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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY

2 Redcliff Street
Bristol
BS1 6GR

Friday, 11 February 2011

BEFORE:

HIS HONOUR JUDGE DENYER QC

- - - - - -

BETWEEN:

MR ROBERT McKIE

Claimant

and

SWINDON COLLEGE

Defendant

- - - - - -

MR M WHITE (Instructed by Messrs Stone King Sewer) appeared on behalf of the Claimant

MR J DAVIES (instructed by Messrs Beachcroft LLP) appeared on behalf of the Defendant

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Approved Judgment

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JUDGE DENYER QC:

1. The claimant was born in May 1953 so he is now nearly 58 years of age. His basic specialism is as an art historian. In the 1980s and early 1990s he taught at various educational institutions in Norwich. In 1994 he applied for a job with the defendant, Swindon College. The title of the job was "Contextual Studies Co-ordinator". In January 1995, he was appointed to this position. In the years that followed, he was promoted with in the institution and received bonus awards. As is often the way, as he progressed, his work became more managerial and perhaps less classroom focused.

2. In November 2002, he left the defendants for a job as "programme leader" at Bath City College. On leaving Swindon and in connection with getting the job at Bath City College, he received an excellent reference from the defendants. This reference is set out at page 1 of divider G. It is not, I think, necessary to read all of it. Let me simply read from the middle paragraph (the third paragraph on page 1):

> "Rob has continued to show strong leadership skills in his management of the curriculum area. He has also planned the curriculum well, built an effective team and employed resources efficiently. This area had been performing poorly in terms of meeting Key Performance Indicators, Rob has skilfully brought the area a lot closer to those indicators to such an extent that it is now one of the best performing areas. The staff have a high degree of respect for him. This is particularly noteworthy because, his background is not business, leisure and tourism and when he took … over morale was quite low."

The next paragraph may be of some significance as well:

> "[He] has a positive personality. He is not afraid to challenge but in a constructive way. As a senior manager I value this side of [his] character highly. We need challenging constructive managers to get the feedback and ideas we need to move forward as a college. Just as importantly, if Rob has questioned a decision or a direction in which we are moving and the final decision is not what he would agree with, he will take it forward positively with his staff. [He] can be trusted to manage independently but is not afraid to come and ask when he may need further guidance."

The reference concludes:

> "It is, therefore, with regret that I highly recommend Rob to you. I am very sorry we are losing him but really pleased he has the opportunity to work with Art and Design curriculum."

3. In respect of his time at Swindon College, which, as I say, came to an end in November 2002, the claimant in these proceedings has produced a number of

witnesses who testified as to his capacities and qualities during his time at Swindon College. The defendants did not challenge most of this evidence and so most of it was read.

4. The evidence that was read included statements from Doney, Bullock, Folkes, Hammond, Hopkins, Barker-Dench, Gates, as well as Pierre Elena. Let me just summarise those witness statements. Jonathan Doney was a colleague in the claimant's department and he says he was not aware of any concerns about the claimant's working methods or capacity and there was certainly no complaints from students about the claimant. Christine Bullock, who in fact wrote the reference to which I have just referred, was head of faculty at the time. She was the claimant's line manager and in that capacity, as one might expect, she had access to all information about the claimant. He was not at any time the subject of disciplinary action, neither was he the subject of any threatened disciplinary action. She makes the point, which seems to me to be a blindingly obvious point, that as head of faculty, had there been such complaints, had there been any prospect of any disciplinary action, she would have known about it and they would have been recorded. She likewise is not aware of any possible surveillance on the claimant by the school's employed (employed in the sense of the brought in to assist the schools) educational psychologist.

5. The statement of Christine Bullock is between pages 13 and 16 of divider C. It may just be worth reading out paragraph 8 at page 15 and paragraph 10 at page 16:

> "8. In the time I knew the Claimant, he was highly respected by me and my colleagues on the Senior Management Team. He had done much to improve the quality of the business area and was highly influential in that area being successful in the Higher Education Quality review and won respect from peers and line reports for his work. He [w]as only involved in tutoring students in my area for a short time. … I heard no negative feedback.
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> …
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> 10. It was a pleasure to manage the Claimant. He is a highly intelligent man with an analytic mind. He could present and debate points extremely well. He also completed the work required of him and consistently met deadlines. He was a good planner and set and met high standards in terms of quality. He was always highly professional in the manner in which he carried out his work, he was also very supportive to me as Manager but never afraid to present new ideas … He also enjoyed a very good professional relationship with those he managed and the rest of my Faculty Management Team…"

That, as I say, is Christine Bullock, his head of faculty.

6. Nicky Folkes at pages 17 to 19 was a work colleague and he simply spells out there were no "safeguarding" concerns in respect of the claimant. Interesting he

observes that the students liked him.

7. Timothy Hammond at 20 to 23, he was a Swindon colleague, effectively throughout the time that the claimant was there. He was there from 1997 to 2004, curriculum manager and senior tutor. He was not aware, either formally or informally, of any complaints about the claimant. He was not aware of any investigation into the claimant and he had never, ever heard any suggestion that the claimant posed any sort of danger to students. He makes this observation, if any complaints were brought to the attention of Bill Hunt, a witness upon whom the defendants rely, that information was not shared with Mr Hammond. He points out that Bill Hunt was a colleague of his and they actually shared an office. He, like everyone else, was totally unaware of any involvement by an educational psychologist in any sort of assessment of the claimant.

8. Mike Hopkins at 24 to 26, was the Vice-Principal, then Principal of Swindon College. He was there between 1997 and 2004. No concerns were brought to his attention. The claimant was promoted twice whilst he was there. "I was not aware of any problems with staff." It is almost inconceivable, as it seems to me, that a person in the position of Vice-Principal, were any serious concerns expressed about, particularly a senior teaching member or member of staff, would be blissfully unaware of possible complaints, particularly if those complaints related in some way in these times to the claimant's interaction with students.

9. Angela Barker-Dench, 28-30, a senior manager at Swindon College, not aware of any concerns, not aware of any threatened disciplinary proceedings at the time of his going. Lastly, David Gates, Deputy Principal, so a not-unimportant person in the college, had access to all the claimant's records, there were no concerns about him and there were no concerns about his relationship with students and staff. It is perhaps just worth reading out paragraph 6 of his witness statement, which is at page 32 of the bundle:

> "The Claimant was a very important member of staff and played a key role in the implementation of a new strategy at the College. I would have been aware if there were any concerns or issues regarding his performance or behaviour. I can categorically state that there were no such concerns. [He] proved to be a very effective manager at a college experiencing a range of difficulties. I regarded the Claimant as a model professional and there were never any occasions when he lapsed from these high standards. There were no instances when the Executive had any concerns of his behaviour with staff and students at the College."

10. Those largely unchallenged witness statements from a variety of people, including people in very senior positions at Swindon College, satisfy me, not simply on the balance of probabilities but so that I am sure, that during his time at the college, the claimant was a well-regarded, highly respected member of staff. There were no complaints about him. No student complained about him. There were no disciplinary matters referable to him at all. In a word, an exemplary professional.

11. So he leaves Swindon College in November 2002. He then worked at City of Bath College until 2007. There is, I accept, some dispute about the circumstances surrounding him leaving that institution, but I took the view at the outset of this case that any issues in respect of City of Bath College were largely irrelevant to the claim with which I was concerned, so I did not permit any extensive examination or cross-examination in respect of that period of time, nor did I admit certain documents that were disclosed in connection with very late raised matters in respect of City of Bath College.

12. For the sake of this judgment then I perhaps ought to record that on the morning of the trial, the defendant sought to introduce a witness statement dated, I think, 27 January 2011, from someone who had worked with the claimant at City of Bath College and who was purporting to give evidence of a damaging nature. I refused to admit it. It was much too late. No proper excuse was put forward for the lateness. The ostensible reason given was that the claimant himself had filed a supplemental statement. The problem with that argument was very simple. The claimant had filed his supplemental statement in the summer of 2010; the defendants had done absolutely nothing about it.

13. In 2007, the claimant left the City of Bath College and went to work at Bristol City College. In May 2008 he was offered and accepted a post at the University of Bath. He started work at the University of Bath on 20 May 2008. His job was director of studies in the division of life long learning. On enquiry by me, that transpires to be the modern term for what we used to call the extra mural department, and I observe in passing is indicative of the way titles have changed over the years, albeit the basic functions have not.

14. There he is, in May 2008, with this new job at the University of Bath, which I have no doubt was a good job. The University of Bath oversee degree courses at certain further education colleges, one of those is Swindon College. Part of his duties as director of studies inevitably involved liaising with and visiting such colleges, including Swindon in and about this degree course.

15. On 5 June 2008, some two or three weeks therefore after he had started work at the University of Bath, an email was sent from Swindon College to the University. It is set out at various places in the bundle but for reference, I will simply refer to divider G at page 28. It is sent from Robert Rowe, Human Resources Manager at Swindon to his equivalent at the University of Bath. It reads as follows (the recipient being Mr Robert Eales):

> "Further to our telephone conversation I can confirm to you that we would be unable to accept Rob McKie on our premises or delivering to our students. The reason for this is that we had very real safeguarding concerns for our students and there were serious staff relationship problems during his employment at this College. No formal action was taken against Mr McKie because he had left our employment before this was instigated. I understand that similar issues arose at the City of Bath College."

That, as I say, emanates and signed by Robert Rowe, Director of Human Resources, Swindon College.

16. The evidence that the claimant has produced in respect of his time at Swindon College and to which I have already adverted, would suggest that the contents of that email were largely fallacious and untrue. In spite of that in these proceedings, heard over the last two or three days, the defendants seek to justify its context.

17. They called Mr William Hunt who was in fact really the only person called by the defendants who had actually worked with the claimant at Swindon College. In relation to the sending of the email, he said this, "We learnt that the claimant would be attending the college in his new capacity at Bath University. I discussed this with Caroline Fidmont, 'We were both aware of behaviour and conduct issues. The claimant didn't like students. The students were too afraid to make formal complaints and Caroline Fidmont said there had been problems at City of Bath College'." Two observations spring to mind. That which Mr Hunt says is completely contradicted by the evidence to which I have already referred and Caroline Fidmont never worked with the claimant at Swindon College. It is true she had worked with him at City of Bath College, but she had never worked with him at Swindon. On any rational view, therefore, she could have no permissible insight at all into the claimant's work and capacities during his time at Swindon College.

18. Mr Hunt accepted that she had never worked with the claimant at Swindon. He agreed that Caroline Bullock, to whose evidence I have already referred, was in fact the line manager of the claimant. He agreed that there had been no formal complaints in respect of the claimant. He was reduced to making allegations such that the claimant used to move post from one pigeon hole to another. Even if there were any substance in that complaint at all, which as I say seems to me to be bordering on the ludicrous, Mr Hunt said "The complaint was only made after he left". As to the contents of the email sent by Mr Rowe, Mr Hunt was keen to tell us that he only told Mr Rowe that there had been staff relationship problems. He said he did not tell Rowe that the claimant might have been disciplined. So it comes to this. His evidence stands in complete contra-distinction to that which I have already referred. He agrees there are no formal complaints. He denies telling Mr Rowe that the claimant might have been disciplined.

19. But what we arrive at is this, the only possible justification that the contents of the email could come from Hunt, because Fidmont is totally incompetent to give such information. She only worked with the claimant at City of Bath College. She did not in fact file an admissible witness statement in these proceedings and, as I say, by definition she could not assist as to whether disciplinary proceedings were threatened against the claimant at Swindon, that staff did not like him at Swindon, that students were frightened of him at Swindon, for the simple and obvious reason she had never worked with him at Swindon.

20. Insofar as Hunt asserts that there was difficulties with colleagues and that students found him difficult, afraid to make formal complaints, I completely reject it. I likewise reject the allegation that in some way the claimant did not like students. I have no doubt he expected high standards of his students. I am sufficiently old-fashioned not to find that to be a matter to be criticised but rather to be lauded.

21. In summary, the evidence of Mr Hunt in no ways justifies the contents of the email that was sent.

22. I did not find Dr Lombard to be a particularly helpful witness. He is a chartered psychologist. He tells that he made a report specifically referable to the claimant at the time the claimant was working at Swindon, the inference being that there were sufficient concerns about the claimant, either his teaching methods or his manner of dealing with students that would justify a chartered psychologist looking at the matter and reporting on it. According to him, as I say, he made a report. Sadly, it would seem, that report is now lost. He does not have a copy of it. The defendants do not have a copy of it in the claimant's personnel file. No-one else at Swindon seems to have been aware of it and, I have to say, I find the idea that there was any sort of formal report, critical of the claimant circulating or submitted at a time prior to his leaving Swindon College to be completely and utterly unproven.

23. There were factual errors in Dr Lombard's statement. He used graphic terminology, such as the claimant having introduced "a reign of terror". He referred in particular to an individual at Swindon, a colleague, one Pierre Elena that apparently, according to Pierre Elena, the claimant had made his life hell. Unfortunately from the defendant's point of view, there is in the bundle and filed on behalf of the claimant, and not challenged by the defendants, a statement from Pierre Elena which clearly indicated that it certainly was not true. The claimant had not made his life hell; in fact, he got on well with the claimant. In spite of that statement from Pierre Elena, Dr Lombard was only prepared to make a grudging admission that he might possibly have been mistaken in that part of his evidence. In any event, when he was cross-examined, he accepted that in this so-called report which no-one else has seen, he did not recommend any disciplinary sanction against the claimant and the report said nothing about any "safeguarding" issues.

24. I suppose for the sake of completeness I also ought to mention Annette Bigglestone. She did give evidence. It transpired she works for the same organisation, and still does, as Dr Lombard and in fact her disagreements with the claimant were about assessment procedures. Insofar as it is relevant, I would entirely reject any suggestion made by her that the claimant was either difficult or bullying at best, because of his insistence on proper standards and all the other qualities referred to in the evidence to which I have already referred, he could no doubt be a demanding colleague.

25. Insofar as any justification and evidence justifying the sending of that email is concerned, I reject that evidence. It does not in any way, shape or form, convince me that the evidence of the claimant and his witnesses is wrong and provides no

justification for the contents of the email.

26. While dealing with the facts, and this is obviously a matter to which I shall return later, one must look at the circumstances in which that email was actually sent. Mr Rowe is the Human Resources Director at the Swindon College. He himself has no personal knowledge of the claimant. He was not HR Director at the time when the claimant was there. Apparently, on 3 June it became known at Swindon College that the claimant would be attending the premises in connection with his new job at Bath. According to Mr Rowe, Will Hunt and Caroline Fidmont told him, "The claimant shouldn't be admitted for safeguarding reasons". I have already made the point that Mr Hunt denies in fact having said that and that Caroline Fidmont has not given evidence. We are into the realms of hearsay upon hearsay. He said he said the email on 5 June, simply to confirm that the claimant would not be allowed to attend the site.

27. With great respect to Mr Rowe, it is somewhat ingenuous to say that that was the only purport of the email. It was the conclusion of the email, but it chose to set out reasons. I think when we actually look at the circumstances, we can see that the procedure adopted at Swindon College giving rise to the sending of the email, can be described as slapdash, sloppy, failing to comply with any sort of minimum standards of fairness, certainly any such standards as would be recognised by any judicial body taking decisions and disseminating information about another individual, because Mr Rowe agreed he had no personal knowledge of things at all. He agreed that Fidmont knew nothing about the claimant at Swindon. He asserts that Hunt was deeply concerned. He agreed there was no record of complaints in the personnel file and, with great respect to him, his answer that to some extent that was neutral seems to me to verge on the ludicrous. Of course, if there were no complaints recorded on file, that gives rise to a *prima facie* assumption that there were no complaints and the absence of complaints is not therefore to be regarded as a countervailing factor to the situation that might arise if there were complaints. It seems to me that to dismiss the contents of the personnel file, recording promotions and such like and indicating no complaints, to dismiss it as of no great relevance, seems to me to be just plain wrong.

28. According to Mr Rowe he did have a meeting with a man called Burton, who was a staff member "who may have complained". Burton was not called, we do not know what he might have complained about, do not know who he was. Certainly, as I say, no evidence from Burton. Mr Rowe said that Hunt was well-respected, I accept that. I therefore took his word for things. So far as possible matters at Bath College were concerned, they did not return Mr Rowe's calls and he agreed that it was inevitable that the email that was sent would have an impact on the claimant's employment. He makes the point that the email, or rather the sending of the email, was sanctioned by the Vice-Principal, Mr Letchet. Again, no evidence from Letchet, no evidence that Letchet knew anything about the claimant from his time at Swindon College. At the very least one might have thought that, if an email such as this was going to be sent to a major educational institution such as Bath where, as Mr Rowe rightly accepts, it was blindingly obvious that it would have an impact on his employment situation, at the very least one would have expected that

there would be a formal meeting, a formal discussion, a formal examination of the personnel record, a formal recording of the processes that led to the taking of the decision, not winging off an email after a discussion with Hunt and with Fidmont, who knew nothing about him at Swindon in any event.

29. So not only do I take the view that the contents of the email are not in fact supported by any evidence, I also take the view that the circumstances surrounding the sending of the email flouted elementary standards of fairness, diligence, proper enquiry, natural justice, whichever set of epithets you wish to use. It does not end there, of course. The email is sent and we move on to the evidence of Mr Eales.

30. Let us just look at what happened after the sending of the email. Immediately, and this is in divider D behind page 7, Dr Faith Butt (of whom more in a moment) wrote to Mr McKie on 5 June:

> "The University has received the enclosed email from Swindon College in which they assert they do not want you on the premises or delivering to their students.
>
> This is a serious impediment to your capacity to undertake your duties I would like to discuss this with you at the earliest opportunity. I would therefore be grateful if you would meet me and the Acting Director of Human Resources on Tuesday, 10th…
>
> You are welcome to bring a colleague or union representative with you."

31. Such a meeting did take place on the 10th. I observe in passing that no-one reading that letter of the 5th would in any way understand that this was potentially a disciplinary meeting which might give rise to dismissal.

32. The notes of that meeting on 10 June are set out at pages 8 and 9 behind divider D. I will simply read the last two paragraphs at the bottom of page 8:

> "FB [Faith Butt] stated that the problem the University faced was that 50% of the programmes were linked to Swindon College and 30% … required a direct link with Swindon."

33. Mr McKie made certain suggests as to how the problem might be dealt with in the short time. I should perhaps have added that at that meeting on 10 June, Mr McKie had clearly asked for further time to consider the position, get evidence to answer and deal with the various assertions that clearly were set out in the email. I now go to the paragraph at the bottom of page 8:

> "MC [Michael Carley, the claimant's union rep] stated he was surprised Swindon College had not substantiated their allegation and that they were negligent in not dealing with the safeguarding issue referred to in the email.

> RM [Mr McKie] asked if [Butt] and [Eales] wanted to know about the nature of the issue..."

Mr Eales, no doubt cognisant of basic employment law, said the issue they were considering was Mr McKie's inability to fulfil the duties of his post because Swindon College were refusing to allow him on the their site. But then this, which rather gives the lie to the assertion that it was the simple basic fact of his being banned from Swindon that was the sole motivator behind the dismissal:

> "FB [Faith Butt] stated that as a Board Member of Swindon College she would not expect the College to make such serious statements … the College must be very serious about this matter for it to be put into writing."

34. I pause there. The idea that she should have been part of a disciplinary process as it transpired on 10 June whilst being on the governing body of Swindon College, I find staggering. It contradicts almost every rule, as it seems to me, about decision making in a quasi-judicial matter. There is a conflict of interest. The informed observer could not but derive a feeling that here was bias in the most and obvious form to which a conflict of interest between, on the one hand acting fairly to the claimant in her capacity as an employee of Bath University, and on the other hand, her duties to Swindon College in the capacity of board member.

35. Be that as it may, he was summarily dismissed. I have indicated that, in my view, the proceedings were not fair. I am not going to repeat that. The decision was not fair. The claimant was given no opportunity to consider his position. Again, an elementary rule of procedural fairness in connection with any sort of proceedings that, if an allegation is made against you, you should be given a reasonable period of time to deal with that allegation, which includes getting evidence.

36. Of course, Bath University, in a sense were in a relatively strong position. The claimant had only just started working for them. He was in his probationary period. At common law, therefore, it they sacked him, provided only they paid the one month notice, they were in the clear and, because he had only worked for a few weeks, any protection under the unfair dismissal legislation would not be available to him. In a nutshell, they could act unfairly with impunity. I should add that it is my view, as I expressed I think quite clearly during the course of the evidence, that I regard the response of the University as supremely supine in the face of that email and one would have thought, at the very least, they would have inquired further and considered the claimant's response further, rather than acting as they did.

37. What remedy might the claimant have? In the light of my findings already expressed, it might well be argued that the contents of the email were in fact defamatory of the claimant but any action in defamation was likely to run into the buffers of the doctrine of qualified privilege which is only to be defeated when a claimant can show express malice, and very properly it was accepted he could not do that. There is a tort whose boundaries I will not attempt to define, of malicious falsehood, but again you need to prove malice and again, very realistically this was

felt not to be a runner. So does the law in fact provide a remedy to someone such as Mr McKie, who has clearly and obviously suffered loss, financial loss I accept, by virtue of being dismissed by the University of Bath when that University acted upon an email from Swindon College banning him from attending the premises, but giving reasons why.

38. Let us consider a bit of basic law. As long ago as the early 1950s in a famous dissenting judgment, Denning LJ in Candler v. Crane, Christmas [1951] 2 KB 164 flagged up the possibility of liability in what came to be known as "negligent mis-statement or negligent misrepresentation". It was, in fact, as I say, a dissenting judgment but was ultimately approved by the House of Lords in 1964 in Hedley Byrne v Heller [1964] AC 465. Hedley Byrne gave rise to the so-called liability for negligent mis-statement. When A requests of B to provide information about C and B agrees and provides that information knowing that A will act upon it, B may be regarded as assuming a duty of care in and about the compiling and providing of that information, such that if in fact reasonable care is not taken and A suffers loss as a consequence of his reliance upon that negligently provided information, he can recover his loss from B, even where that loss is purely economic. There of course has to be an assumption of responsibility on the part of B. The responsibility being that he will take reasonable care. Often the relationship between A and B will arise in the context of a contractual relationship or what has been described as a relationship akin to contract.

39. Here the information was provided by Swindon College. It was provided to the University of Bath. The University acted upon it. They suffered no loss. They in fact bring no claim. The person who suffered loss was the claimant. The question that arises, therefore, is whether Swindon owed any duty to the claimant in and about the information contained in the email.

40. The matter is pleaded thus, and I will refer both to the Particulars of Claim and to the Amended Particulars of Claim. In paragraph 4 of the Particulars of Claim, the email is asserted to have been a reference. Paragraph 5, the defendants owed a duty of care to take reasonable care in providing information. Alternatively, paragraph 6, there was an implied term of contract between the claimant and Swindon giving rise to a duty of care, and that any information would be based upon facts revealed after careful enquiry. In paragraph 7 the email is categorised as false, misleading, inaccurate and unfair, and some 14 particulars are set out. In paragraph 8 there is the allegation that Mr Rowe was negligent in the provision of the reference, essentially no proper enquiries, no proper investigation, reliance upon wholly inadequate evidence. Paragraph 9, an allegation of breach of the implied term.

41. The Amended Particulars of Claim added a paragraph 12 and 13 (you can find those at page 76 to 87 behind divider A or B). Paragraph 12 asserts a breach of a common law duty of care in failing to tell the claimant he was not permitted on the premises, in permitting him to attend on subsequent occasions, in failing to tell him they had safeguarding concerns, in failing to warn him he would be excluded and in providing him with a good reference when they should not have done. It

follows, it was said, that if they had done those sorts of things, he would not have applied for the job with Bath University. My understanding is that paragraph 12 is pleaded both as a common law duty arising in the law of negligence and as breach of implied terms of his employment contract to the effect therein set out.

42. Essentially the allegation is that there was a duty of care attendant upon the sending of the email and the circumstances surrounding that sending and/or that there were duties as per the amendment effectively arising whilst the claimant was still working for the defendants to warn him of certain matters.

43. It is probably appropriate now to refer to Spring v Guardian Assurance [1995] 2 AC 296, a decision of the House of Lords. I am simply going to read the head-note, (a) partly because it seems to me that that accurately summarises the decision and (b) (and I say this with the utmost respect) it is not entirely clear that all their Lordships were *ad idem* as to the reasoning which led to the conclusion which they did:

> "The plaintiff, who was an appointed company representative of the first defendants for the purpose of selling their investment products, was dismissed from the position of sales director (designate) and office manager by the second and third defendants who had been taken over by the first defendants, a subsidiary company of the fourth defendants. The plaintiff then sought to sell the products of another company. Under the rules of the regulatory body Lautro, that company was required to seek, and the first defendants to supply, a reference for the plaintiff. In consequence of the unfavourable reference supplied the company refused to appoint the plaintiff as a company representative. In an action by the plaintiff for damages, the judge held that the defendants had been under a duty of care to the plaintiff, that the reference given had constituted a negligent misstatement and that the defendants were accordingly liable to the plaintiff in negligence, but he dismissed the plaintiff's claims based on malicious falsehood and breach of contract. The Court of Appeal allowed an appeal by the defendants and dismissed a cross-appeal by the plaintiff.
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> …
>
> *Held*, allowing the appeal (Lord Keith of Kinkel dissenting), (1) (*per* Lord Lowry, Lord Slynn of Hadley and Lord Woolf) that an employer who gave a reference in respect of a former employee owed that employee a duty to take reasonable care in its preparation and would be liable to him in negligence if he failed to do so and the employee thereby suffered economic damage; that the imposition of such a liability was not contrary to public policy on the ground that it might inhibit the giving of full and frank references; that the fact that in an action for defamation or injurious falsehood based on an inaccurate reference the employer would have a defence of qualified privilege did not bar an action by the employee in negligence where no such defence was available…"

Turning the page, according to Lord Goff, Lord Slynn and Lord Woolf:

> "It was also an implied term of the contract between the plaintiff and the second and third defendants that they would ensure that reasonable care was taken in the compiling and giving of the reference, and they were in breach of that implied term…"

44. The important point there is that the claimant was not, as per, for example, Hedley Byrne v Heller, the person who asked for and received the information and who suffered loss as a consequence of relying upon it, the person who suffered loss was the subject of the information and he had suffered loss. In the particular circumstances existing, that was sufficient to give rise to a duty of care to him as the subject-matter of the advice or reference. So clearly an extension of the fact situation in, for example, Hedley Byrne.

45. With great respect to Mr White, this is not a reference situation. It is similarly impossible to construe this email as a reference. A reference is a reference; it is the situation that arises where one employer is asked to provide information about an employee or ex-employee who is seeking employment with someone else and that someone else has asked for or requires the information. It may also be the situation where a bank is contemplating lending money to a particular individual and seeks information about the financial status of that individual. All of those, I fully accept, are properly to be characterised as references, but I am afraid this was not a reference. It had nothing to do with the appointment of the claimant. Swindon College provided no information in connection with his being offered employment. Bath relied on nothing from the defendants in offering the claimant the job, so this is not a reference case in my view.

46. Likewise, it is not really a White v Jones situation. I need not spend time on this, but again there we had solicitors who were clearly negligent and/or in breach of contract with their client, who had asked them to prepare a will which would have been of benefit to the ultimate claimant. Negligently and in breach of contract, they failed to prepare the will properly, or I think at all, such that the claimant, the intended beneficiary, was deprived of that which he would have otherwise received under the will. Again, there is quite clear a contractual background. The claimant was effectively in the position of a potential third party beneficiary to the contract, if the solicitors had done that which they ought to have done. So again, as with Spring, the claimant was closely within the contemplation of the person ultimately stigmatised as negligent.

47. At its highest, here the defendant simply imparted information to Bath University and my understanding is that this situation is not in fact covered by any existing authority. Before I look at Caparo Industries Plc v Dickman & Ors [1990] 2 AC 605, let me just deal with the proposed amendments to the Particulars of Claim. I have already referred to them. With the utmost respect, it seems to me they are largely hopeless. It would be impossible to imply terms to that effect into the employment relationship. One has only to state this proposition that in some way

they were under an implied duty not to provide him with a good reference because ultimately it might lead to him being employed by Bath College and then he might find himself the subject of less helpful information. I may not be doing justice to Mr White's arguments, but I am afraid it does not seem to me that those potential new allegations in the amendment really get off the ground and that it is simply impossible to start implying the sort of terms into the employment contract which terminated, let us remember, in 2002, to the effect that he would seek to allege.

48. I turn to Caparo. I am content simply to recite a very well known passage clearly and obviously binding on me, from the speech of Lord Bridge in Caparo, at page 617:

> "But since the Anns case a series of decisions of the Privy Council and of your Lordships' House …have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope … What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels … Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in Sutherland Shire Council v. Heyman (1985) 60 ALR 1, 43-44, where he said:
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> > 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories…'"

49. I repeat, that is binding on me and I am very mindful of the fact that a judge at first instance should be very careful about even purporting to extend the existing boundaries of liability. Nevertheless, I clearly and obviously have to consider the three stage Caparo test: what damage did the claimant suffer? He lost his job with the University of Bath which has given rise to a non-insignificant loss of earnings. So he suffered economic damage. In the light of the evidence from the defendants, clearly accepting that they realised that the email might potentially have an impact upon the claimant's employment position vis-à-vis Bath, it seems to me that that

damage to which I have alluded, was eminently foreseeable and I do not believe that I am straining any concepts of foreseeability so to characterise it. But of course, I have to consider the question of proximity or neighbourhood.

50. It is undoubtedly true that six years had elapsed, effectively, since the claimant had been employed by the defendants. But, it is the fact that the defendants chose to act in the way which they did, purportedly relying upon information derived from the time that the claimant worked at Swindon. In other words, they themselves brought about the relevant degree of proximity, as it seems to me, and that therefore the mere fact that a number of years had gone by is not sufficient, of itself, to say that the relationship between themselves and their ex-employee was no longer sufficiently proximate to give rise to any sort of duty of care.

51. I do accept, whether this is meaningful or not I do not know, but one could not imply continuing contractual duties some five or six years down the line, certainly in the context of this case, but the fact that one could not imply a contractual duty, does not seem to me fatal to the existence of a duty of care in negligence, provided foreseeability is established, and provided proximity is established. As I have indicated, in my view, both are present. There was a proximate relationship. They knew with whom they were dealing. They purported to rely upon historic evidence as to their dealings with him and chose to communicate that information to a third party. Lastly, therefore, I have to decide whether it is fair, just and reasonable. I think to some extent one could turn that the other way around, though I have to be careful. If they do not owe him a duty of care, either because it is not foreseeable or that this relationship is not proximate, a man who, in my judgment, has been clearly and obviously wronged is to be left without a remedy. It can happen. The law cannot right all men's wrongs, but it does somewhat go against the grain. In my view, in the particular circumstances of this case, and in my view consistent with the authorities as they now stand, it is fair just and reasonable to impose a duty of care upon the defendants in the circumstances of this case.

52. Finally, it may be said that is all true, or may be true, but what about causation? The bottom line, say the defendants is this. Bath University sacked the claimant because they, Swindon, would not permit him to enter and that has a superficial attraction. But it totally ignores, in my view, the fact that you cannot simply isolate one sentence in the email from those sentences which surround it. It would be ridiculous, in my view, to say that Bath simply acted on the basis of that line that says he cannot work at Swindon and totally ignore the fact that safeguarding issues were thrown up and, in the climate in which we live now, that is a word of considerable power and the disciplinary action might have been taken against him.

53. There is simply no way of ignoring the fact that Swindon gave reasons purporting to justify their decision and, as I have indicated, those reasons do not stand up to any sort of scrutiny at all. In other words it is the totality of the email, not just the single line about banning him from the premises, which was the cause of the University of Bath sacking him.

54. In my view, therefore, applying the Caparo test, mindful that there is no direct authority specifically in point, accepting that this is a slightly different factual situation from Spring, an obviously different factual situation from White, nevertheless I am satisfied damage was foreseeable, the relationship was sufficiently proximate, it is fair, just and reasonable and there is a causal connection between the negligence in and about the sending of the email and the damage whereof the claimant complains.

55. I therefore find for the claimant on the question of liability.

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