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

No. QB-2019-003463

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 August 2020

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Queen's Bench Division)

B E T W E E N :

(1) HAVEN SOLICITORS LIMITED
(2) RONALD MARTIN THOMPSON

Claimants

- and -

(1) POLICE FEDERATION OF ENGLAND AND WALES
(2) CRAIG HEWITT

Defendants

John Stables (instructed by Haven Solicitors Limited) for the Claimants

Aidan Eardley (instructed by Berryman's Luce Mawer LLP) for the Defendants.

Hearing date: 28 July 2020

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 18 August 2020

J U D G M E N T

RICHARD SPEARMAN Q.C.:

Introduction

1. This is a claim for slander and malicious falsehood based on words spoken or said to have been spoken at a meeting which took place on 24 and 25 January 2019 (“the Meeting”). The First Claimant (“Haven”) is a firm of solicitors of which the Second Claimant (“Mr Thompson”) is the sole owner and director, and by which he is employed as its principal solicitor. The First Defendant (“PFEW”) is a staff association created by the Police Act 1919, the membership of which is made up of police officers below the rank of superintendent, as well as police cadets who choose to join. The Second Defendant (“Mr Hewitt”) holds the post of Head of Civil Claims at PFEW.
2. From early 2014 until about 18 December 2018, Haven was an approved firm on PFEW’s panel of solicitors (“the Panel”). During that period, all or much of Haven’s work consisted of providing legal services, specifically with regard to police pensions, as solicitors on the Panel. By an email and attached letter from PFEW dated 18 December 2018, Haven was notified of the decision to remove it from the Panel due to “concerns about the services provided to our members” (“the Removal Decision”). Thereafter, and until about 21 January 2019, Mr Thompson took these matters up in correspondence with PFEW, essentially seeking details of the reasons for the Removal Decision and clarification of whether any material grounds for concern had previously been notified to Haven, but did not, in his view, receive any satisfactory response.
3. At the same time, Haven took these matters up with various Branch Boards of PFEW. The structure of PFEW comprises a National Board and National Council and 43 Branch Boards and Branch Councils. It is or appears to be common ground that Haven worked with a number of those Branch Boards, and that all the funding for the material instructions was provided by PFEW centrally. However, there is or may be an issue between the parties as to whether the decision as to which solicitor on the Panel should be instructed in any particular instance is a matter for PFEW alone, or whether the Branch Boards enjoy any autonomy in that regard. In any event, one consequence of Haven taking these matters up with the Branch Boards is that some of them asked PFEW for an explanation of the Removal Decision. That in turn led to Mr Hewitt making statements concerning the Removal Decision at the Meeting, which is pleaded in the Defence to have been “a Secretaries Workshop ... [held] to inform Branch Board Secretaries about matters relevant to their role and to promote discussion of such matters”. This claim arises from what was or is alleged to have been said in that regard.
4. Neither Mr Thompson nor anyone else from Haven was present at the Meeting, but they were given an account of what happened at it by some of the Branch Board Secretaries who had been present. It is PFEW’s case that those attending the Meeting were expressly told that the information with which they were being provided at the Meeting was confidential, and that this dissemination to Haven and Mr Thompson was a breach of confidence. The Particulars of Claim plead that the Meeting “was attended by all or most of the 43 Branch Board Secretaries” and Mr Thompson’s third witness statement dated

27 May 2020 refers to it being attended by “representatives of [PFEW’s] Branch Boards”, but Mr Stables, who appeared for the Claimants on the applications before me, suggested that the number of persons attending may have been in excess of 43, for example because more than one person may have attended from each Branch Board. The Defence admits the allegation that the Meeting “was attended by all or most of the 43 Branch Board Secretaries”, and Mr Eardley, who appeared for the Defendants, told me on instructions that there was no larger pool of persons in attendance at the Meeting.

5. The Claim Form and Particulars of Claim are dated 30 September 2019, and they rely upon a single sentence of words allegedly spoken by Mr Hewitt at the Meeting (“the Hewitt Statement”). Among other things, the Defence (dated 27 November 2019) denies that Mr Hewitt spoke and published the Hewitt Statement (although aspects of the words complained of in the Hewitt Statement are admitted as having been spoken in answer to “questions, comments and criticisms from the audience”) and pleads that on the same occasion Mr Hewitt “read out a long list of very serious substantive criticisms of the Claimants’ services” (hereafter “the Hewitt List”) and that “[t]he allegation in the Hewitt Statement ... was relatively minor in comparison to the very serious allegations of substantive shortcomings [in the Hewitt List], and will have added only marginally, if at all, to the harm caused to the Claimants’ reputations”.
6. Following service of the Defence, the Claimants applied by notice dated 20 January 2020 for permission to amend the Particulars of Claim, to plead claims for slander and malicious falsehood in reliance on the Hewitt List as well as on the Hewitt Statement. The application was said to be urgent because the limitation period was about to expire. However, that particular difficulty was resolved by a standstill agreement the terms of which are recorded in a letter from the Defendants’ solicitors dated 23 January 2020.
7. The Defendants applied by notice dated 26 May 2020 for an order that, on the same occasion as the determination of the Claimants’ application for permission to amend, the Court should determine as a preliminary issue three matters concerning “the statement set out at paragraph 14 of the Claimants’ draft Amended Particulars of Claim”, namely (a) its natural and ordinary meaning, (b) whether it is a statement of fact or opinion, and (c) if it is a statement of opinion, whether it indicates in general or specific terms the basis of the opinion. The Claimants then issued an application notice dated 29 May 2020 seeking an injunction designed, in substance, to prevent the Defendants from interfering with the Claimants’ access to witnesses who are or may be able to provide the Claimants with evidence as to what transpired at the Meeting which is material to their actual and prospective claims for slander and malicious falsehood.
8. These three applications (“the Amendment Application”, “the Preliminary Issue on Meaning Application” and “the Injunction Application”) now come before me pursuant to an Order of Nicklin J dated 3 June 2020 which was made on the Court’s own initiative and without a hearing. Nicklin J ordered that, on the present occasion, the Court should (a) hear and determine the Amendment Application, (b) consider whether the issue of publication of the Hewitt Statement should be determined as a preliminary issue in advance of the determination of any preliminary issue on meaning, and (c) give directions

for the hearing of the Preliminary Issue on Meaning Application and the Injunction Application. When setting out his reasons for making that Order, Nicklin J began by observing “This case appears to be in something of a mess”. With regard to the Injunction Application, Nicklin J stated “... The parties ought to be able to agree a sensible framework permitting the Claimants to approach potential witnesses to ask them whether they will provide a witness statement giving relevant evidence ... If agreement has not been reached by the Hearing, then the Court will give directions for the hearing of the Injunction Application”. Later on in the explanation of his reasons, Nicklin J stated that the “immediate road-map” would appear to be as follows:

- “(1) First, sort the statements of case. If permission to amend is agreed by consent or granted by the Court, an Amended Defence will then identify the extent to which there is a dispute over publication of the words spoken by the Second Defendant.
- (2) Second, if there is a dispute about publication, the Court will consider whether that should be resolved by preliminary issue ...
- (3) Third, once the issue of publication has been resolved, and if the claim survives, then the Court can consider whether it ought to determine meaning (and fact/opinion) as a further preliminary issue.”

The Amendment Application

The matters in issue

9. As indicated above, the Claimants seek permission to amend the Particulars of Claim to rely upon the Hewitt List in addition to the Hewitt Statement. So far as concerns the contents of the Hewitt List, the Defendants’ position, as set out in a letter from their solicitors to Haven dated 30 April 2019, is that no note or recording was made of the Meeting, and no version of the document that was read out by Mr Hewitt at the Meeting has been retained, but (a) Mr Hewitt read out a Word document and (b) that Word document was in “exactly the same form” as a table contained in an exchange of emails between Mr Hewitt and PFEW’s Manager of In-House Legal Services, Jonathan Keighley. That exchange of emails was enclosed with that letter. The table (which, in the circumstances, is in identical form to the Hewitt List) comprises 26 items marked A-Z, ranging from “A. General manner of conducting business (anecdotal)” to “Z. Ethical issues (IOD reviews)” – “IOD” being a reference to claims for “Injury on Duty”, which is one class of claim in respect of which Haven provided legal services.
10. By the draft Amended Particulars of Claim, the Claimants seek to add claims for both slander and malicious falsehood based on the Hewitt List. The Defendants have agreed to the amendment which adds a claim for slander, as well as other amendments, but they oppose the amendment which seeks to add a claim for malicious falsehood.
11. The draft amendment pleads the Hewitt List in its entirety at §14, a series of ten natural and ordinary meanings of the Hewitt List at §14A, and a further natural and ordinary

meaning of the Hewitt List at §14B. At §14C, it pleads that the Claimants take exception to the whole of the Hewitt List, but “are seeking remedies in relation to only the most serious imputations” made by it. At §14D, it pleads the Hewitt Statement, and at §16 it pleads that the natural and ordinary meaning of the Hewitt Statement is that:

“[T]he reason that Haven had been removed from the Panel was that the PFEW had repeatedly, both in writing on several occasions and in a number of meetings, brought to the Claimants’ attention the very serious problems and issues with Haven’s legal services that the Second Defendant had already told the meeting about, but the Claimants had not taken any action to address those concerns, either because they could not be bothered, or because they were unable due to incompetence to take any action to address or rectify those problems”.

12. At §17 and §18 there are pleas of serious harm in relation to both Claimants in respect of the publication of both the Hewitt List and the Hewitt Statement (see section 1 of the Defamation Act 2013).
13. At §19, the draft Amended Particulars of Claim turn to malicious falsehood. The existing claim of falsity in relation to the Hewitt Statement is set out at §20 and §21, and lengthy particulars of malice are set out at §22.1 to §22.22 inclusive. These parts of the pleading are essentially unaltered from the original Particulars of Claim, although they are sought to be amended to include further words which are consequential on the introduction of a claim for malicious falsehood in relation to the publication of the allegations complained of in the Hewitt List as well as those complained of in the Hewitt Statement. The pleading then sets out claims for damages, aggravated damages, and special damage, and a claim for an injunction at §23 to §27, in terms which make no reference to the Hewitt List, and specifically to the proposed claim for malicious falsehood based upon it. However, the import of those paragraphs will be affected by the introduction of such a claim, in that they are apt to apply to it if it is allowed in.
14. The centrally contentious part of the proposed amendment is contained in §19A and §19B. By way of preamble, §19A pleads (i) that each of the allegations complained of in §14A was false (I interpose to remark that I believe that what is intended is to rely upon not only those allegations but also the additional allegation complained of in §14B, and that this seems to have been what was contemplated by §19B, but §19B refers back to §14D and not §14B), (ii) that most of those allegations are so vague “that it is not practically possible for the Claimants to give detailed particulars of falsity”, and (iii) that in the particulars of falsity which follow “the Claimants set out such facts and matters as it is possible to do at this stage in the proceedings, and will seek to rebut any case on truth asserted by the Defendants”. In broad terms, §19A.1 to §19A.11 allege that 11 of the 26 items contained in the Hewitt List are false. The complaint made in §19A.11 appears to be repeated in substance in §19B, in which the reference to §14D (where the Hewitt Statement is pleaded) seems to be an error for a reference to §14B.
15. In some instances, the proposed pleading in §§19A.1-19A.11 mirrors almost exactly an item in the Hewitt List. For example, item N states “Reports of rude and unprofessional

conduct, both verbal and in correspondence, which reflects poorly on PFEW since it is known that we have instructed them”; and §19A.5 pleads “It was false that either Haven (acting through any employee) or the Second Claimant had conducted themselves rudely or unprofessionally”. In other instances, the pleading contains a gloss or slant on the wording of the equivalent item. The allegation which is singled out for particular mention (in the sense that it is made the subject of separate entire paragraphs in the pleading, as opposed to being addressed in one of a number of sub-paragraphs in which other allegations are also dealt with) is that contained in item M, in which regard:

(1) The Hewitt List states at M:

“Including unnecessary information in advices and making them needlessly long/complicated, e.g. unhelpfully including large tranches of regulations and judgments. The suspicion is that this is done to make it appear that more work has been done than is actually the case. Unfortunately, it would still be necessary to review the entire letter since, often, funding requests or information relating to the matter would be ‘buried’ in the text.”

(2) §14B pleads:

“In their natural and ordinary meaning, the said words also meant and were understood to mean that there were reasonable grounds to suspect that the Claimants had tried fraudulently to charge for more work than they had actually done.”

(3) §19.11 pleads:

“It was false that that there were reasonable grounds to suspect that the Claimants had tried fraudulently to charge for more work than they had actually done.”

(4) §19B pleads:

“The allegation in paragraph 14D (sic) was false. There were no or no reasonable grounds upon which to suspect the Claimants of having tried fraudulently to charge for more work than they had actually done. The fact that the Claimants wrote long legal letters (although it is not admitted that the Claimants’ letters were overly long) is not a proper ground for this suggestion.”

16. The matters already in issue form part of the context to the dispute as to whether the proposed claim for malicious falsehood based on the Hewitt List ought or not be allowed in. In response to the claims for slander and malicious falsehood based on the Hewitt Statement which were contained in the Particulars of Claim, the Defence makes extensive reference to the Hewitt List (which was referred to in these proceedings at that stage as “the Keighley Table”). The publication of the Keighley Table by Mr Hewitt is pleaded at §14 of the Defence. Among other things, the Defence then pleads:

(1) At §17.1:

“The Hewitt Statement (if published at all) was spoken and published on the same occasion that the Second Defendant read out a long list of very serious substantive criticisms of the Claimants’ services. Insofar as the Claimants’ reputations have been or are likely to be seriously harmed by anything said by the Second Defendant at the Meeting, this will have been because of the publication of that list of criticisms (about which no complaint is made) and not because of the publication of the Hewitt Statement.”

(2) At §17.2:

“Likewise ... insofar as the Claimants have been caused financial loss as a result of anything said by the Second Defendant at the Meeting, this will have been because of the publication of the said list of criticisms and not because of the publication of the Hewitt Statement.”

(3) At §18.2:

“... The allegation in the Hewitt Statement, which concerned a failure to rectify identified shortcomings in Haven’s service, was relatively minor in comparison to the very serious allegations of substantive shortcomings, and will have added only marginally, if at all, to the harm caused to the Claimants’ reputations.”

(4) At §24.6:

“... it is admitted and averred that the Keighley Table did not include the allegation made in the Hewitt Statement. That is because the Keighley Table set out the true reasons for the decision to remove Haven from the Panel. The Second Defendant communicated those reasons to the Meeting in his pre-prepared statement. In the discussion that followed he did not identify any different or additional reasons but merely stated his honest and correct belief that concerns had been raised with the Claimants prior to the Removal Decision.”

(5) At §24.7:

“... it is denied that the Defendants harboured any hostility or bad faith towards the Claimants or that the Keighley Table indicates the same ...

24.7.4 The criticisms in the Keighley Table were all relevant matters for the Defendants to consider when determining, in their discretion, that Haven should be removed from the Panel ...

24.7.5 It is denied that the points on the Keighley Table were vague. They were appropriate summaries of detailed concerns that had been provided to the Defendants ...”

(6) At §24.9:

“... The Defendants did not believe that anything said at the Meeting was false, dishonest or malicious ...”

(7) At §25.2:

“... If the Second Defendant’s feelings have been hurt or his plans frustrated, that is as a result of the Removal Decision itself and/or the explanation at the Meeting of the many serious shortcomings in the Claimants’ services.”

(8) At §26:

“Further or alternatively, insofar as the Claimants might otherwise be entitled to general damages, the Defendants rely, in mitigation or extinction of such damages, on the following facts and matters which constituted directly relevant background context to the publication (if proven) of the Hewitt Statement, being matters referred to or underlying the Keighley Table, which the Second Defendant read out immediately before allegedly speaking and publishing the Hewitt Statement.”

Applicable principles

17. The principles which apply to contested applications for permission to amend were not in dispute, and are so well known as not to require detailed citation. Helpful summaries are to be found in the judgments of Carr J (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 at [38] and Coulson J (as he then was) in *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited* [2015] EWHC 1345 (TCC) at [19], based on a consideration of a number of recent cases, most of which post-dated the Jackson reforms to the CPR. As I said in *Buckingham Homes Ltd v Rutter* [2019] EWHC 1760 (Ch) at [20], it is clear from these summaries that the determination of such an application is a multi-factorial exercise, in which different considerations will assume different significance in different cases.

18. The position was summarised as follows in *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268 by Sir Geoffrey Vos, Chancellor of the High Court, at [41]:

“In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal.”

19. Some important factors which fall to be taken into account in this context were identified, in typically clear and concise terms, by Hamblen J (as he then was) in *Brown v Innovatorone Plc* [2011] EWHC 3221 as follows:

“(1) the history as regards the amendment and the explanation as to why it is being made late;

- (2) the prejudice which will be caused to the applicant if the amendment is refused;
- (3) the prejudice which will be caused to the resisting party if the amendment is allowed;
- (4) whether the text of the amendment is satisfactory in terms of clarity and particularity.”

20. I consider that the following factors merit particular mention in the present case:

- (1) First, a distinction falls to be made between amendments which are prompted by some new factor, and those which are not.
- (2) Second, lateness is a relative concept, but, generally speaking, the later the amendment the heavier the burden on the applicant to show that the balance should be struck in favour of granting permission to amend. As was said in *Quah Su-Ling* at [38(d)]: “It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done”.
- (3) Third, the text of the amendment must, in the words of Hamblen J, be “satisfactory in terms of clarity and particularity”.

Parties’ submissions

21. Mr Stables submitted, first, that the claim which is sought to be added by the contested part of the proposed amendment (“the Contested Claim”) is one which the Claimants could have brought by separate proceedings in any event, is (in the circumstances outlined above) to be treated as being brought with the limitation period, and is not to any significant extent one that is sought to be added “late”. In support of the latter argument, Mr Stables placed particular reliance on *Tesla Motors Ltd & Anor v British Broadcasting Corporation (BBC)* [2013] EWCA Civ 152, Moore-Bick LJ at [50]:

“For my own part I do not think that the application to amend in this case was made late in the ordinary sense. Although particulars of claim and a defence have been served, there has been no case management conference and directions have not been given for preparation for trial. There has been no disclosure and no exchange of witness statements. In truth the proceedings are still in their infancy and I can see no grounds for thinking that the proposed amendment would be likely to have a disruptive effect on the progress of the proceedings. Accordingly, if I were satisfied that the claim had a real prospect of success, I would not refuse permission to amend on that ground.”

22. Second, Mr Stables submitted that the explanation for the application to add the Contested Claim is as set out in the letters from Haven dated 15 January 2020 and 14 February 2020. These include that “the amendments arose out of the service of the Defence”, and that “in light of the service of the Defence, it has become apparent that the truth or falsity of the allegations in the [Hewitt] List will need to be litigated in any event.

The Court will also need to determine the extent to which the Hewitt List was damaging to the reputation of the Claimants. The amendments do not, therefore, add in any significant way to the factual issues or to the scope of the dispute”.

23. Mr Eardley submitted that this explanation did not hold water, and that the true explanation is that the Claimants made a tactical decision not to complain about the Hewitt List “in the hope that the action could be fought without the quality of their legal services coming under scrutiny”. He supported this submission on two main grounds. First, although the letter of claim dated 8 March 2019 had attributed to the Hewitt Statement a meaning which included that “Haven and Mr Thompson had provided a sub-standard legal service to PFEW”, this had not been carried through into the meaning complained of in the Particulars of Claim. Second, by the letter from the Defendants’ solicitors to Haven dated 30 April 2019, the Claimants had been provided with both the Hewitt List and the information that Mr Hewitt had read it out at the Meeting, and yet the Claimants had chosen to bring no claim based upon its publication.
24. Mr Stables responded that the Claimants’ reasons for having acted as they did were subject to legal professional privilege, and that no adverse inferences should be drawn.
25. Third, Mr Stables submitted that the introduction of the Contested Claim would not cause any, or any significant, prejudice to the Defendants. In particular, the need to investigate the truth of the allegations contained in the Hewitt List (and, I would add, whether those allegations were published maliciously) arises as a result of the way in which the Defendants have chosen to plead the Defence; and, as the proceedings are at an early stage, the proposed amendment gives rise to no difficulties in terms of time to gather evidence, consequential amendments, or indeed any other procedural steps.
26. Fourth, Mr Stables submitted that the Contested Claim had a realistic prospect of success, did not lack the requisite clarity and particularity, or alternatively did not do so due to any fault of the Claimants, and would occasion prejudice to the Claimants if it was refused. These submissions were largely responsive to objections which had been notified by the Defendants’ solicitors, and which Mr Eardley expanded at the hearing.
27. In addition to his argument that the application to introduce the Contested Claim should be viewed against the background that the Claimants had made a deliberate decision not to complain about publication of the Hewitt List at the outset, Mr Eardley concentrated his submissions on two main topics, which are separate but overlap. First, the adequacy of the Claimants’ pleaded case. Second, proportionality, and whether the introduction of the Contested Claim would provide the Claimants with any legitimate advantage sufficient to justify the added complications to which, he submitted, its introduction would give rise. The fact that the Defendants had already agreed to the introduction of a claim for slander based on the Hewitt List formed one aspect of the latter argument.
28. Dealing first with the pleaded case on meaning and publication, Mr Eardley submitted that there is no averment in the Contested Claim that any of the Branch Board Secretaries who attended the Meeting actually understood the Hewitt List to bear the pleaded

meanings. There is only a formulaic defamation pleading at §14A as to the natural and ordinary meaning of the words complained of. That is insufficient, in light of the applicable legal principles. On the one hand, because the “single meaning” rule does not apply to claims for malicious falsehood, a claimant “can seek to show that any reasonably available meaning of the statement in question was false and made maliciously”: see *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2011] QB 497; *Tinkler v Ferguson* [2019] EWCA Civ 819, at [29]. On the other hand, in the words of Mr Eardley, because “[t]here can be no damage if, despite a meaning being “available”, no one in fact understood the statement in that sense ... it is essential for the claimant to establish that the statement has been understood in the sense complained of as false”, for which propositions Mr Eardley cited *Peck v Williams Trade Supplies Ltd* [2020] EWHC 966, at [12]-[18]. Mr Eardley submitted that it could not be inferred that there were a substantial number of listeners who would have understood the Hewitt List in the sense pleaded in the Contested Claim and that “Individual publishees who in fact understood the [Hewitt List] in the pleaded sense ought to have been identified”.

29. Mr Eardley next submitted that the particulars of falsity were “inadequate”, gave the Defendants “no idea of the case they would have to meet”, and “have the effect of reversing the burden of proof”. In particular, with regard to a number of the allegations complained of, where the “particulars of falsity” consist of nothing more than a bare assertion that the allegation is false, Mr Eardley submitted that the explanation that the allegations themselves are in general terms is not good enough. For example, the Claimants could do more than plead “It was false that the Claimants had wrongly and negligently given misleading advice to clients”. They might, for example, plead that they had advised clients in various specified ways but had not been sued for negligence.
30. Mr Eardley then turned to a number of items in the Hewitt List which he contended were, or were at least arguably, statements of opinion, and submitted that (a) the allegations derived from these parts of the Hewitt List are not actionable at all, alternatively (b) the claim based on these items could only succeed if they conveyed opinions which the Defendants did not in fact hold, and yet there is no pleaded case that the Defendants did not hold these opinions. In support of the first of these submissions, Mr Eardley referred to two decided cases. In one, *Euromoney Institutional Investor plc v Aviation News Ltd* [2013] EWHC 1505, Tugendhat J said at [102] that “a statement of opinion cannot be complained of as a falsehood for the purpose of a claim in malicious falsehood”. In the other, *Tinkler v Thomas* [2018] EWHC 3563, Nicklin J at [16a] cited that case as authority for the proposition that “In general, an *unverifiable* statement of opinion cannot be complained of as a falsehood for the purposes of a claim in malicious falsehood” but added at [16d] that “a statement of opinion that is capable of being proved true is, in principle, *capable* of founding an action for malicious falsehood where the opinion can be proved to be false and the claimant takes on the burden of doing so”. Two items in the Hewitt List which Mr Eardley relied upon in this context are item A (“General manner of conducting business (anecdotal)”) and item Z (“Ethical issues (IOD reviews)”). The third is item M, which I have already quoted in full above, and which begins with the sentence “Including unnecessary information in advices and making them needlessly long/complicated, e.g. unhelpfully including large tranches of regulations and

judgments”. In oral argument, Mr Eardley emphasised that his submission with regard to item M extended to the remaining sentences of that item.

31. Mr Eardley’s next submissions related to the issues of causation and the likelihood of pecuniary damage. First, he pointed out that the draft Amended Particulars of Claim contain no pleaded case that the reading out of the Hewitt List caused Haven special damage, and that the case on special damage remains confined to the Hewitt Statement. Second, he submitted that the plea in §19 of the draft pleading that “The Hewitt Statement and the Hewitt List were calculated to cause pecuniary damage to the Claimants in respect of their trade or business as providers of legal services and to cause pecuniary damage to the Second Claimant in respect of his profession as a solicitor, pursuant to section 3 of the Defamation Act 1952” is a bare assertion which does not meet the requirements of a proper pleading. Mr Eardley submitted that (a) what is required is proof that publication was more likely than not to cause the pecuniary damage, (b) the nature of the likely damage and the causal route by which such damage was likely to occur must be pleaded in an appropriate level of detail and set out a case which has a real prospect of success, and (c) in assessing that issue, the court will need to distinguish carefully between the statements complained of and statements about which no complaint is made; and the likely effect of the statements complained of must be assessed against the background of those that are not. Mr Eardley placed reliance on *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152 at [27]-[37] and *Tinkler v Ferguson* [2020] at [42]-[45], and, further, at [58], [62] & [94](iii).
32. Mr Eardley turned next to the issues of proportionality and legitimate advantage. His core submission was that trying the case based on the Hewitt List not only as a slander claim but also as a malicious falsehood claim would introduce significant complications which are not justified by any legitimate advantage for the Claimants flowing from the introduction of that malicious falsehood claim. He argued that complications would arise due to (a) the divergent (and unclear) rules on meaning as between defamation on the one hand and malicious falsehood on the other; (b) a significant legal issue as to whether a defendant to a malicious falsehood claim can defend that claim by reference to a “general sting” when faced with a complaint about a specific allegation; (c) the attendant possibility that the slander claim would be pursued by reference to one meaning and the malicious falsehood claim by reference to others; and (d) the need for the Claimants to lead evidence as to the sense in which attendees at the Meeting actually understood the Hewitt List, which would not be required for the slander claim.
33. Turning from that downside to the potential upside for the Claimants, Mr Eardley submitted as follows. If the Claimants are able to establish that the Hewitt List bore the natural and ordinary meanings alleged in §14A and §14B of the draft Amended Particulars of Claim, they will gain nothing by pursuing the case in malicious falsehood. Conversely, if they fail on that issue, neither of them have, in the words of Moore-Bick LJ in *Tesla* at [49] “sufficient prospect of recovering a substantial sum by way of damages to justify continuing the [malicious falsehood claim] to trial”. If, instead, the Court finds a natural and ordinary meaning for the Hewitt List which is different from the meaning advanced in the Contested Claim, but finds that the slander meaning is true, then, again,

the Claimants will gain no advantage sufficient to justify a trial in which two sets of meanings have to be considered. It is fanciful to suggest that any attendee at the meeting would have overlooked the 15 allegations in the Hewitt List that are not complained of and/or the obvious general sting of incompetence and unprofessionalism; and, acting only on the 11 allegations complained of, would have been more likely than not to have taken steps to the Claimants' financial disadvantage.

34. Finally, with regard to the question of discretion, Mr Eardley submitted that if the above pleading points are accepted the Claimants will have failed to set out a proposed amended case which has a realistic prospect of success, and they should not be given another opportunity to re-plead. However, even if those pleading points are rejected, the Claimants cannot show any legitimate advantage to be gained from the addition of the Contested Claim sufficient to justify the added complications which it entails. In addition, this is a "late" amendment: the Contested Claim could have been incorporated at the outset; the Claimants' explanations for not having incorporated it at the outset "are not only inadequate, but positively disingenuous"; and the Defence has already been served, and amending it to deal with the Contested Claim will involve considerable work over and above that required in light of the unopposed amendments.

Discussion

35. In my view, there are two important factors which affect both the weight and the attractiveness of the Defendants' arguments. The first is the extent of the matters which are already in issue in these proceedings in light of the contents of the Defence. The second is the Defendants' stance concerning the Claimants' access to witnesses. This is set out in a letter from the Defendants' solicitors dated 2 July 2020, as follows:

"Our clients recognise the undesirability, for both the parties and the court, of witnesses giving oral evidence pursuant to a witness summons rather than through witness statements filed and exchanged in advance of trial. Therefore, once the statements of case are settled and directions for trial (including, as the case may be, trial of a preliminary issue) are given, our clients would be prepared to write to all potential witnesses confirming that they may, if they wish, give witness statements for the claimants on the matters in issue. To do so at the present stage would be premature, however, given the fact that our clients have already written to those concerned and because our clients are plainly not obliged to assist the claimants to make their case and to obtain evidence to that end. It is one thing for parties to cooperate in the determination of a claim that has been properly framed but quite another to expect our clients to waive their legal rights in order to enable the claimants to formulate a claim in the first place."

36. So far as concerns the first of these factors, it seems to me that the existing Defence gives rise to issues as to (a) whether the publication of the Hewitt List caused or was likely to cause serious harm to the reputations of the Claimants, (b) whether the publication of the Hewitt List caused financial loss to the Claimants, (c) the seriousness of the allegations contained in the Hewitt List in comparison to those contained in the Hewitt Statement, (d) whether the Hewitt List set out the true reasons for the decision to remove Haven from the Panel, (e) whether the discussion that followed the publication of the Hewitt List

identified any different or additional reasons to those contained in the Hewitt List, (f) whether and to what extent the Hewitt List does or does not indicate that the Defendants harboured hostility or bad faith towards the Claimants, (g) whether the criticisms in the Hewitt List were all relevant matters for the Defendants to consider when determining, in their discretion, that Haven should be removed from the Panel, (h) whether the points in the Hewitt List were “vague” or “appropriate summaries of detailed concerns that had been provided to the Defendants”, (i) whether the Defendants did or did not believe that anything said at the Meeting (which I take to include what was said by reading out the Hewitt List) was false, dishonest or malicious, and (j) whether Mr Thompson’s feelings have been hurt or his plans frustrated as a result of (among other things) the explanation at the Meeting of the many serious shortcomings in the Claimants’ services (which includes what was read out from the Hewitt List).

37. In these circumstances, I consider that the Claimants are right to say that in light of the contents of the Defence (a) the truth or falsity of the allegations in the Hewitt List will need to be litigated in any event, (b) the Court will also need to determine the extent to which the Hewitt List damaged the reputation of the Claimants, and (c) the Contested Claim does not add significantly to the factual issues which are already in dispute.
38. Whether, in light of those considerations, it is right to say that the application for permission to amend to include the Contested Claim “arose out of the service of the Defence” or reflects the abandonment of a previous tactical choice made by the Claimants strikes me as a sterile debate. The reality, as it seems to me, is that the Defendants have chosen to accord the contents, publication and ramifications of the Hewitt List prominence among the issues to be tried, if not positively to throw down a gauntlet with regard to those matters, and the Claimants have responded, reasonably if not predictably, by saying that if the Claimants and the Court are already required to grapple with those matters, there is no adequate reason why they should be denied the opportunity to rely upon the contents of the Hewitt List to make additional claims.
39. I do not consider that the amendment is being made late, and, for the above reasons, I consider that there is a sufficient explanation as to why it is only being sought now.
40. Turning to the first of Mr Eardley’s points on the pleading, the *Peck* case concerned publication to a single individual. In those circumstances, having discussed a number of principles of the law relating to malicious falsehood, Nicklin J said at [16] that “the only relevant question is what meaning did the publishee understand the publication to bear and, if there is a dispute about that, whether *this* meaning is an available meaning for the purpose of malicious falsehood”. I am unable to extract from that case authority for a proposition of universal application that “it is essential for the claimant to establish that the statement has been understood in the sense complained of as false” by identifying at the stage of formulation of a pleading “[i]ndividual publishees who in fact understood [it] in the pleaded sense” which applies in the circumstances of the present case where, as set out above (a) the Claimants’ access to the material publishees is subject to the consent or cooperation of the Defendants, and (b) the Defendants have made clear that they will not provide such consent or cooperation until “the statements of case are settled and

directions for trial ... are given". In this regard, the facts of the present case are unusual, and I doubt whether they would have been in contemplation even if some wider formulation had been stated in *Peck* than I believe Nicklin J to have articulated. It seems to me that there would be a manifest potential for injustice if such a principle was to be applied remorselessly on the particular facts of the present case.

41. Mr Eardley's next point on the pleading concerned the adequacy of the particulars of falsity. I did not find this point persuasive as a reason for refusing permission to amend to plead the Contested Claim. I am not convinced that the Claimants either can do more, or, if they can do more, should be required to more, to plead to allegations which are expressed in general terms. As to the complaints that the Defendants "have no idea of the case they would have to meet", and that the Claimants' particulars "have the effect of reversing the burden of proof", the Defendants have already advanced a positive case in a number of respects concerning the Hewitt List, including (for example) that it "set out the true reasons for the decision to remove Haven from the Panel". The reality is that the Defendants plainly must have had in mind specific matters which led them to formulate and publish each of the items on the Hewitt List. However, they have not identified those matters to the Claimants, and the Claimants are therefore in no position to plead particulars of falsity by reference to them. I doubt that pleading further averments, for example by supporting the allegation that "It was false that the Claimants had wrongly and negligently given misleading advice to clients" by some pleading relating to the extent to which they have or have not been sued for negligence, would be of benefit to anyone. As the Defendants know what underlies each of their own "true reasons" they should not have difficulties in understanding or pleading to the existing particulars of falsity, but if they do, it seems to me this a matter that would be better addressed by a Request for Further Information than by refusing the amendment.
42. I am also unpersuaded by Mr Eardley's submissions concerning the items in the Hewitt List which he contended were, or were at least arguably, statements of opinion. To my mind, there are two major problems with this line of argument. First, the *Euromoney* and *Tinkler v Thomas* cases, taken together, do not establish that a statement of opinion can never be complained of as a falsehood for the purposes of a claim in malicious falsehood. Instead, they appear to acknowledge that "a statement of opinion that is capable of being proved true is, in principle, *capable* of founding an action for malicious falsehood". Mr Eardley did not, as I understood him, contend that any of the items in the Hewitt List which he relied upon in this context were unverifiable statements of opinion. Second, when assessing whether these items constitute statements of fact or opinion, it seems to me to be relevant that the Hewitt List begins with the words "The Police Federation has the following complaints with the services provided by Haven". In my view, those words are suggestive of factual failings rather than adverse opinions. Whether or not that is right, it seems to me more likely than not that these items constitute statements of fact. In any event, even if one or more of these items is a statement of opinion, and Mr Eardley was arguing that the same is not or are not capable of being proved true, I am not persuaded of that, and thus not persuaded that it is not or that they are not capable of founding an action for malicious falsehood.

43. On the face of it, there is greater force in Mr Eardley’s submissions relating to the issues of causation and the likelihood of pecuniary damage. It seems to me that the Claimants’ decision to complain about only 11 out of the 26 allegations contained in the Hewitt List does at the very least give rise to potential difficulties. The claim based on the Hewitt List is made pursuant to section 3 of the Defamation Act 1952 alone. In *Tesla*, Moore-Bick LJ referred at [45] to “the difficulty of showing the extent to which any loss that can be established was caused by actionable statements rather than statements that for one reason or another are not actionable”. That is a general proposition. However, at the same time it is important to keep in mind that the outcome in *Tesla* depended on the facts of that particular case. This is illustrated by the next few sentences in the judgment of Moore-Bick LJ: “This is a particularly acute question given the number of times the film was broadcast before the beginning of the limitation period ... the pleading does not attempt to identify what part of the loss was caused by the actionable statements”. Similarly, Nicklin J stated general propositions in *Tinkler v Ferguson* at [45]: “At the pleading stage, the claimant must identify (a) the nature of the loss which it is alleged the falsehoods caused; and (b) the mechanism by which s/he contends that the loss is likely to have been sustained”. Whether those requirements are satisfied depends on the way in which the pleading is formulated in any particular case.
44. In the present case, Mr Stables points out that, in contrast to *Tesla*, the Claimants do not accept that any of the allegations made by the Defendants are true. The Claimants have selected only 11 allegations for complaint for reasons of proportionality, and not because they accept that the other 15 allegations, or any of them, are true. Accordingly, on the Claimants’ case, all the statements in the relevant universe are actionable, although they have chosen to make only 11 of them the subject of the Contested Claim. Further, although the Claimants contend that the 11 allegations are the most serious, and thus the ones most likely to have caused loss, they are inhibited in making good that case by their inability to access witnesses without the consent or cooperation of the Defendants, which is currently being withheld. For these reasons, Mr Stables submitted that causation is a matter for trial. Mr Stables further submitted that the requirements identified by Nicklin J were satisfied in relation to the Contested Claim: the nature of the loss is pleaded in §23 of the draft Amended Particulars of Claim (Mr Stables also made reference to §24, but I do not consider that can be right, because §24 relates to the Hewitt Statement alone); and the mechanism by which that loss was sustained “which is in any event very obvious” is pleaded in §§18.5, 18.6A, 18.7, 22.1 and 22.2.
45. It appears to me that the Claimants may well face difficulties at trial with regard to causation, not only for the reasons submitted by Mr Eardley on the present application but also due to the perhaps more fundamental problem of separating the loss occasioned by actionable statements from that occasioned by the Removal Decision. In my judgment, however, their pleaded case that the Hewitt List was calculated to cause pecuniary damage goes well beyond bare assertion, and, overall, the Contested Claim sufficiently meets the requirements identified in the authorities to be allowed in.

46. As to Mr Eardley's points concerning proportionality and legitimate advantage, I consider that some of the complications which he identified are likely to arise in any event in light of the issues raised by the current pleadings. For example, the sense in which the attendees at the Meeting actually understood the Hewitt List will or may be relevant to issues such as whether the publication of the Hewitt List (i) caused or was likely to cause serious harm to the reputations of the Claimants, and (ii) caused financial loss to the Claimants. On that basis, the need for evidence on that topic would arise in any event. Mr Eardley's other suggested complications essentially concerned the law relating to meaning. I do not consider that these matters provide a proper or sufficient basis for refusing permission to amend to plead the Contested Claim. In particular: the postulated lack of clarity as to whether a defendant to a malicious falsehood claim can defend that claim by reference to a "general sting" when faced with a complaint about a specific allegation is not put forward as giving rise to any certain difficulty, the Defendants did not seek to have that issue resolved at this stage of the proceedings, and the introduction of the Contested Claim does not prevent them from seeking determination of it at a later stage if they consider that to be helpful or appropriate. It is preferable for such an issue to be addressed if and when it arises on the concrete basis of the parties' pleaded cases rather than in a vacuum at the present time.
47. In my judgment, similar considerations apply to Mr Eardley's arguments to the effect that the introduction of the Contested Claim offers the Claimants no or no sufficient advantage to justify the complications to which a trial of it would give rise. First, the very complexity and diversity of the various scenarios put forward by Mr Eardley suggests that they do not provide an appropriate basis for determining an application for permission to amend, but are instead matters which should properly be determined at trial. Second, attacks on the viability of the Claimants' case as to how attendees at the Meeting would have regarded and reacted to the allegations in the Hewitt List would be more attractive and carry greater weight if the Defendants had consented to the Claimants having access to material witnesses. Third, Mr Stables' arguments that the Contested Claim offers advantages to the Claimants arising from the differences between claims for defamation and claims for malicious falsehood cannot be dismissed as having no substance. For example, because the "single meaning" rule does not apply to claims for malicious falsehood, the Claimants "can seek to show that any reasonably available meaning of the statement in question was false and made maliciously".
48. For all these reasons, taking account of the overriding objective, and balancing the injustice to the Claimants if they were to be refused permission to amend to plead the Contested Claim on the one hand against the need for finality in litigation and the injustice to the Defendants and other litigants if the Claimants are granted permission to amend on the other hand, and in light of the views which I have expressed on matters such as lateness, the explanation which the Claimants have provided, and the merits of the Contested Claim, I have concluded that permission to amend should be granted.

Trial of a Preliminary Issue to Determine the Words Spoken

49. When giving the reasons for his Order dated 3 June 2020, Nicklin J said at (B):

“... If not properly case managed, a large amount of time and costs can be spent on issues that ultimately are not relevant because the claimant fails to demonstrate publication ... Active consideration requires to be given **now** to isolating the issue of publication and having it tried as a preliminary issue. It is not until there is certainty – either by agreement or ruling by the Court – *what* words were published by the Second Defendant, that the Court could rule on meaning. For as long as there is a dispute about publication, there cannot sensibly be a ruling on meaning (or fact/opinion)...”

50. As the Claimants plead and the Defendants admit that the Hewitt List was published in its entirety, these observations must be read as applying to the Hewitt Statement alone.
51. The Defendants contend that it would be appropriate to order the trial of a preliminary issue to determine whether the words complained of in the Hewitt Statement (or some variant of the same) were published, because this will save costs and court time. Mr Eardley submitted that resolution of that issue “will allow in turn an early determination of meaning and a focussed defence of truth”, and that the issue could be tried within a single day “perhaps with a direction limiting each side to a maximum of 3 witnesses”.
52. The Claimants take a diametrically opposite stance. Mr Stables submitted that it would be unjust to the Claimants to order such a trial when the Defendants have denied them access to witnesses (according to Mr Stables, and in line with the evidence served by the Claimants in support of the Injunction Application, “unlawfully ... [and] by means of cover up and witness intimidation”), and, further and in any event, that the expense and complexity involved would be out of all proportion to any advantage to be gained.
53. In my judgment, it would be quite wrong, and contrary to the overriding objective, to order such a trial until the Claimants’ difficulties in gaining access to witnesses have been resolved. Without being able to obtain access to the individuals who attended the Meeting, the Claimants will be unable to obtain witness statements, and will need to resort to witness summonses. As the Claimants will not know what evidence each attendee is likely to give, they will be unable to concentrate their efforts on particular individuals, and thus confine the number of witnesses they wish to summons. This will lead to a prolonged and untidy trial, in which both evidence in chief and cross-examination will need to be dealt with on the hoof. The alternative, suggested by Mr Eardley, of limiting each side to a specified number of witnesses, and curtailing the duration of the trial, would be manifestly unjust to the Claimants. They will not know which witnesses are the best for them, and if the time for witness evidence is limited by the Court they will be unable to use their time as effectively as the Defendants.
54. As matters stand at present, the Claimants’ difficulties in gaining access to witnesses will not be resolved until either the Injunction Application is heard (and succeeds) or the Defendants’ offer contained in the letter from their solicitors dated 2 July 2020 kicks in (which will be after “the statements of case have settled”). At that stage, the Claimants will be in a position to make informed submissions about which witnesses they should be allowed to call at the trial of a preliminary issue to determine whether and to what extent the Hewitt Statement was published and about other matters (such as the need for

disclosure, and the overlap between evidence to be given at that trial and the full trial). And the Court will be able to make an informed determination on better materials than are available before me of the merits and practicality of ordering such a trial. It is thus possible that it may be appropriate for such a trial to be ordered then.

55. On the information at present available to me, however, I doubt whether this will be so. The centre of gravity of the claim has now shifted from the Hewitt Statement to the Hewitt List, such that resolution of the issue of publication of the Hewitt Statement seems to me unlikely to narrow the issues for trial to any remarkable extent. Further, the purpose of resolving that issue is, essentially, to clear the path to a ruling on the meaning of the words spoken by Mr Hewitt at the Meeting following the publication of the Hewitt List. However: (a) that would lead on to a trial of a further preliminary issue as to the meaning of whatever words are found to have been spoken in that regard (i.e. the Hewitt Statement or some variant of it) and (b) resolution of that further issue would be unlikely to narrow the issues for trial to any marked extent, given the significance of the Hewitt List in comparison to the Hewitt Statement. Accordingly, it would be necessary to balance the expenditure of time and resources which would be involved in two preliminary trials against the consideration that such trials would still leave all the issues relating to the Hewitt List unresolved. Finally, although I do not have sight of the relevant evidence, it seems to me that there may well be difficulties and dangers in seeking to divide the issues for trial in this way. For example, a key witness on the preliminary issues relating to the Hewitt Statement (e.g. Mr Hewitt himself) may also be called to give evidence on other matters at the full trial. If the credibility of that witness on the trial of the preliminary issues is attacked by reference to other issues, the trial of the preliminary issues may get out of hand; but if an attack on that basis is not allowed, it may emerge at the full trial that the credibility of the witness is open to question on grounds that did not feature at the preliminary trials, and which would or might have affected the Court's appraisal of the evidence at those trials.
56. For these reasons, I do not consider it appropriate to order at this time the trial of a preliminary issue to determine the issue of publication of the Hewitt Statement.

The Preliminary Issue on Meaning Application

57. In accordance with the reasoning of Nicklin J, and as I believe both sides accepted at the hearing, the trial of a preliminary issue to determine the meaning of the Hewitt Statement cannot sensibly take place before determination of the issue of whether it was published. In light of my decision not to order determination of the latter issue at the present time, it follows that no order for the trial of the former issue should be made.
58. On the materials at present available, I would not be disposed to order the trial of a preliminary issue to determine the meaning of the Hewitt Statement in any event.
59. In referring to "the statement set out at paragraph 14 of the Claimants' draft Amended Particulars of Claim", it is unclear whether the notice in the Preliminary Issue on Meaning Application is intended to extend beyond that, and to embrace, further or alternatively,

the Hewitt List. On the one hand, the Hewitt List is pleaded at §14, and the Hewitt Statement at §14D, and these factors suggest that the Application is concerned with the Hewitt List alone. On the other hand, the Hewitt List contains 26 items, and the Claimants complain about 11 of those items, and if the Application is intended to refer to these items (as opposed to a single statement, such as the Hewitt Statement) it is unclear why it seeks determination of “the natural and ordinary meaning of the statement” and “[w]hether that statement is a statement of fact or opinion”, and “[i]f so, whether the statement indicates in general or specific terms the basis of the opinion”. To complicate matters further, in an exchange of emails following the hearing Mr Stables suggested that the Defendants’ proposal comprised or included an order for determination of (i) meaning and (ii) “common sting” in respect of the Hewitt List, although I do not consider that this was apparent from the arguments at the hearing.

60. In these circumstances, I consider I should explain in addition why I would not be disposed to order now the trial of a preliminary issue to determine the meaning of the Hewitt Statement in any event, or the trial of the preliminary issues of meaning and/or of fact/opinion in respect of the Hewitt List. My reasons, in summary, are as follows:

- (1) A detailed Defence to the claim based on the Hewitt Statement has already been served, including defences of truth, qualified privilege, and pleas which grapple with numerous other issues, including those summarised above. Accordingly, such a trial will result in no saving of time or effort in that regard.
- (2) Beyond that, and addressing both the Hewitt Statement and the Hewitt List, it was common ground between the parties that context is relevant (see the discussion of the legal principles relating to meaning by Nicklin J in *Zarb-Cousin v Association of British Bookmakers* [2018] EWHC (QB) 2240 at [15]-[20], including the citation from the judgment of Tugendhat J in *Crow v Johnson* [2012] EWHC 1982 (QB) at [24], which contains the words “In defamation context is crucial.”).
- (3) Mr Stables submitted that, in the present case, context would involve consideration of (among other things) what was communicated to attendees prior to the Meeting, what was said at the Meeting, how it was said, and words spoken before, after and during the publication of the words complained of. He further submitted that the Claimants had no personal knowledge of this broader context, and had been deprived of the means of obtaining such knowledge by the Defendants’ conduct in impeding access to material witnesses. Accordingly, either the trial of a preliminary issue to determine meaning would be conducted on a basis which was unjust and unfair to the Claimants, or it would have to be deferred until a stage of the proceedings after statements of case had been finalised and costs on disclosure and so forth had already been incurred, in which case it would not serve to avoid expenditure of time and money on those matters.
- (4) Mr Eardley disagreed. In his Skeleton Argument, he submitted that the trial of the issue of natural and ordinary meaning, and of the related issue of fact/opinion, should be fixed for an interval after the trial of the issue of publication of the Hewitt

Statement and “before service of the Amended Defence”. It seems to me that this would offer the prospects of saving the costs that would otherwise be incurred in addressing issues which (in the words of Nicklin J) are ultimately not relevant. However, it would not be just or fair to the Claimants, for the reasons explained above. I therefore do not consider that this should be ordered now.

- (5) In his oral submissions, Mr Eardley contended that the trial of the issues of meaning and fact/opinion could be controlled by robust case management orders. I naturally accept that, as a matter of principle, this must be correct. Without a much fuller understanding of what documents are or may be relevant to the trial of these issues, and what evidence is available to be given and by who, however, I do not consider that the court will be in a position to make case management orders which are right and accord with the overriding objective. This means that no such orders can or should be made now. By the time the requisite information is available, time and costs will have been expended. This would be relevant to whether any order for such a trial should be made at that stage, but it is not possible now to know whether or not that will be so when that stage is reached.
- (6) The concerns that I have expressed above about the potential dangers and difficulties involved in conducting a series of trials of separate issues in which the credibility of witnesses may be material, and where the same individuals may be called to give evidence on other issues on different occasions, also apply here.
- (7) In light of these considerations, I asked Counsel at the hearing whether they knew of any case involving oral publication in which a trial of a preliminary issue on meaning had been ordered. At the time, they told me that they did not.
- (8) Subsequently, however, Mr Eardley drew my attention to *Dhir v Saddler* [2018] 4 WLR 1, and asked me to take that decision into account. Mr Stables responded that *Dhir* was distinguishable on a number of grounds and did not assist the Defendants in the present case, and that their proposals would be extremely costly and wasteful as duplicative and would offer no true benefits in the present case.
- (9) In *Dhir*, “the words spoken by the Defendant [had] been agreed from the outset” ([1]), and the actual meaning of those words was determined, with the agreement of the parties, on the day before the trial was listed to commence (see [22]). On the basis of the evidence of all the witnesses for both sides which the parties wished or were able to call to as witnesses at trial, the words complained of were spoken by the Defendant after another individual (i.e. not the Defendant) had read from prepared notes, and consisted of the words “*he [the Claimant] threatened to slit my throat*” (see [9]-[11]). Nicklin J ruled (perhaps unsurprisingly) that these words meant “*the Claimant had threatened to slit the throat of the Defendant*” (see [22]). At [30], when discussing whether these words imputed the commission of the criminal offence of making a threat to kill which was punishable by imprisonment (such that the slander claim could be maintained by the Claimant without proof of special damage), Nicklin J said (among other things):

“Obviously, context is very important ... There is no evidence of any surrounding context for the Defendant’s words that could lead to them to be understood in any way other than imputing the commission of the offence of making a threat to kill. Had the Defendant said, as context for her remark, that the Claimant had not been serious or had been joking, then the position might be different. But here, she reported the threat made by the Claimant in all seriousness. Certainly, there was nothing in the context of her statement that would have given the hearer any reason to doubt that the threat was made by the Claimant with full menace.”

- (10) In contrast to *Dhir*, in the present case there is a dispute as to whether the words complained of as the Hewitt Statement were spoken. Although there is no dispute that the Hewitt List was published, also in contrast to *Dhir* there are issues about context which relate to both the Hewitt List and the Hewitt Statement. At present, those issues relate to the availability of evidence about context, as opposed to a crystallised dispute as to whether anything was said or done in the relevant context which would have influenced the understating of the attendees of any of the words complained of. As set out above, the Claimants in the present case do not have access either to relevant witnesses or to relevant documents, whereas all the evidence relating to publication and the context of publication that either party wished or was able to adduce was available to the Court in *Dhir*. Indeed, and again perhaps unsurprisingly, the determination in *Dhir* was made by agreement of the parties. For all these reasons, I consider that the differences between *Dhir* and the present case are much more telling than the similarities, and the fact that the issue of meaning was determined (by a whisker) in advance of the start of the trial in *Dhir* provides no support for the argument that it would be appropriate to follow the same course in the present case, at least as matters presently stand in it.

The Injunction Application

61. The Claimants contend that the Injunction Application is vital and urgent, and is needed to secure access to witnesses and to reverse for the past and to prevent for the future the Defendants’ improper and unlawful interference with and intimidation of witnesses. The Defendants contend that the Injunction Application is both overly ambitious and completely unfounded, and that they have offered a pragmatic solution to the matters about which the Claimants complain which balances what they assert to be PFEW’s rights of confidentiality against the need for an effective trial of the pleaded issues.
62. All that is before me under this heading on this occasion, however, is the determination of what directions should be given for the hearing of the Injunction Application. At the conclusion of the hearing, I asked the parties to seek to agree such directions in the event that they continued to be unable to agree a solution to the issues which have given rise to the Injunction Application. Subsequently, they informed me that they had agreed the following directions, which I regard as appropriate and am prepared to order:

- (1) A hearing of the Claimants' application be fixed on the first available date convenient to the parties after 1 November 2020, time estimate 1 day.
 - (2) Any evidence in response be filed and served by the Defendants by 4.30pm on 2 October 2020.
 - (3) Any reply evidence be filed and served by the Claimants by 4.30 pm on 16 October 2020.
 - (4) Hearing bundles be agreed 10 days before the hearing and filed and served by the Claimants 7 days before hearing.
 - (5) Skeleton arguments be filed 3 days before the hearing.
63. At the same time as I was informed about the agreement of these directions, for which I am grateful to the parties, I was also informed that correspondence is continuing between them about the underlying issues. I would strongly encourage the parties to reach an agreement about that before further costs and court time are expended on the Injunction Application. Like Nicklin J, I consider that they ought to be able to do this.

Costs

64. If my understanding is correct, the parties were agreed that the appropriate order on the Amendment Application is that the costs of and occasioned by and thrown away by the amendments to the Particulars of Claim should be paid by the Claimants to the Defendants, but that the costs of and occasioned by the hearing to determine whether permission should be granted to amend to plead the Contested Claim should follow the outcome of that hearing, and, in the result, should be paid by the Defendants to the Claimants. That is the order that I regard as appropriate and would make in any event.
65. As for the costs of the Preliminary Issue on Meaning Application to date, I consider that these should be costs in that Application. I have declined to make any order for directions on that Application at the present time, but have left open the prospect that it may be appropriate for it to be pursued at some later stage. If it is not pursued, the costs of and occasioned by it should be paid by the Defendants to the Claimants, but if it is pursued those costs should follow the event when it is finally determined.
66. The costs of the Injunction Application to date should be costs in that Application.

Conclusion

67. I ask Counsel to agree a draft Order for consideration which reflects the above rulings.
68. I am grateful to both Counsel for their clear and helpful submissions.