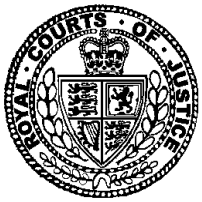

Neutral Citation Number: [2021] EWCA Civ 1006

Case No: A2/2020/1997

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(MEDIA & COMMUNICATIONS LIST)
The Honourable Mrs Justice Tipples
[2020] EWHC 2951 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2021

Before :

LORD JUSTICE POPPLEWELL
LORD JUSTICE DINGEMANS
and
LADY JUSTICE CARR

- -

Between :

TONY GREENSTEIN	**Appellant**
- and -	
CAMPAIGN AGAINST ANTISEMITISM	**Respondent**

- -
- -

David Mitchell (instructed by **Public Access Scheme**) for the **Appellant**
Adam Speker QC (instructed by **RPC LLP**) for the **Respondent**

Hearing date : 24 June 2021

- -

Approved Judgment

Lord Justice Dingemans:

Introduction

1. This is an appeal by Tony Greenstein against an order of Tipples J. ("the judge") dated 11 November 2020, following a judgment dated 6 November 2020 [2020] EWHC 2951 (QB), striking out particulars of malice pleaded in paragraph 26 of the amended reply, among other determinations. Judgment was then entered in favour of the Campaign Against Antisemitsm ("CAA") in respect of a claim for libel. The limited issue on the appeal for which permission has been granted is whether the judge was right to strike out the plea of malice set out in paragraph 26 of the amended reply.

The reference to the spent convictions

2. The claims made by Mr Greenstein arose in respect of the publication of five articles on the website "antisemitism.uk" dated 26 February 2017, 30 July 2017, 25 September 2017, 3 January 2018 and 24 January 2018. The first article was headed "Tony Greenstein's attempt to shut down Campaign against Antisemitism showcases the similarities between far-left and far-right". It was published in response to a public petition by Mr Greenstein demanding that the Charity Commission remove CAA's charitable status.

3. The meaning of the five articles was determined by Nicklin J. in a judgment dated 15 February 2019, [2019] EWHC 281 (QB). It is not necessary to set out those meanings in this judgment.

4. So far as is relevant the first article highlighted Mr Greenstein's petition and then made a series of points against Mr Greenstein. The article referred to previous convictions of Mr Greenstein, which were spent convictions pursuant to the provisions of the Rehabilitation of Offenders Act 1974 ("the 1974 Act"). The spent convictions were included in a paragraph which started "Mr Greenstein is not above lying" and reference was made to two statements made by Mr Greenstein which were said to be lies. The article continued:

> "In this context, then, it is entirely relevant to mention that Mr Greenstein has criminal form for brazen deception, having past convictions for credit card theft and subsequent use, vandalism, drug possession and a number of other petty crimes."

5. In the amended defence it was pleaded that these allegations of fact were true. This is because Mr Greenstein, when he was about 30 years old, had pleaded guilty at Brighton Magistrates' Court to stealing a credit card and using it to obtain toys worth £46. Seven other offences of dishonestly obtaining goods to the value of £200 were taken into account. Mr Greenstein had also pleaded guilty to damaging a photocopier and possession of cannabis. He pleaded guilty to another offence of possession of cannabis a year later.

6. Although these matters of fact were admitted in the amended reply, it was denied that the CAA was entitled to rely on the defence of truth. This was because the convictions were spent, within the meaning of the 1974 Act, and it was pleaded that the spent convictions were published maliciously in the article.

The relevance of malice to the defence of truth and spent convictions

7. Section 8(3) of the 1974 Act provides that nothing in section 4(1) of the Act (which relates to the effect of rehabilitation when convictions have become spent) shall prevent a defendant from relying on a defence of truth "subject to subsections (5) and (6) below".

8. Section 8(5) of the Act provides that a defendant may not rely on a defence of truth "if the publication is proved to have been made with malice".

9. In these circumstances if Mr Greenstein can show that the publication of the spent convictions in the article was "made with malice", the CAA would not be able to rely on the defence of truth.

The test for malice

10. The common law test for malice was considered by the House of Lords in *Horrocks v Lowe* [1975] AC 135. This was a case arising from words spoken by one councillor about another councillor in a council meeting, which was an occasion attracting qualified privilege. The trial judge found that the councillor honestly believed that what he had said in the meeting was true but had become so anxious to have the other councillor removed from a Committee that he did not consider fairly and objectively whether the evidence he had in his possession justified his conclusions or comments, see page 144c. This meant that the statements were published maliciously and the defence of qualified privilege failed. The Court of Appeal allowed an appeal by the defendant, and the House of Lords upheld the decision by the Court of Appeal.

11. So far as is relevant to the test of malice in this case Lord Diplock referred at 150f-g to malice being proved where "the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames." Lord Diplock gave as possible examples of malice: a desire to obtain a private advantage, see page 150g; and the incorporation of irrelevant defamatory matter, see page 151g.

12. Lord Diplock had earlier warned at page 150d-e, in the context of considering whether a person held an honest but unreasonable belief, that "in ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value … they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach". In relation to the inclusion of irrelevant matter Lord Diplock emphasised that the test was not whether it was "logically relevant" but whether the defendant had "seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite or for some other improper motive", see page 151g-h.

13. In *Herbage v Pressdram Ltd* [1984] 1 WLR 1160 there was a publication of articles which referred to spent convictions. Griffiths LJ confirmed that "malice" for the purposes of section 8(5) of the 1974 Act meant that the convictions had been "published with some irrelevant, spiteful or improper motive", adapting the test set out in *Horrocks v Lowe* to section 8(5) of the 1974 Act.

14. In *KJO v XIM* [2011] EWHC 1768 (QB), Eady J explained that to advance a plea of malice for the purposes of the 1974 Act "any plea of malice, therefore, would have to be advanced on the alternative ground, canvassed by Lord Diplock in *Horrocks v Lowe* [1975] AC 135, that the defendant, while knowing the words to be true, published them with the dominant motive of injuring the claimant's reputation. That is almost untrodden territory in the (more usual) context of qualified privilege ….".

The pleading of malice

15. An allegation of malice is an allegation of dishonesty and should not be lightly made, see Duncan and Neill on Defamation, Fifth Edition, at 19.18. The rules of pleading allegations of malice are therefore strict. Practice Direction 53B requires at paragraph 4.8(2) that where a claimant alleges that a defence is not available because of the defendant's state of mind "the claimant must serve a reply giving details of the facts and matters relied on". A pleading of malice "requires a high degree of particularity", see *Thompson v James* [2013] EHWC 585 (QB) at paragraph 16.

16. Where the claimant is relying on an inference, the claimant must allege specific facts from which it is alleged the inference is to be drawn, see generally Gatley on Libel and Slander, Twelfth Edition, at paragraph 28.6. The pleaded particulars must be more consistent with the existence of malice than with its non-existence, see *Bray v Deutsche Bank AG* [2008] EWHC 1263 (QB); [2009] EMLR 12 at paragraph 35. This is because otherwise the particulars cannot prove malice. Mere assertion will not be sufficient.

The relevant allegation of malice

17. The allegation of malice is pleaded in paragraph 26 of the amended reply in the following terms:

> "26. … the defendant was actuated by an irrelevant, spiteful or improper malice which was the dominant purpose for the publication. Whilst the defamatory article is unattributed and the defendant has not disclosed the author(s), if required to specify a person for the purposes of section 8(5) , Rehabilitation Offenders Act 1974 , the claimant identifies the defendant's chief executive, Mr Falter.
>
> Particulars
>
> (1) The defendant's motive was to smear the claimant as a criminal.
>
> (2) The claimant's convictions were for summary-only offences. They were over thirty-years-old. The current period of rehabilitation under section 5 of the Rehabilitation of Offenders Act 1974 is 12 months from the date of conviction. For decades the claimant has been a rehabilitated person within the meaning of section 4 of the Act who was to be treated as though he had "not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction".

(3) These historic, spent convictions were part of the claimant's private life.

(4) The defendant did not refer to the fact that these convictions were spent or that the claimant was protected by the provisions of the Rehabilitation of Offenders Act 1974. The defendant can be taken to have known about these provisions and deliberately ignored them. It proclaims its legal activism concerning the criminal law at paragraph 1.13 of the article as well as at paragraph 13.3 of the amended defence.

(5) Moreover, its reference to the claimant's historic and spent convictions at paragraph 1.11 of the article was gratuitous and irrelevant to the subject matter of the article. It was followed by an equally gratuitous and irrelevant smear suggesting he was a misogynist. The defendant's dominant purpose was character assassination.

(6) The defendant has falsely claimed at paragraph 15.3 of its amended defence that the claimant was accusing it of lying and denying that he was an anti-semite. The claimant did neither. The allegations of both lying and anti-semitism were levelled by the defendant against him, without any advance warning, for the first time in its article.

(7) The claimant repeats paragraph 22 above."

18. Paragraph 22 of the amended reply was as follows:

"22. Further or alternatively, in publishing the words complained of the defendant its servants or agents) did not hold the opinion that the claimant was an anti-semite. Whilst the defamatory articles are unattributed and the defendant has not disclosed their author(s), if required to specify a person for the purposes of section 3(5) Defamation Act 2013, the claimant identifies the defendant's chief executive, Mr Gideon Falter:

Particulars

(1) The defendant acted in retaliation and out of spite following the claimant's change.org petition dated 6 February 2017 and complaint to the Charity Commission dated 8 February 2017 seeking that the Charity Commission deregister it.

(2) The defendant maliciously referred to the claimant's historic and spent convictions. The claimant refers to paragraph 26 below.

(3) In spite of its close interest in the claimant and his history of political activism the defendant deliberately omitted any reference to his lifetime's work opposing racism including anti-

> semitism. The claimant repeats paragraph 12.2 to 12.5 above and refers to paragraph 28 below.
>
> (4) The defendant deliberately distorted and misapplied the working definition [the IDA definition] against the claimant. The claimant repeats paragraphs 5.1 and 5.2 above.
>
> (5) The defendant is inconsistent, hypocritical and opportunistic in its purported policing of anti-semitism, deliberately ignoring acts of anti-semitism committed by its political allies, particularly when perpetrated against its political opponents, including the claimant. It ignored the claimant's following complaints of genuine anti-semitism …
>
> (6) The defendant is dishonest or reckless as to the truth in alleging anti- semitism against its targets: … [The claimant then alleges that (a) in 2009 Mr Falter made a false accusation against Mr Rowan Luxton, a senior civil servant and Head of the Foreign Office's South Asia desk; (b) in 2017 the defendant deliberately misrepresented tweets of the newly-elected Palestinian Vice President of the University of Exeter's Students' Guild, Ms Malaka Shwaikh; (c) Mr Falter falsely alleged anti- semitism against Dr Gould in an attempt to force the University of Bristol to dismiss her; (d) in 2017 the defendant made false accusations against Jackie Walker]."

The judgment below

19. CAA applied, among other applications for reverse summary judgment and strike out, to strike out paragraph 26 of the amended reply. The judge set out the relevant tests for malice and the relevant paragraph of the amended reply. The judge recorded that Mr Greenstein contended that his malice plea was properly pleaded and particularised. The CAA submitted that the plea was hopeless and that the pleadings did not set up a case more probative of malice than its non-existence.

20. The judge held that the reason provided in the article for inclusion of the convictions was "clearly plausible; it is more likely the claimant is lying because he has dishonesty convictions". The judge then addressed the particulars of malice holding that paragraph 26(1) was mere assertion; paragraph 26(2) was assertion and did not support a plea of malice; paragraph 26(3) was irrelevant because the 1974 Act allowed reference to spent convictions, subject to proof of malice; paragraph 26(4) was correct but did not support a plea of malice; paragraph 26(5) was mere assertion and the reason for inclusion of the convictions had been provided in the article, namely that having accused him of lying it was relevant that he had been convicted of dishonesty; paragraph 26(6) was mere assertion; and paragraph 26(7) referred to paragraph 22 which suffered from defects identified in an earlier part of the judgment where paragraph 22 had been struck out. The judge stated that paragraph 22 did not in any event support a case that the convictions were included maliciously.

21. For those reasons the plea of malice was struck out. The effect of the orders made by the judge is that Mr Greenstein will be able to bring to trial only claims for misuse of private information and for infringement of the Data Protection Act.

The judge was right to strike out the plea of malice

22. The main point taken on the appeal by Mr Mitchell is that there could have been no good reason to include the reference to the spent convictions, they referred to matters which had occurred when Mr Greenstein was about 30 years old, and had taken place some 30 years ago. Mr Mitchell submitted that the only reason for including the spent convictions must have been spite on the part of the author of the article, and it undermined the scheme of the1974 Act to have struck out the plea of malice. Mr Mitchell submitted that even if it was permissible to include the dishonesty convictions because Mr Greenstein was accused of lying and "brazen deception" it was irrelevant, and therefore evidence of spite, to include the convictions for criminal damage and possession of drugs. The judge was wrong to say that the matters pleaded were mere assertion.

23. Mr Speker QC submitted that the article identified why the convictions had been included, because it showed that Mr Greenstein was not above lying and brazen deception. Mr Speker submitted that it was not responsible to maintain the plea of malice. The judge had been right to strike out this plea of malice because, properly analysed, all that had been pleaded was assertion. I am very grateful to Mr Mitchell and Mr Speker QC, and their respective legal teams, for their helpful written and oral submissions.

24. In my judgment the judge was right to strike out this plea of malice. The introduction to paragraph 26 did no more than recite the legal test for malice and assert that it was satisfied. Many of the particulars were in truth mere assertion ("the defendant's motive was to smear the claimant as a criminal") or did not advance the defendant's case on malice ("these historic, spent convictions were part of the claimant's private life"). What was lacking was the identification of any facts or matters from which it could be inferred that it was more likely than not that these convictions had been published for some irrelevant, spiteful or improper motive.

25. The closest that the submissions on behalf of Mr Greenstein came to identifying a sustainable case of malice was in the suggestion that the reference to convictions for vandalism and drug possession were irrelevant to the suggestion that Mr Greenstein was lying and had "form for brazen deception". It is true that previous convictions for dishonesty may be relevant to establishing a propensity to lie. In my judgment, however, this suggested way of establishing malice is not sustainable in this case for three reasons. The first reason is that there was nothing to show that the spent convictions were not included for the reasons set out in the article, namely to show that Mr Greenstein was capable of lying and brazen deception. This is so even though as a matter of strict logic convictions for criminal damage and possession of drugs do not establish a propensity to lie or deceive. As Lord Diplock had noted in *Horrocks v Lowe* people do not always form beliefs by a process of logical deduction. In this article the author had expressed in terms the view that the convictions were "entirely relevant" to the question whether Mr Greenstein had lied.

26. The second reason is that the law has long recognised that it is only fair for someone to know the character of a person who is attacking the character of another. This article was inviting the reader to make an assessment about Mr Greenstein in the context of his petition to remove CAA's charitable status, which it is apparent that CAA considered to be an attack on its existence. In *R v Brewster* [2010] EWCA Crim 1194; [2011] 1 WLR 601 at paragraph 20 the Court of Appeal Criminal Division, when considering an issue of admission of a witness' bad character, referred with approval to a commentary by Professor JR Spencer QC who had noted that convictions may bear upon credibility both directly and indirectly. Convictions might be indirectly relevant because "a person who would do something like this is not a person whose word can be trusted". This is not dissimilar to the approach taken in the criminal courts when a defendant, by attacking the character of a prosecution witness, exposes his own bad character to the jury, pursuant to section 101(1)(g) of the Criminal Justice Act 2003. In such a case the jury will be directed that they had heard about the defendant's previous convictions because "you are entitled to know about the character of the person who makes these allegations when you are deciding whether or not they are true". A criminal trial judge is very likely to exclude spent convictions to ensure a fair trial for the defendant, but if the law permits a jury to know about a person's past convictions where that person is attacking the character of another, it is not possible to infer that the inclusion of the spent convictions in this article was done out of spite, without some other facts and matters about the motivation of the author of the article.

27. The third reason that this suggestion of malice cannot be sustained is that it was not pleaded in these terms. Mr Mitchell says, and I accept, that the matter was raised in oral submissions, but it is not apparent that any application was made to re-amend the plea of malice so that the plea could be set out on this basis. In any event, if it had been it is apparent from the first two reasons given above that any such application would not have succeeded.

Conclusion

28. For the detailed reasons set out above I would dismiss the appeal.

Lady Justice Carr:

29. I agree.

Lord Justice Popplewell:

30. I also agree.