



Neutral Citation Number: [2020] EWHC 3522 (QB)

Case No: QB-2019-004703

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2020

Before :

MRS JUSTICE COLLINS RICE

Between :

DAVID DAY

Claimant

- and -

JANINE CHIVERS

Defendant

Mr Jake Rudman (instructed by Lawcomm) for the **Claimant**
Ms Elizabeth Bowden (instructed by Placidi) for the **Defendant**

Hearing date: 15th December 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE COLLINS RICE

Mrs Justice Collins Rice:

Introduction

1. The claimant, Mr Day, and the defendant's husband, Mr Chivers, were business partners in a laundry enterprise. Their working relationship is at an acrimonious end, and there are commercial proceedings on foot between them. Mr Day brings this libel action in addition, because of a number of Facebook posts by Mrs Chivers at about the time the business relationship was breaking down.
2. The matter was listed for a four-day trial from 15th to 18th December 2020, at which a considerable amount of witness evidence was due to be given. Having considered the parties' pleadings and skeleton arguments, and in particular the extent of the preliminary matters raised, I invited their views on the merits of adjourning the hearing after submissions on the ordinary and natural (and any innuendo) meaning of the posts complained of; whether the posts amounted to statements of fact or of opinion; and whether the posts were defamatory of Mr Day at common law – to enable me to give a ruling on those preliminary issues. I was minded to conclude that it would assist the efficient disposal of the case, narrow and focus the issues, reduce ultimate costs and the burden on witnesses, and be in the interests of justice as a whole to do so. The parties on reflection concurred.

Legal principles and approach

3. I had adopted the standard approach to determination of meaning. I first read the posts complained of, without knowing what either party wanted to say about their meaning. I formed and noted some provisional views. I then read the trial bundle and the skeleton arguments. I heard oral submissions and reserved judgment.
4. There is no dispute as to the applicable legal principles or the correct approach. I directed myself to the guidance on 'meaning' distilled from the authorities and set out in *Koutsogiannis v Random House Group* [2020] 4 WLR 25, at paragraphs 11 and 12. My task is to "*determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear*". The governing principle is reasonableness. The intention of the publisher – for these purposes Mrs Chivers – is irrelevant in law: the test focuses on how words are read, not how they come to be written. It is objective, not subjective.
5. I keep in mind, as guided, the perspective of an ordinary, reasonable reader of Facebook posts like these, reading each post once through in the context in which it appears, and forming an impression of what they convey on their face. The reader is neither naïve nor suspicious; is able to read between the lines and pick up an implication; and is allowed a certain amount of loose thinking without being avid for scandal. Context is important, and 'common knowledge' can be factored in, but no evidence beyond the posts complained of is admissible as to what they mean.
6. I am guided away from over-elaborate analysis of text. That is not, in particular, how Facebook posts are read (*Vardy v Rooney* [2020] EWC 3156 (QB) at paragraph 18; *Stocker v Stocker* [2019] 2 WLR 1033 at paragraphs 41 to 47). I need to avoid both

literalism, and any strained or forced interpretation. I can and must determine the single meaning I myself consider correct, and am not bound by the meanings advanced by the parties, so long as I do not alight on something more injurious than the claimant's pleaded meaning.

7. I have further directed myself to *Koutsogiannis* at paragraphs 16 and 17 for guidance on considering whether the words complained of contain allegations of fact or opinion. On this, again, the question is how the words would strike the ordinary, reasonable reader. Subject matter and context can be especially important here. "*Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.*" but sometimes care is needed: there is a difference between comment which is pure opinion and comment which is an imputation of underlying fact.
8. I am reminded by the authorities that the test for the difference between fact and opinion is an objective one. That comes back to how the words would strike the ordinary reasonable reader. I have to look at the substance, not the intention of the writer or any label the writer may have attached.
9. The test at common law for whether a (natural and ordinary) meaning is defamatory is well-established: whether it substantially affects in an adverse manner the attitude of other people towards a claimant, or has a tendency to do so. That is not about actual impact at this stage, it is about the meaning of the words and their inherent tendency to damage someone's reputation. 'Substantially' imports a threshold of gravity or seriousness.
10. While there are three preliminary issues I am required to determine, the authorities also counsel against the dangers of trying to solve them in too linear or compartmentalised a fashion. I have to bear in mind whether this is a case in which the questions of 'meaning' and 'fact/opinion' might throw light on each other, such that it would be wrong to tackle them in an order which proves to be a trap of false logic. I note the risk and seek to avoid it.

The First Publication

11. On 28th October 2019, Mrs Chivers posted this on her Facebook wall:

"SHIRLEY DRY CLEANERS...

Just to make people aware the shop is now CLOSED. If you have clothes in there you need to contact the owner DAVID DAY. He also owns FOYES CORNER LAUNDRETTE. He is the only one with a key and 100% legal responsibility as you can see in the pic.

He is pretending to be a caring part of the Shirley community while being the sole reason the shop is now closed. He is trying to pass the blame to my husband and I who worked with him for 3 months... leaving after being threatened, intimidated and manipulated by him.

He has now given out our personal phone numbers and home address to customers. We have young children in the house and I do not want them affected by this horrible mess.

I put on a brave face while cleaning up the petrol and glass from my shop when he targeted that but you do not involve my home and my children.

People need to know the TRUTH about DAVID DAY.”

12. The ‘pic’ was a screenshot of the Companies House page for Shirley Dry Cleaners Limited, naming Mr Day as the “1 active person with significant control” and owner of 75% of the shares and voting rights.
13. Mr Day fears that the natural and ordinary meaning of this – what it says about him – is that he:
 - a) threatened, intimidated and manipulated Mr and Mrs Chivers over a period of three months whilst they were working for him, thereby making them fear for their family’s safety and forcing them to leave his employ;
 - b) gave out their personal phone numbers and home addresses to customers of Shirley Dry Cleaners without their consent, thereby putting them and their children in danger;
 - c) petrol bombed Shirley Dry Cleaners, thereby leaving petrol and broken glass in the shop, causing criminal damage to the property and unduly intimidating Mr and Mrs Chivers and their children;
 - d) is fraudulently pretending to be a caring part of the Shirley community when in fact he conducts himself in an unethical, manipulating and intimidating way in his businesses; and
 - e) is the sole reason Shirley Dry Cleaners has closed and therefore is a businessman who should not be dealt with or respected.
14. Mr Day says that these are allegations of fact, and clearly defamatory of him on the common law test.
15. Mrs Chivers has not pleaded a rival equivalent ‘meaning’ but Ms Bowden, on her behalf, took issue with Mr Day’s contended meaning in a number of respects, in her written and oral submissions. She says that it tries to present a linked narrative where no such connections are suggested on the face of the post; that it gratuitously inserts commentary or inference of the worst sort with language such as ‘petrol bombed’ and ‘fraudulently’, stretching the words actually used beyond their natural meaning; and reaches ‘conclusions’ about Mr Day which are unsupported by the post. She also says that much or most of it amounts to Mrs Chivers’ opinion rather than factual allegation.
16. I remind myself that my task is not to agree or side with one party or the other about meaning, but, having formed some initial views, to hear what the parties say and test those views, before doing what the law requires me to do: find a single natural and

ordinary meaning. I also remind myself that I need to look at this post as a whole, as it would have been read; not broken up on a sentence-by-sentence or word-by-word basis. I also need to be clear that I am not *at this stage* considering whether anything in this post is true, fair or otherwise justifiable. I am simply considering what meaning about Mr Day an ordinary and reasonable person would get from just looking at it once. I remind myself of the guidance that social media is conversational and fast-moving: people scroll through messages relatively quickly, and the reader's reaction to a post is impressionistic and fleeting, absorbing the essential message quickly before moving on. (*Vardy v Rooney* at paragraph 18).

17. My initial view about the post, coming to it fresh, was that it opened by giving some information about the closure of Shirley Dry Cleaners and making it clear that that was Mr Day's sole responsibility. I thought that was important scene-setting. It then identifies a discrepancy between Mr Day's public and private behaviours – in the community, he pretends to be caring, but in his business practices he wrongly puts the blame for the shop closure to his associates, Mr and Mrs Chivers, and had threatened, intimidated and manipulated them over a period of three months. That made them leave the business arrangement. He has now gone further and disclosed the personal phone numbers and home address of his ex-associates to customers, causing them concern about their privacy and the wellbeing of their young children. That crossed a line between work and home life which was important. Mrs Chivers had taken Mr Day's conduct in her stride when he had targeted or attacked her shop, using petrol and causing damage including broken glass, but she felt differently about her home and home life.
18. On this sort of understanding of the meaning of this posting, I am clear that it contains – largely consists of – allegations of fact. It comes across as an account of things that Mr Day has done. The fact that it was written from a personal perspective by Mrs Chivers – her side of the story – and on her Facebook wall, does not alter that in law. Facebook does not dissolve factual allegations into opinion or make them in some way personal perspectives. This post undoubtedly conveys a meaning that Mr Day did a number of things. The reader's orientation would have been set to expect facts by the informative opening, and reinforced in that by the closing indication that facts about Mr Day were being imparted.
19. It means other things too. It records how Mrs Chivers herself felt about what Mr Day did, for example in breaching the privacy of her home life. It indicates that she was entitled to feel that way – that Mr Day, by his actions, caused her to feel as she did. There is both fact and opinion in this, and – without being over-analytical – a reader would, in my view, grasp the facts about Mrs Chivers' feelings and read between the lines as to the connection between what Mr Day had done and those feelings, and her opinion of it all.
20. Finally, the post, in my view, includes some more general opinions about Mr Day – for example that the discrepancy between his 'community' and 'business' personas is devious or hypocritical.
21. I share to some degree Ms Bowden's view that some of what Mr Day fears this post to say about him are not fully borne out by what is actually said, and strains beyond the ordinary and natural meaning. At the same time, there is undoubtedly an overall impression created of him in the mind of the ordinary reader which properly has to be captured in setting out what it means. I remind myself in particular that opinion "*is*

something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.” (Koutsogiannis at paragraph 16(ii)), but that over-elaborate commentary is something different. This post would have been read in a few seconds.

22. Taking all of this into account, the natural and ordinary meaning I arrive at for this post is that it says this about Mr Day:

His business conduct is the sole reason for the closure of Shirley Dry Cleaners. He presents himself in the local community as caring, but in his business practices he is not: he wrongly seeks to blame Mr and Mrs Chivers for the closure of the shop, and threatened, intimidated and manipulated them over their three-month business relationship, causing them to leave it. He also caused an attack on Mrs Chivers’ shop, involving petrol and causing damage, including breaking glass. He has now gone further and disclosed the Chivers’ personal phone numbers and home address to ex-customers, invading their privacy and causing them concern about the wellbeing of their young children.

By so doing, Mr Day has shown himself to be hypocritical, bullying and antisocial to the point of disrespect for the law.

23. The matters in the first paragraph above are allegations of fact – things which Mr Day is said to have done. The matters in the second are expressions of opinion.
24. This meaning is clearly defamatory according to the common law test: tending substantially to affect in an adverse manner the attitude of other people towards Mr Day – or, as some of the recent authorities put it, identifying that he has breached the common, shared values of our society. The breaches identified are grave in both nature and degree, involving as they do serious misconduct which is shocking, unethical and unlawful. There can be no doubt that the meaning I have found would make people think very ill of Mr Day indeed, as a businessman and as a citizen.

The Second Publication

25. The ‘First Publication’ post attracted responses from Mrs Chivers’ Facebook friends. One of them said he had been pleased to hear that the police were involved in Mr Day’s activities and hoped he got his just deserts. Mrs Chivers posted this in response:

“he assaulted the 16yr old Saturday girl when she demanded her money. Hopefully she will press charges. He is a slimy sucker though and gets away with far too much.”

26. Mr Day fears that this contains further factual allegation, and that what it says about him is that he:

- a) assaulted a 16-year-old girl who worked Saturdays at his Dry Cleaners because she demanded payment which the claimant was refusing to pay her;
 - b) is an unethical businessman who has wrongly escaped criminal culpability for his violent and illegal business practices for a long time.
27. Ms Bowden says it is just Mrs Chivers' opinion.
28. My own first impression of the meaning of this post was that Mr Day had failed to pay the Saturday worker her wages, and when she asked for them he had assaulted her. Mrs Chivers hoped the girl would take the matter to the police, or perhaps already had, and that Mr Day would be convicted and punished. But she thought perhaps he would not be, because he was a devious person who was successful at avoiding the proper consequences of his actions.
29. I cannot agree with Ms Bowden that the allegations of non-payment and of assault lies in the realm of opinion. The post clearly means that Mr Day had done what Mrs Chivers said he had. But I do agree that much of the rest of this short post would be read as Mrs Chivers' personal opinion. I am not on balance persuaded that her opinion has the specific link with business practice which Mr Day understands, however. I think the ordinary reader would more readily understand it as an all-purpose comment about the sort of man he is.
30. The natural and ordinary meaning I arrive at for this post is this:
- Mr Day failed to pay his Saturday worker her wages. When she asked for them, he assaulted her.
- By doing so, he deserves to be prosecuted, convicted and punished. But he may well avoid that, because he is devious, and successful in avoiding the proper consequences of his actions.
31. The matters in the first paragraph above are allegations of fact. The matters in the second are expressions of opinion.
32. This meaning is clearly defamatory on the common law test. The factual component alleges cheating and attacking a female teenage employee, conduct which falls far below shared societal values to the point of unlawfulness. The opinion component, aside from the language of personal insult ('slimy sucker'), compounds the impression given of Mr Day by adding the view that he may elude justice for that conduct because of his deviousness. People could not fail to think of this as shocking, and to think the worse of Mr Day in consequence.

The Third Publication

33. Mrs Chivers' postings continued to garner responses on Facebook, and she added some further posts of her own. One of her Facebook friends said her mother had worked for Mr Day some time before; he was 'horrible' and had manipulated her mother out of a lot of money. On 4th November 2019 Mrs Chivers posted this in response:

“that’s horrible. Unfortunately he does it to everyone, it’s his pure greed that has caused all this mess. He thinks he’s above the law and has got away with for it too long.”

34. Mr Day says that the natural and ordinary meaning of this is that he:
- a) is a greedy and amoral businessman who manipulates everyone who works for him for his own benefit; and
 - b) carries out manipulative and unlawful employment practices and has done for a long time.
35. He says that these are factual allegations.
36. He also says that, if a reader of this post had also read the ‘First Publication’ complained of, they would understand this one to mean that this behaviour of his warranted criminal investigation by the police and civil action against him. This is pleaded as an ‘innuendo’ meaning. An innuendo meaning is a meaning which is conveyed to people by reason of their knowing facts (which may or may not be agreed or proven at this stage) which are extraneous to the item complained of. Here, the extraneous facts are the contents of the earlier post. I must consider how that knowledge would, if established, affect the way that an ordinary reasonable person would understand the meaning of this post.
37. On natural and ordinary meaning, Ms Bowden says that what this post means is that Mr Day had manipulated more than one person out of money. He is greedy and his greed has caused ‘all this mess’ – that is, the closure of the Shirley Dry Cleaners and the whole Facebook conversation itself. He believes himself to be above the law – the rules that apply to others do not apply to him – and he got away with thinking that for too long. She says, again, that this is all Mrs Chivers’ opinion.
38. My own initial impression had been that this post meant that the specific case her Facebook friend had mentioned – the allegation that Mr Day manipulated a woman employee out of a lot of money – was just one example of what was a general manipulative, practice, motivated by greed. That practice had caused ‘all this mess’ – by which I had understood, in context, the Chivers’ business predicament.
39. I have reflected on what the parties say. I do not think that ‘everyone’ can be taken too literally, but I do think that it indicates a general practice. As the example to which Mrs Chivers was responding was of practice in relation to an employee, I agree that there is a particular emphasis on the business context here.
40. The natural and ordinary meaning I arrive at is this:

Mr Day makes a business practice of manipulating employees and others out of their money. He is motivated by greed. This greedy, manipulative practice is the cause of the breakdown of the business enterprise with the Chivers.

This shows that Mr Day thinks he is above the law. He has avoided the consequences of these practices for too long.

41. Again, the first paragraph of this meaning is alleged fact. The second is opinion.
42. As to a possible innuendo meaning, the question I have to answer is, given the natural and ordinary meaning as I have found, it, what further or different meaning the post would have for someone who had read the First Publication post. I am not persuaded that having read that post would add a great deal to the *meaning* of this one. It might reinforce the ordinary meaning that there had been a consistent course of conduct. It might make a reader think there were other reasons, apart from those in this post, to consider that Mr Day thought himself ‘above the law’. But in my view those are points which go more naturally to impact than to intrinsic meaning.
43. There is no doubt that, in the meaning I have found, this post is defamatory of Mr Day at common law. The unethical business practice alleged, the idea that he considers himself unconstrained by the law, and that he has eluded the proper consequences of this ‘for too long’ – all of this is seriously inconsistent with shared societal values, and would cause people to have a low opinion of him.

The Fourth Publication

44. Shirley and Freemantle Community Watch is a local residents’ group which has a Facebook page. On 12th November 2019, under the heading ‘just for your information’ the Group’s Facebook page showed a picture of the glass front door of Shirley Dry Cleaners, with a handwritten note stuck on the inside. The note says “All customers’ clothes have been taken to Fayes Corner Laundrette Ltd, 216 Shirley Road. An ex member of staff has let us in to remove the clothes and get them back to their rightful owners since John + Janine Chivers abandoned the business and staff with no notice or warning. Fayes Corner Launderette Ltd has no relation to Shirley Dry Cleaners Ltd.”
45. Underneath this picture, Mrs Chivers posted this:

“Just for clarification this is utter nonsense... If you see my previous post regarding Shirley Dry Cleaners & the ‘not’ related Foyes Corner, you will see the correct owner of both is David Day. He is the one who refused to authorise the payroll meaning the poor staff was not paid and why they walked out... Nothing to do with my husband and I. We are just his excuse...”

Someone else posted underneath this that Mrs Chivers ought to get advice if Mr Day was ‘slating’ the couple. Mrs Chivers responded:

“We have police and solicitors involved.”

46. Mr Day says that, in its natural and ordinary meaning, this conveys that:
 - a) he refused to authorise payroll of his staff, leading to them walking out;
 - b) his conduct was so bad that it warranted criminal investigation by the police and civil action against him.
47. He also pleads an ‘innuendo’ meaning. He says that if someone read the ‘previous post’ referred to by Mrs Chivers in this post, then they would very clearly understand that his conduct was so bad that it warranted criminal investigation by the police and civil action

against him. The previous post referred to is a post by Mrs Chivers on the Group's page, dated 28th October, which is in substantially similar terms to the 'First Publication' complained of in this action.

48. What Ms Bowden says about this is that the natural and ordinary meaning is simply that the Chivers have sought the assistance of the police and solicitors in relation to Mr Day and that it does not suggest any more than that.
49. When I first looked at this post, I understood it to be a rebuttal of what was said about the Chivers in the shop window notice. That notice had suggested that they were to blame for the closure of the shop and the inconvenience to customers because they had suddenly and unaccountably walked away. Mrs Chivers' post was saying that the notice was untrue in that attribution of blame, and was also untrue in saying that the two shops were unrelated. The real explanation was that Mr Day, who owned both shops, had caused the closure because he had not allowed the staff to be paid and they had therefore left. The observation 'we are just his excuse' made me think that Mrs Chivers was saying that the shop window notice was Mr Day's version of events, and she was setting the record straight as she saw it.
50. I thought her reference to having police and solicitors involved was, in context, connected to her account of Mr Day's business conduct as she set it out. I thought it referred to historical facts about the Chivers' own conduct in taking matters to law enforcement, and also, reading between the lines, meant that Mrs Chivers was justified in involving police and solicitors – in other words, that there were reasonable grounds to suspect that Mr Day had committed criminal acts and civil law wrongs. So I disagreed with Ms Bowden that the involvement of police and solicitors is purely a description of the Chivers' actions and says nothing at all about Mr Day's.
51. I have, however, reflected further on this point. I remind myself that I must not alight on a meaning which is worse than that pleaded by a claimant. What Mr Day's pleading says about the 'police and solicitors' post is that it meant Mr Day's conduct 'warranted criminal investigation by the police' and 'civil action against him'. In defamation law there are three technical levels ('Chase levels') of factual allegation: (1) that a claimant committed acts – is guilty of them; (2) that there are reasonable grounds to suspect a claimant is guilty of an act; and (3) that there are grounds to investigate whether a claimant committed an act. My initial understanding of the meaning of Mrs Chivers' post was at the second of these levels. I think that corresponds to Mr Day's pleading as regards the 'solicitors' – his conduct 'warranted civil action against him'. But I think it is worse than Mr Day's pleading as regards the 'police', where he says his conduct 'warranted criminal investigation by the police'. I think that is at the third level. So I have adjusted my finding on meaning accordingly.
52. The natural and ordinary meaning I arrive at is this:

Mr Day is wrongly blaming the Chivers for the closure of the shop. What caused the closure was Mr Day's refusal to authorise the payment of the staff, so that they walked out. The Chivers have involved the police and solicitors in connection with these matters, because there are reasonable grounds to suspect Mr Day has committed civil wrongs, and reasonable grounds for the police to investigate whether he has committed a crime.

53. These are factual allegations. They describe Mr Day's conduct, and say that there are, objectively, good grounds for involving law enforcement.
54. If someone had read the 'previous post' which Mrs Chivers refers to, or the 'First Publication' complained of, they would in my view understand that the alleged civil wrongs in connection with which the solicitors were involved could include the commercial issues relating to the collapsed business relationship, Mr Day's bullying behaviour, and his breach of the Chivers' family privacy. They would also understand the alleged criminal behaviour with which the police were involved could include the incident involving petrol and broken glass at Mrs Chivers' shop. If someone had read the 'Second Publication' complained of, they would understand that alleged criminal behaviour could include the assault on the Saturday worker.
55. Both the natural and ordinary meaning, and the 'innuendo' meanings, of this post are clearly defamatory at common law. They set out unfair treatment of staff, wrongful blaming of the Chivers for the ending of the business relationship, reasonable grounds to suspect Mr Day of unlawful conduct in that respect, and reasonable grounds for the police to investigate whether he has also committed serious wrongdoing in breach of the criminal law. These are obviously contrary to the shared values of ordinary society.

Conclusion

56. I have set out the ordinary and natural meaning of each of the posts complained of at paragraphs [22], [30], [40] and [52] above, respectively. I have set out further innuendo meanings, for any readers who had read other posts, at paragraph [54].
57. I have indicated the extent to which each consists of allegations of fact, or matters of opinion.
58. I consider that all of the meanings satisfy the common law test for being intrinsically defamatory.
59. Should this litigation proceed further, it will be for Mr Day to establish that the posts complained of are not only of defamatory tendency at common law, but also pass the threshold set out in section 1 of the Defamation Act 2013 – that they have caused or are likely to cause serious harm to his reputation. That requires looking beyond the meaning of the words and considering the actual facts about their impact.
60. It will be for Mrs Chivers to establish that the factual allegations are substantially true (section 2 of the 2013 Act), the opinions are justifiable in accordance with section 3 of the Act, or that any other statutory or common law defence is made out.
61. The purpose of this preliminary ruling has been to clarify the basis on which the parties can decide how most efficiently to proceed, if so advised, and how best to marshal the written and oral witness evidence they would need to advance their respective positions.