ii) the Defendant's evidence – from Ms Booker – that the Claimant told her that he had got someone to lie for him about having offered him a job; and

    iii) the Claimant's claim that he lost a job as a result of the First Slander.

    The latter two issues bear primarily on the credibility of the Claimant and the evidence he gave.

The Claimant's relationship with Ms Kleina and the watch incident

14. Although not directly relevant to the issues I have to decide, the immediate context of the dispute between the Claimant and the Defendant is the former's relationship with Ms Kleina. What follows is a brief history of that relationship. It attempts to identify matters of common ground between the parties, but insofar as it trespasses on disputed matters, it is not necessary for me to resolve any dispute as, ultimately, it does not assist me in resolving the main issues in the case.

15. Ms Kleina started working, part-time, for Mrs Seabourne-Hawkins in around April 2017, but her friendship with the Claimant pre-dated that. In her witness statement, Ms Kleina states that the Claimant assisted Ms Kleina's mother with a claim for sick pay. As a thank you for his assistance, Ms Kleina's mother had given the Claimant a present of a watch on or around his birthday on 23 June 2017. The Claimant invited Ms Kleina to a picnic to celebrate his birthday. Ms Kleina did not want to attend this event, as she was apparently the only other guest. Although she did go to the picnic, Ms Kleina said that she made up an excuse about having another appointment so that she did not have to stay too long. In December 2017, the Claimant bought tickets for him and Ms Kleina to attend the Marlands Centre Christmas Party. Ms Kleina told the Claimant that she did not want to go with him.

16. On Valentines' Day 2018, the Claimant sent Ms Kleina flowers and chocolates accompanied with a note: "*to touch your heart as you have touched mine*". Ms Kleina did not want a romantic relationship with the Claimant. She ended the friendship and blocked the Claimant from contacting her on her telephone. Ms Kleina told Mrs Seabourne-Hawkins what had happened, and Mrs Seabourne-Hawkins asked the Claimant not to come to The Cave on Sundays, when Ms Kleina worked there.

17. Matters came to a head in early April 2018. The Claimant says in his witness statement that, by then, his friendship with Ms Kleina had deteriorated and she was not speaking to him. On 6 April 2018, he came to The Cave to speak to Ms Kleina. In his statement, the Claimant describes what happened as follows:

> "Kristina was standing behind a glass counter and I calmly asked if we could speak. She ignored me so I asked, 'is that it?', referring to our friendship. She replied 'yes' and so I said, 'so you are just going to give up on our friendship when I have done absolutely nothing wrong?' Again, Kristina simply replied, 'yes'. I then said, 'well you know what, if that is the case' and began to take my watch off that

> Kristina had given me for my birthday. I threw the watch at waist height onto a desk behind Kristina. This was meant to be a symbolic gesture of our friendship ending. The watch did not make contact with Kristina and I certainly did not throw the watch directly at her… Nothing more was said between Kristina and me. No security was called and Kristina did not appear distressed or upset."

18. In her statement, Ms Kleina described the incident as follows:

> "John came in the shop when I was working, stood in front of my counter, leaned towards me and waved right in my face saying 'hello, are we not speaking?' So I replied 'no, I don't want to talk to you'. John then took off his watch and threw it at me, which landed on the floor. At that moment, I was scared of John as he looked very angry and it seemed as though he would get aggressive so I said, 'if you want to talk, we can do this outside work'. But I didn't talk to him as I said that only because I had customers… so he stormed out of the shop…"

19. Mrs Seabourne Hawkins was not working at The Cave when the incident happened; she was on holiday with the Defendant. In her statement, she said that Ms Kleina telephoned her shortly after the incident and was quite shaken and upset. At Mrs Seabourne-Hawkins' suggestion, Ms Kleina reported the watch incident – and other alleged harassment – to the police on 30 April 2018 (see further [61] below).

20. In July 2018, the Claimant sent a letter to the Admissions Department of Southampton University. Ms Kleina had applied for a place at the University and the Claimant had proof-read a letter of application that she had sent at the beginning of the year. In his letter to the University, the Claimant wrote:

> "Many months ago, Ms Kristina Kleina… asked me to proof read her letter of submission for a place at your University to which I duly pointed out minor spelling mistakes…
>
> In the draft letter shown to me to be sent to you, she stated that she engages in the sport of either volleyball or netball (I think the former but am not 100% certain) and that this was developed her ability to work in a team.
>
> I questioned that she should put this information in her letter as having known her for over a year that that information was a blatant lie and that she has no interest in any sport whatsoever. She replied 'they won't check'.
>
> I sincerely hope that she did not lie on her application supporting letter to gain entry to your University and include the information about actively taking part in sport whilst at college…
>
> If your investigations show that she did lie on her letter, I sincerely hope that your University will take appropriate action, and if she did not lie then I wish her well in her course.
>
> Should you require any further information you can contact me on [number given]…"

21. Ms Foubister cross-examined the Claimant about his motive for sending this letter. She asked him why he had waited until July 2018 before sending his letter. The Claimant said that Ms Kleina had not applied to the University before then. That

answer was wholly unconvincing. In my judgment, the sending of that letter by the Claimant, particularly its timing, was a transparent attempt by him to harm Ms Kleina, almost certainly driven by a desire for revenge and to attempt to cause her harm for the way he felt he had been treated by her; it demonstrates an element of spite and vindictiveness on the part of the Claimant.

Ms Booker's evidence

22. Ms Booker had worked in a neighbouring shop in The Loft Ladder and later in a nearby shop. She knew the Defendant and his wife and the Claimant. In her witness statement, Ms Booker stated that the Claimant had come into her shop on more than one occasion "*bragging that he [had] got someone to lie for him about offering him a job, but because of the allegations that [the Defendant] was supposed to have said, he is saying that they no longer want him.*" Ms Booker also stated that, on one occasion, the Claimant had asked her mother if she would be a witness for him and sign a letter stating that she would not offer him a job as a result of the First Slander. Ms Booker stated that her mother was not prepared to sign any such letter.

23. When she was cross-examined by Mr Owen-Thomas, Ms Booker confirmed that she could not remember precisely when the conversations between her and the Claimant had taken place. Asked to recall further detail of the conversations, Ms Booker said that, on one occasion, the Claimant had come into the shop and said to her that he was "*out to get Sam and Jimmy*". She said that she had reported what the Claimant had said to the Defendant and his wife a couple of days after the incident. Mr Owen-Thomas asked Ms Booker whether she had made any notes of the alleged conversation with the Claimant. She stated she had not, but that she had provided the Defendant's solicitors with a hand-written note of her recollection of the conversation. Mr Owen-Thomas put it to Ms Booker that she was not telling the truth and she had made up the alleged encounters with the Claimant. He suggested to her that she was unable to provide any date on which these events had happened because she realised that the Claimant might be able to demonstrate that he could not have been in the shop on the relevant date. Mr Owen-Thomas even suggested to Ms Booker that the hand-written note she claimed to have sent to the Defendant's solicitors did not exist. Ms Booker stood by her evidence.

24. After a short break, the Defendant's solicitors produced the hand-written note to which Ms Booker had referred in her evidence. Although the document itself was not dated, Paul Brook, the Defendant's solicitor, confirmed in a witness statement provided during the hearing, that he had taken a scan of the hand-written statement from Ms Booker shortly after she had provided it to him. The document was scanned by Mr Brook on 2 April 2019. The Claim Form had been issued some 3 days earlier.

25. Mr Owen-Thomas did not seek to cross-examine Mr Brook on the contents of his statement or to recall Ms Booker for further cross-examination. I permitted Mr Brook's witness statement to be admitted in evidence, given the allegations that had been made against Ms Booker. The Claimant did not oppose this. In the hand-written note, Ms Booker recorded this:

> "John Rayner has come in to my shop on a number of times [bragging] that he has got someone to lie for him about offering him a job, but because of the

> allegations that Jimmy was supposed to have said, he is saying that they no longer want him. He said he would use this to claim more money from them."

The withdrawal of the job offer at *Boutique de Fleur*

26. Ms Dowd was the director and owner of the *Boutique de Fleur* florist shop in Southampton. Her evidence was that, in early February 2018, she had been looking for a part-time delivery driver for her business. On Valentines' Day 2018, the Claimant had worked for her doing deliveries and she had been impressed by him. Later, in March, she said she had discussed with the Claimant whether he might become the shop's full-time delivery driver. She said that she offered him the job on 3 April 2018, and that it was intended that he would take up his position on 8 May 2018. However, she said that, on 20 April 2018, the Claimant had come to her shop and told her that, the previous day, the Defendant had accused him, "*in front of two security guards*", of sexually assaulting a member of the Defendant's staff. She said that the Claimant told her that he felt that it was best to be honest about the accusation as he still wanted the job that Ms Dowd had offered to him. The Claimant told Ms Dowd that the allegation was not true, and, in her evidence, Ms Dowd confirmed that she did not believe the allegation. Nevertheless, she decided to rescind the job offer as, she said, she could not "*take any risk whatsoever of an incident occurring similar to the accusation that had been made*".

27. In his evidence, the Claimant stated that he had gone to the *Boutique de Fleur* on 20 April 2018 "*to discuss work*":

> "I was still very distressed and shaken that such a serious accusation had been made. Sheryl could tell when I walked in that I was upset. She enquired as to what was wrong and I was close to tears as I told her that James had accused me of sexually assaulting a member of his staff and that his accusation had been made in Marlands in front of two security guards and that I had been to the police to report the incident. I felt that I should be honest and upfront about the accusation now that Sheryl was going to be my employer."

28. Ms Dowd was cross-examined by Ms Foubister. Ms Dowd confirmed that she had made the offer of the job to the Claimant on 3 April 2018, but had done so orally; she had put nothing in writing. Asked about that, Ms Dowd said that there was no need for any confirmation of the terms of the job offer until the Claimant had accepted, and they had worked out the terms. Ms Foubister asked Ms Dowd about a letter dated 27 April 2018 that she produced with her witness statement. The terms of the letter were as follows:

> "**Re Job offered on Tuesday 3 April 2018**
>
> Dear John,
>
> After much thought we have decided to withdraw our offer of the full-time job we offered earlier this month that was due to commence on Tuesday 8th May (Monday 7th being the bank holiday).
>
> Even though the work we offered, 40 hours a week at £12.00 per hour plus fuel allowance for deliveries made, with your duties being split between both delivery and office clerical work, it would however have involved you being directly in contact with our customers and suppliers. Because of the impending large

> events/contracts we are undertaking in the near future we cannot take the risk of being even remotely acquainted with any potential scandal in any way at this time.
>
> We thank you for being honest and upfront regarding your current situation and sympathise but due to the statements being made against you, unfortunately we are rescinding the offer we made to you for the position we currently have available.
>
> We apologise for the inconvenience this may cause as we found you to be polite, aware and diligent and knowledgeable and a perfect match for all aspects of the job we offered for our business.
>
> We wish you well in your future employment search.
>
> Yours faithfully,
>
> Sheryl Dowd
>
> Director."

29. Ms Foubister asked Ms Dowd why it was necessary for her to write a letter to the Claimant rather than simply call him. Ms Dowd replied that she felt it needed something more, something that was "*formalised and finalised*". Ms Foubister put it to Ms Dowd that the Claimant had asked her to write the letter of 27 April 2018. Ms Dowd denied that and said the she had been "*advised that [she] needed to make it official*". Asked who had given this advice, she replied simply "*a friend*", without identifying him/her. She accepted that the original offer of the job on 3 April 2018 had been made orally and the terms had not been discussed. Ms Foubister asked what was the point, in the letter of 27 April 2018, of inserting terms that had not been discussed or agreed for a job offer that had been withdrawn. Ms Dowd said that she had wanted to "*finalise things*" and so that she would have a document "*for her records*". Ms Foubister put it to Ms Dowd that the Claimant had written the letter of 27 April 2018 or told Ms Dowd what to write. Ms Dowd denied that.

30. Ms Foubister put it to the Claimant, when he gave evidence, that he had persuaded Ms Dowd to lie for him. The Claimant denied that. Ms Foubister suggested to the Claimant that Ms Booker's evidence showed that he had been bragging about lying about this evidence. The Claimant said he did not accept that. He denied writing the letter of 27 April 2018. Ms Foubister suggested to the Claimant that there was no need for him to mention to Ms Dowd the allegation he said had been made by the Defendant. The Claimant replied that Ms Dowd could have found out, if he had not told her, and that he felt legally obliged to tell her about it.

31. I can state my conclusions on this evidence quite shortly. They bear most significantly on the Claimant's credibility.

32. I am unable to accept the evidence of the Claimant or Ms Dowd as to the rescission of the job offer. The letter of 27 April 2018 is a very odd document. Looked at in isolation – before considering Ms Booker's evidence – the circumstances in which it is said to have come into existence are not credible. According to Ms Dowd (and the Claimant) she had offered the Claimant the job on 3 April 2018, but, on 20 April 2018, told him that she would have to reconsider the offer after the Claimant had disclosed that the allegation of sexual assault that had been made the day before. The original job offer

had been made orally. No terms had been discussed between the two on 20 April 2018. Seven days later, having allegedly been advised to do so by an unnamed "friend", Ms Dowd claims to have sent the letter of 27 April 2018 to the Claimant, rather than simply telephone him. As all previous discussions about the job had been oral, the sending of this letter is odd. The suggestion that such a document was needed to "*finalise things*" or so that Ms Dowd would have a document "*for her records*" is not credible. By far the strangest aspect of this letter is the inclusion of terms of employment that had never been agreed in respect of a job offer that was being rescinded. These details were therefore unnecessary and gratuitous, and their inclusion forced, but, by contrast, they were very important for the purposes of the Claimant's civil claim. Indeed, the letter of 27 April 2018 was duly attached to the letter of claim sent by the Claimant's solicitors on 30 November 2018 to substantiate the Claimant's claim that he had suffered significant financial harm as a result of the First Slander.

33. If Ms Dowd had genuinely withdrawn a job offer she had previously made to the Claimant, there would have been nothing wrong in her recording that fact in a witness statement in which it would have been material to state the likely terms on which the Claimant would have been employed even if these had not been agreed. But Ms Dowd denied having been asked by the Claimant to write the letter of 27 April 2018 and denied that he had written it for her. On her evidence (and that of the Claimant), the letter was unsolicited. I cannot accept that evidence. In his closing submissions, Mr Owen-Thomas accepted that, following the original job offer, the Claimant and Ms Dowd had yet to "*thrash out the terms*", but submitted that I should accept her evidence on the basis that it was perfectly credible that she may have wanted "*to put down such terms as were in her mind*" and "*to close this chapter*"; "*she wanted to communicate it in a formal and complete way*". In her closing submissions, Ms Foubister submitted that the 27 April 2018 letter "*looks like a fabricated withdrawal of a non-existent offer*". I regret to say, I agree. The letter of 27 April 2018 bears the hallmarks of manufacture; it even includes the same phrase "*honest and upfront*" that appears in the Claimant's witness statement.

34. Then there is the evidence of Ms Booker. Having seen Ms Booker cross-examined, and her reaction to it being suggested to her that she was lying in her account of the Claimant having come into her shop, more than once, "*bragging*" that he had got someone to lie for him to state, effectively, that he had lost a job because of the First Slander, I am quite satisfied that Ms Booker was telling the truth. Her account is corroborated by the written note she sent to the Defendant's solicitors. The allegation that she has manufactured this account is fanciful.

Issue 1: Did the Defendant make the alleged statement in relation to the First Slander?

Publication: the law

35. In any defamation action, the claimant bears the burden of demonstrating that the defendant published the allegedly defamatory statement to a third party. The standard of proof is the balance of probabilities.

36. In a slander action, where the defendant does not admit publication, the claimant must prove, by evidence, the precise words spoken by the defendant. In ***Bode -v- Mundell* [2016] EWHC 2533 (QB)**, Warby J explained the requirements as follows:

[12] Two requirements of defamation law are central to the defendant's application. The first is that precision in the pleading and proof of publication, including the actual words used, is always essential. It is not enough to plead or prove the gist or substance of what was said. In libel this is rarely a problem. In slander, it often is. A recent example is ***Umeyor -v- Ibe*** **[2016] EWHC 862 (QB)**, where the claimant failed to plead or prove a proper case on publication.

[13] The pleading requirement is set out in CPR 53 PD 2.4 [now see CPR 52 PD 53B §4.1(2) and §4.2], which provides that

> "In a claim for slander the precise words used and the names of the persons to whom they were spoken and when must, so far as possible, be set out in the particulars of claim if not already contained in the claim form."

This is no more than a reflection of a long-established principle, that the precise words used must be pleaded "in order that the defendant may know the certainty of the charge and be able to shape his defence": ***Cook -v- Cox*** **(1814) 3 M & S 110, 113** (Lord Ellenborough), cited in *Gatley on Libel & Slander* 12th ed. para 26.13. The words "so far as possible" in the Practice Direction have not qualified that principle: ***Best -v- Charter Medical of England Ltd*** **[2002] EMLR 18** [7] (Keene LJ).

[14] For the same reasons, a claimant has to *prove* publication of particular words at the trial. *Gatley* puts in this way:

> "32.13 **Action for slander.** Where there is no admission by the defendant that he spoke the words complained of or words to like effect, the claimant must call evidence of what the defendant said and of who heard him. The actual words spoken must be proved; it is not sufficient for witnesses to state what they believe to be the substance or effect of the words, or their impression of what was said. The burden is of course on the claimant to do so."

[15] The reference here is to witnesses, but of course the best evidence will be a recording. In this action, as will be seen, the claimant has no recording, nor any witnesses to the alleged slander. His case relies on inference from documents he obtained some months after the alleged slanders.

[16] These requirements are not mere technicalities. As explained by Keene LJ in the passage cited from ***Best***, the actual words used are critical because everything else flows from the words: meaning, whether defamatory, defences and damages. See also ***Umeyor*** at [39].

Publication: the Claimant's case

37. The Claimant's pleaded case is that the Defendant published the words – "*You need to sort him out because he has sexually assaulted a member of our staff*" – to "*Mr Martin Barfoot, and others whose names are unknown to the Claimant*" (see [5(i)] above). His case at trial widened to allege publication to both Mr Barfoot and a second security officer, Dorin Teodorescu.

Publication: the evidence

38. The key evidence relating to the incident on 19 April 2018 is:

    i) the evidence of the Claimant;

    ii) the evidence of the Defendant;

    iii) an "Incident Report" compiled on 19 April 2018 by Martin Barfoot, the security officer at the Marlands Shopping Centre; and

    iv) CCTV footage (and stills taken from it) of at least the initial stages of the confrontation between the Claimant and the Defendant, albeit the footage is not very good quality and has no sound.

39. It is common ground between the parties that the two security officers who can be seen in the CCTV footage are Mr Barfoot and Mr Teodorescu. In his evidence at trial, the Claimant said that both Mr Barfoot and Mr Teodorescu had heard what he claims the Defendant said. Mr Barfoot and Mr Teodorescu were not called to give evidence, by either party.

40. The Defendant's solicitors sent Mr Barfoot two letters – dated 17 July 2019 and 5 September 2019 – asking him whether he would provide a statement setting out what he recalled about the incident between the Claimant and Defendant on 19 April 2018. A letter from Mr Barfoot, dated 12 December 2019, has been admitted by agreement of the parties. In it, Mr Barfoot says:

> "I have been approached on multiple occasions by both parties in relation to the events of 19/04/2018 and my recollection of the event in regards to what was said by both Mr Seaborne-Hawkins (sic) and Mr Rayner during their altercation.
>
> Due to the time that has passed since the 19/4/2018 and the numerous incidents and people I have dealt with in both my work life and personal life in that time, I am unable to accurately recall the event in its entirety in regard to alleged comments made by either party. In 2018 in the time immediately following the incident, when the event was fresh in my mind, I may have had recollections of what had been said, however now that it has been over a year since the incident so I cannot 100% confirm the alleged comments made by either party.
>
> I submitted a factual incident report on the day of the incident which was sufficient with my employer at the time. I am aware that both parties have a copy of this report which stands as my statement in relation to the incident. I therefore feel that any other recollection of the incident on the 19/4/2018 that I may have could possibly have been influenced by hearsay, 3rd party versions of the event or other factors.
>
> I would like to add that considering I am being referred to as a witness in this case, I have only been contacted by legal representatives from either side very recently…
>
> As I have made clear in both this statement and phone conversations with Mr Mathew Howe [Claimant's solicitor] I am unable to remember anything in regards to what was said on the date of the incident, if called as a witness I will

> still be unable to remember what was allegedly said by either party and that questioning and evidence that may be shown will not have any impact on whether I remember anything.
>
> The event was so long ago and has no relevance in my life for it to be important enough to recall in exact detail. I have been told by Mr Howe that his client believes that me being questioned in court might jog my memory and make me remember. I am certain this will not be the case and in a way I interpret this as an attempt to pressure me into incorrectly recalling the events of the day in question.
>
> In closing I will say that if I am asked to court to appear as a witness I will still 100% be unable to remember any alleged comments made by either party and will be of no use to either party involved in this case."

41. Mr Barfoot's letter, which I consider genuinely expresses his position, might stand as a warning to any claimant considering bringing a claim for slander of the risk of fading memories. Had he been approached, and asked for his recollection of events, shortly after 19 April 2018, Mr Barfoot may have been able to provide evidence of what had taken place and, critically, what had been said between the two men. As it was, Mr Barfoot was apparently not approached until mid-2019. Those contemplating slander actions would be well advised to prioritise the gathering of evidence in support of their claim whilst events are still fresh in witnesses' minds.

42. I do not have an equivalent letter from Mr Teodorescu. Asked about this in his evidence by Ms Foubister, the Claimant confirmed that Mr Teodorescu had refused to give a statement. On 20 December 2019, a witness summons was issued, on the application of the Claimant, directing Mr Teodorescu to attend the trial and give evidence. I am told that the witness summons was not served on Mr Teodorescu by the Claimant. I do not know whether Mr Teodorescu is in the same position as Mr Barfoot and I do not know, had he been called to give evidence, what he would have said. As a result, and as Mr Owen-Thomas recognised in his closing submissions, the issue of publication depends largely upon an assessment of the Claimant's word against that of the Defendant.

43. The CCTV footage (and stills) cannot assist as to what was said. There is a dispute in the evidence of what was said at what point in the footage, and the CCTV has no sound. There is therefore no value in engaging in speculation of whether, if the words were spoken at one point in the footage, they could have been heard by one or more of the security officers. The Claimant, when he was giving evidence, seemed to me to be prone to advancing theories about what could have been heard by the security officers. This was simply speculation. It is no substitute for evidence from the people who were actually present, which I do not have.

44. What the CCTV footage does demonstrate is that there was an argument between the Claimant and the Defendant outside the management office doors. Both Mr Barfoot and Mr Teodorescu are present, and Mr Barfoot makes efforts to keep the two men apart. The Defendant turns to walk away. As he is moving through the doors, the Claimant appears to direct a remark at the Defendant (who at this point has his back to the Claimant). The Defendant immediately turns around, drops his bag, and seeks to pursue the Claimant through the doors, but is prevented from doing so. At this point, Mrs Seabourne-Hawkins arrives. Remarks appear to be directed through the door

(presumably to the Claimant). Mrs Seabourne-Hawkins is allowed to go through the doors. She is inside for some 25 seconds before coming back out to join her husband. The CCTV shows the Defendant and Mrs Seabourne-Hawkins talking with Mr Teodorescu for around 10 minutes.

45. Mr Barfoot's report was completed by him on 19 April 2018 ("the Incident Report"); so shortly after the incident. He recorded the following:

> "Date and time of incident: 17.45 19.04.2018
>
> Location of incident: First floor between Loft Ladder and Management
>
> Nature of incident: Disagreement between 2 tenants
>
> Factual description: Control called for security to go to the Loft Ladder because there had been a report of a disturbance involving 2 tenants of the Loft Ladder, Myself (S4) and [redacted, but assumed to be Mr Teodorescu] (S4) made out way [to] the first floor and when we arrived Jim Seabourne Hawkins (The Cave) and John Rainer [sic] (the little Indian Bazaar) were in the middle of a loud aggressive exchange outside of the 1st floor mirror doors. I managed to separate the 2 of them and sent Jim out to the shop floor to wait with [redacted] whilst we found out what the dispute was about. After another exchange the 2 men were separated again, once we had been told what the incident was about John and Jim were both advised to avoid each other and seek help from the police in dealing with this issue. Police were not called for this by security."

46. In his witness statement, the Claimant described the incident, and the immediate run up to it, as follows. He had been standing outside The Loft Ladder with the Defendant, Mrs Seabourne-Hawkins and Steven Wright, another shop owner at the Shopping Centre. Mrs Seabourne-Hawkins had told the Claimant not to come "*into her space*" and said, "*you are not allowed to speak to Kristina*". The Claimant replied, "*you do not have the right to tell me who I can and cannot speak to and that if Kristina doesn't want to talk to me it is for Kristina to tell me that, not you, you are not her mother and I can speak to whoever I want.*"

47. The Claimant stated that it was at this point that the Defendant began to walk away, but then turned back and said: "*you're scum*". The Claimant said that he asked him: "*what did you just call me?*" The Claimant then said something to Mrs Seabourne-Hawkins, and the Defendant interrupted to state: "*just do as you are told*". At this, the Claimant said that he began to walk away and said that he was going to "*sort this out*" with the management of the Marlands Shopping Centre.

48. In his statement, the Claimant then explains what happened next by reference to stills from the CCTV footage. The material part of the Claimant's evidence is this passage:

> "Just as we passed Rock-Bottom toy store, we were approached by security officer Dorin Teodorescu ("Dorin"), who was closely followed by another security officer, Martin Barfoot ("Martin"). Dorin asked both James and I what was going on. A still from the … CCTV [shows] Dorin in a high visibility jacket approaching me…
>
> It is then that James pointed towards me and stated, 'that man needs sorting out as he has sexually assaulted a member of our staff'. I quickly turned around to exclaim, 'no I have not' and then immediately turned and continued towards the management office. [There is] a CCTV still showing this phased of the interaction…"

49. A point made by Ms Foubister, when cross-examining the Claimant, was that the CCTV stills - identified by the Claimant as depicting the moment that he claimed the Defendant spoke the words - show that only Mr Teodorescu was present. Mr Barfoot is seen arriving a short time afterwards. The Claimant, in his Particulars of Claim, had not named Mr Teodorescu as having been one of the persons who heard what the Defendant was alleged to have said.

50. In cross-examination, Ms Foubister asked the Claimant why there was no mention of the other security officer in his letter of claim. The Claimant responded that he had not written the letter and had only been given a copy of it on the morning of the trial.

51. In his letter of claim, dated 30 November 2018, the Claimant's solicitors described the incident, as follows:

> "On the 19th April 2018, our client was walking through The Marlands Shopping Centre… when you approached a security guard, Martin Barfoot… You made an allegation to Mr Barfoot, out loud in front of other shoppers, that our client had sexually assaulted Kristina Kleina, [an] employee who works for you…"

I note that in the subsequent Particulars of Claim, it was not claimed that the Defendant had named Kristina Kleina; rather it was claimed that he had sexually assaulted "*a member of our staff*".

52. Ms Foubister then asked the Claimant about the following paragraph in his witness statement:

> "James, Dorin and Martin followed me until we were all standing outside the doors of the management office. Martin enquired as to what had happened. I explained that James had just accused me of sexual assaulting (sic) a member of his staff [and he identifies a still from the CCTV when this conversation happened]."

She suggested to the Claimant that it was he who had told Mr Barfoot what the Defendant had said. The Claimant responded, "*no he had already heard it*" and added "*he asked me again when we were behind the closed doors*".

53. The Claimant's account and his evidence on this point has been inconsistent and is not convincing. In my view, assessed overall, the letter of claim, the Particulars of Claim and the Claimant's witness statement strongly suggest that, by 30 November 2018, the Claimant did not have a clear recollection of the events and particularly what the Defendant had said. Rather than be candid about that, in his witness statement, with the

aid of CCTV that had been obtained, he has sought to reconstruct events rather than give his genuine recollection of them.

54. In relation to the aftermath of the First Slander, after he had entered the management offices (as described in [44] above) the Claimant said this in his witness statement:

> "James then attempted to follow me through the doors but was prevented from doing so by Dorin. This is shown by the CCTV … Samantha then joined James and both gestured and shouted at me through the glass doors, whilst I was explaining to Martin everything that had just occurred… I sat in the management office with Claire [Claire Heaven, the administrator of the Marlands Centre] in complete distress, attempting to fight back tears. I simply could not believe that James had made such a serious accusation which was completely untrue. An incident report was written by Martin… The incident report records that I was advised to seek police advice in relation to the accusations made about me. Later that evening I went to Southampton Central Police Station and spoke to PCEO Wicks seeking advice on the accusation. He advised me it was a civil matter."

55. What emerges from this passage is that, on the Claimant's evidence, there were two more people who could have corroborated his, near-contemporaneous, complaint that the Defendant had accused him of sexual assault: Claire Heaven and PCEO Wicks. The Court has no evidence from either of them, despite the obvious potential importance of their evidence in supporting the Claimant's account.

56. The first contemporaneous documentary record of the claim that the Defendant had alleged that the Claimant was guilty of sexual assault is in a text message sent to Ms Kleina on 22 April 2020:

> "Just so you know Jim and Sam are saying I sexually assaulted you, so unless you can prove that I suggest you get them to write me an apology or expect a visit from the police."

The Claimant followed that text with four further text messages:

> "You have 24 hours"
>
> "You now have 23 hours"
>
> "You now have 22 hours"
>
> "Don't think I will stop counting – you now have 21 hours"

57. The Claimant relies upon the first of those messages as providing corroboration of his claim that the Defendant had made an allegation of sexual assault, but this text message does raise further questions.

    i) First, there is no suggestion anywhere else in the case that Mrs Seabourne-Hawkins had made such an allegation. When cross-examined, the Claimant accepted that the reference in this text message to Mrs Seabourne-Hawkins making an allegation that he had sexually assaulted Ms Kleina was not true.

ii) Secondly, the reference to the police is inconsistent with the Claimant's evidence. In the section of his witness statement set out above ([54]), the Claimant said that he had reported to the police in the evening of 19 April 2018 the false accusations made against him by the Defendant, but was told that it was a civil matter. It was highly unlikely, therefore, that the Defendant (or his wife) could expect a visit from the police.

58. In his witness statement, the Defendant gave a similar description of the events that took place outside The Loft Ladder. He says that after the Claimant had told Mrs Seabourne-Hawkins that she could not tell him to whom he could speak, he (the Defendant) stepped forward and pointed his finger at the Claimant and said, "*you will not talk to her. You assaulted her last week when you threw your watch at her.*" After some further words, the Defendant said that he told his wife, "*come on, let's go, he's scum*". In response, the Defendant said that the Claimant ran towards him with clenched fists and came right up to his face. The Defendant said, "*get out of my face, your breath stinks*". The Claimant, he said, then stepped back a few paces and shouted, "*I'm going to the management.*"

59. In her witness statement, Mrs Seabourne-Hawkins gave a similar account. In particular, she confirmed that her husband had said to the Claimant: "*you will not talk to her [Kristina]. You assaulted her when you threw a watch at her and we're going to the police about you.*"

60. Mr Owen-Thomas did not suggest to either the Defendant or his wife that it was not correct that the allegation made by the Defendant in the incident outside The Loft Ladder was that the Claimant had assaulted Ms Kleina by throwing the watch at her.

61. The Claimant was interviewed by police on 16 July 2018. This was a voluntary interview, under caution, in connection with allegations of harassment and assault made against the Claimant by Ms Kleina and Mrs Seabourne-Hawkins (respectively referred to as KK and SS in the transcript of the interview). During this interview, the Claimant mentioned the events that led to the First Slander. He said this:

> "SS and her husband then walked out and walked to the lifts and I was still speaking with [Steve Wright] and SS turned around and came to where I was and said 'KK is working tomorrow, and I don't want you to go anywhere near my shop and speak to KK at all. SS's husband then comes over and calls me scum. I then asked SS's husband what he called me and then he responded by saying you heard and then we both squared up to each other but there was no physical contact… I then suggested that we go to the Marlands management office to sort this out and I started to walk towards there. SS's husband was then confronted by a security guard who asked what is happening and he pointed to me and stated that I had sexually assaulted a member of his staff. I requested [that they] keep the discs of evidence etc. and I paid £10 to get it."

The Claimant was informed by the police on 13 August 2018 that no action would be taken against him in connection with the alleged harassment/assault.

62. When he was cross-examined, the Claimant accepted that, if the Defendant or his wife had thought that he had sexually assaulted Ms Kleina, they would have reported the incident to the police. Neither had done so.

63. As to the First Slander, the Defendant's evidence in his witness statement was:

> "… John and myself started to briskly walk down towards the manager's office side by side. I told John that he was just a trouble maker, to which John replied the he wasn't and I said 'yes you are, look at you you're causing trouble now.' I then said again 'you're a troublemaker'.
>
> John started to turn to face me, at this point there were two security guards, Mr Martin Barfoot and another security guard called Dorin with us. Martin stepped in front of John with his hands on his shoulders directing him backwards through the mirrored doors. I was stood outside of the Rockbottom toy store with Dorin approximated 15ft from the doors. As Martin and John went through the doors, John shouted extremely loudly over the shoulder of Martin 'you wanna tell your wife to stop drinking piss'. It was loud enough for the whole shopping centre to have heard. I was extremely distressed at this outburst and I want around Dorin. He tried to stop me, but didn't physically touch me at all. I went over to the doors and opened it. Martin appeared to be restraining John against the back wall with his hands still on his shoulders.
>
> I then quite loudly said 'how dare you shout something like that, what the hell has that got to do with anyone, you're disgusting'. At this time, my wife had come down to the office and I turned to her and said 'you want to hear what he just shouted about you, he said you need to stop drinking piss'. My wife then approached the doors and said to John, 'you're a pest John'. He said he wasn't, then she said, 'Kristina just wanted you to leave her alone and you keep pestering her, that makes you a pest.' She then turned and walked the opposite way and didn't reply about what he said about her…
>
> I would like to make clear that I have never made the statements that were attributed to me in the Claimant's pleadings. I never accused John of sexually assaulting Kristina Kleina, I only ever said that he was not to speak to her as he had assaulted her by throwing the watch at her. I did not say this in front of any security guards…"

64. In his cross-examination, Mr Owen-Thomas suggested to the Defendant that he thought that the Claimant's interest in Ms Kleina was sexual and that, because of the substantial age difference between them, it was inappropriate. The Defendant did not accept that. He said that he did not know what sort of relationship the Claimant had with Mr Kleina; he had become concerned when it became apparent to him that the Claimant was not respecting Ms Kleina's request that the Claimant should leave her alone and not speak to her. The Defendant denied that he had made any allegation to the security officers, in the argument that took place outside the management offices, that the Claimant had assaulted Ms Kleina. He reiterated that he had told the Claimant, earlier, outside the shop, that he had assaulted Ms Kleina by throwing the watch at her.

65. During cross-examination, the Defendant repeated that the Claimant had made the disparaging remark about his wife as the Claimant had gone through the doors to the management offices. Having reviewed the CCTV footage, I consider that the Defendant's reaction is certainly consistent with, and generally supports, the Defendant's evidence on this point. The Defendant did accept that he was speaking with Mr Teodorescu for some time – he estimated 10 minutes – after the Claimant had gone into the management offices and that "*a lot was said during those 10 minutes*".

Questioned by Mr Owen-Thomas, the Defendant confirmed that he had mentioned the watch incident "*in general terms*" during this period. He agreed that he thought that "*something needed to be done*" about the Claimant: "*I thought he needed to be told to stay away from us*".

66. The Defendant's witness statement deals with several other matters relating to the dispute with the Claimant, but it also contains the following account of an incident on 13 December 2018 (i.e. some 2 weeks after the letter of claim had been sent to the Defendant by the Claimant's solicitors – see [51] above):

> "… I received a phone call from Gavin, who is a colleague in the loft ladder. He told me that John had called him out of the shop to the balcony area where he stands to show him court papers and he told Gavin that he was taking us to court and it was going to cost us over £100,000. John would have known that Gavin would inform is of this encounter, and I believed that it was just a scare tactic to try and intimidate us into paying him money.
>
> Gavin also told us that John had said to him that if you add sexual to the charge it has to be taken more seriously. Gavin refused to be a witness, as he is frightened and alarmed by John's overall behaviour."

67. The evidence of what was said by Gavin is, of course, hearsay. He has not been called to give evidence and his evidence has therefore not been tested. Mr Owen-Thomas did not challenge the Defendant's evidence of what Gavin had said. Ms Foubister did cross-examine the Claimant about this issue. The Claimant denied that he had told Gavin that adding "*sexual*" to the allegation would lead to it being treated more seriously. He did accept, however, that, in a defamation case, an allegation of sexual assault was likely to be regarded more seriously by the court.

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68. Having considered the evidence, my conclusion is that the Claimant has failed to prove, on the balance of probabilities, that the Defendant spoke the words alleged to constitute the First Slander. On the evidence, I am satisfied that the Claimant has invented the claim that the Defendant alleged that the Claimant was guilty of sexual assault. My reasons for my conclusions follow.

69. I think it is inherently implausible that the Defendant would have made an allegation of sexual assault against the Claimant. Although the Defendant considered that, by throwing the watch at Ms Kleina, the Claimant had assaulted her, he did not consider that it was a sexual assault. An allegation of sexual assault, if made by the Defendant, would have been a fabrication by him. Having seen the Defendant give evidence and be cross-examined, I do not consider that the Defendant would have manufactured such an allegation; and no plausible explanation has been advanced for why he would do so.

70. If the Defendant had made an allegation of sexual assault against the Claimant in the hearing of one or both of the security officers, then I am satisfied that certain things would have happened in consequence. First, having seen him give evidence, I am sure that the Claimant would have been incensed by it. It was not something, in my judgment, he would have let go. This expected reaction is not consistent with evidence of what did happen.

71. The CCTV footage shows that it is the Claimant who goes through the doors of the management area. By this point, the Claimant's evidence is that Defendant had made the allegation of sexual assault. The allegation is that the Defendant had said the words: "*You need to sort him out*". In context, that can only have been directed at the security officers. In other words, the Defendant was seeking to raise the allegation of sexual assault with the security officers. Yet, the Defendant did not follow the Claimant into the management offices to pursue this complaint. He waited outside for a while, before leaving with his wife.

72. In his police interview, the Claimant did say that he took immediate steps to obtain "*the discs of evidence*". If that was a reference to the CCTV recording of the incident during which the First Slander was alleged to have been spoken, then that appears to demonstrate a clear recognition by the Claimant of the need to gather evidence of what had happened. Much the more important evidence to obtain was that of the two security officers: Mr Barfoot and Mr Teodorescu (and also the supporting evidence of the recent complaint from Claire Heaven and PCEO Wicks – see [55] above). There is no corroboration of any allegation of sexual assault in the Incident Report. In my assessment, if he had been accused sexual assault, in front of the two security officers, the Claimant would have taken immediate steps to try to gather evidence of what the two security officers had witnessed and heard. He did not do so in the immediate aftermath. So far as the evidence demonstrates, the first efforts to contact Mr Barfoot were not made until mid-2019. Although Mr Barfoot has stated that he cannot recall the incident and what was said, I consider that, as a matter of generality, the more serious an allegation that is made, the more likely it is that a person hearing it would remember it. An allegation of sexual assault – had it been made – would have been very serious. If it had been made, I consider that Mr Barfoot would likely have recorded it in his Incident Report and second, I consider that, even after the passage of time, it is likely that he would have remembered it.

73. No evidence has been provided from Mr Teodorescu, Ms Heaven, or PCEO Wicks to corroborate the Claimant's evidence.

74. Further, had an allegation of sexual assault been made as alleged in the First Slander, I would have expected the Claimant to have confronted the Defendant about it very shortly afterwards. There is no trace of any such complaint from the Claimant about what would have been a serious and baseless allegation. I am quite satisfied, having seen him give his evidence, that the Claimant simply would not have left the matter there. There is no evidence of challenge of the Defendant by the Claimant. On the evidence I have, the first time the Claimant confronted the Defendant with the claim that he had made an allegation of sexual assault against the Claimant appears to be in the letter of claim sent on 30 November 2018, over six months later.

75. Finally, I am satisfied that the Claimant has sought to manufacture evidence of the loss of a job at the florist shop and there is evidence, albeit hearsay, of the Claimant manufacturing the allegation of sexual assault. The evidence of Ms Booker – which I accept – not only supports the conclusion of manufacture of the evidence of the lost job at the florists – it also shows that the Claimant said he was "*out to get*" the Defendant. This motivation is also corroborated by the (albeit hearsay) evidence from Gavin, that the slander action against the Defendant was going to cost the Seabourne-Hawkins "*over £100,000*". That evidence, in turn, is also consistent with the vindictive

attempt to jeopardise Ms Kleina's application for a place at Southampton University (see [20]-[21] above).

76. In the final analysis, I cannot and do not believe the evidence given by the Claimant that the Defendant spoke the words alleged to form the First Slander. I can and do accept the Defendant's denial of having done so.

77. The consequence of this finding is that the Claimant's claim will be dismissed. It is not necessary for me to decide the other issues, although the factual findings I have made would likely also have disposed issues (ii)(b) and (c) (see [9] above) in the Defendant's favour.