



Neutral Citation Number: [2021] EWHC 3810 (KB)

Case No: QB-2021-001333

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

Royal Courts of Justice  
Strand, London  
WC2A 2LL

Date: Wednesday, 27<sup>th</sup> October 2021

**Before:**

**MASTER DAVISON**

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**Between:**

**IS PRIME LTD**

**Claimant / Respondent**

**-v-**

**(1) MOHAMMED ADIL SIDDIQUI**  
**(2) TF GLOBAL MARKETS (UK) LTD**

**Defendants / Applicants**

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**MR. DAVID SHERBORNE and MR. JULIAN SANTOS** (instructed by **Harbottle & Lewis**) appeared for the **Claimant**

**MR. JUSTIN RUSHBROOKE, QC and MS. KATE WILSON** (instructed by **Carter-Ruck**) appeared for the **Defendants**

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**APPROVED JUDGMENT**

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## MASTER DAVISON:

1. This is an application to strike out the claimant's claim for special damages. That claim is an integral and necessary part of the claimant's common law claim for malicious falsehood which has arisen in the following circumstances.
2. The claimant and the second defendant are both brokers in the City of London. On 30<sup>th</sup> April 2020 the claimant issued proceedings against the second defendant and others in the Commercial Court under action CL-2020-000264. Those proceedings allege the breach of an agreement by the second defendant and affiliated companies to use the claimant as their exclusive broker.
3. On 12<sup>th</sup> February 2021, the second defendant filed its defence and counterclaim in the Commercial Court action. Between 20<sup>th</sup> and 24<sup>th</sup> February 2021 the second defendant, through the first defendant, one of its directors, published a series of messages on LinkedIn and Skype. Adopting the characterisation of those messages set out in Mr. Sherborne's and Mr. Santos's skeleton argument, the defendants allege that the claimant (a) was the subject of a class action by the second defendant and others, (b) was the subject of a claim worth £100m from the second defendant and others, (c) had faced the same legal dispute with other clients and (d) was the subject of a claim for market manipulation by the second defendant.
4. On 13<sup>th</sup> April 2021, the claimant issued proceedings for malicious falsehood. Malicious falsehood is an economic tort and an essential ingredient is that special damage, i.e. financial loss or damage, which is or is capable of being estimated in money, has been suffered. Unless and until there has been such loss there is no cause of action at common law.
5. The harshness of this rule has been ameliorated by section 3 of the Defamation Act. Section 3 is in these terms:

“In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form, or (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business, held or carried on by him at the time of the publication.”
6. In such a case, to quote from the decision of the Court of Appeal in the *Tesla Motors* case, [2013] EWCA Civ 152:

“Since the claim is for general damages it is unnecessary for the claimant to identify the amount of pecuniary loss which it is said the falsehoods were calculated to cause. All that is required in order to make the nature of the case clear is identification of the nature of the loss and the mechanism by which it is likely to be sustained.”

7. Indeed, it appears from the earlier decision of the Court of Appeal in *Joyce v Sengupta* [1992] 1WLR 337, that evidence of actual pecuniary loss is not only unnecessary but inadmissible; see at page 346 letter H.

8. There can be no objection to a claimant running a claim in the alternative and that is what this claimant has done or attempted to do. The particulars of claim after reciting the offending messages, and giving particulars of falsity, and particulars of malice, continue at paragraph 7 and 8 as follows:

“7. The defendant’s publication of the said statements was calculated to cause pecuniary damage to the claimant in respect of its business. The messages, therefore, fall squarely within and the defendant relies upon the provisions of section 3(1)(b) of the Defamation Act 1952.

8. Or, in the alternative, by reason of matters included above, the claimant has suffered loss and damage and a general loss of business. In support of that contention the claimant will rely upon the following matters.”

9. Paragraph 8 then sets out eight sub-paragraphs which, I was told by Mr. Sherborne in his oral submissions, were intended to particularise or “support” (i) the probability of loss occurring, (ii) the impact on the claimant’s business, and (iii) the claimant’s case on special damages.

10. In the context of the present application, it is only the sub-paragraphs squarely in the third category that I need quote. These are paragraphs 8.6 and 8.7:

“8.6 Indeed despite the relatively short passage of time since the defendant’s publication of the false statements in the messages the claimant has already experienced clients reacting adversely to the messages, including by reducing their trade volume with the claimant. The claimant is currently assessing these losses and will update and expand upon these particulars, including the particulars of special damages, in due course as and when it is in a position to do so.

8.7 In the premises it is reasonable to infer as is inevitable, or at least foreseeable, that other clients will do the same resulting in very substantial financial losses for the claimant as a result. It is inevitable or foreseeable that the claimant’s losses will also include a significant reduction in new client enquiries. Such losses are currently accruing and are not yet amenable to calculation, particularly pending full disclosure by the defendants of all the parts of the false statements and the claimant will provide details of such losses once they have crystallized.

9. Paragraph 8 of the particulars of claim generated a request for further information, dated 11<sup>th</sup> May 2021. I will not recite it in full.

“1. Give full particulars of loss and damage which the claimant has suffered.

2. Since the claimant must know now whether it has in fact suffered a general loss of business, state with full particularity what general loss of

business the claimant relies upon giving particulars of the size of the loss of business in monetary terms.”

10. Paraphrasing, paragraph 3 sought particulars of any financial impact on the claimant’s business from the four recipients of the messages that the claimant had been able to name. Paragraph 4 sought specifics of any decline in volume and value of trade with any client alleged to have reacted adversely to the messages. Paragraph 5 sought “now and with full and proper particularity losses that are currently accruing with the best approximate value of such losses that is available.”
11. That request for further information was responded to on 25<sup>th</sup> May 2021. The response runs to five pages. It does not give any of the details requested or a schedule even on a provisional or indicative basis. I will not quote it all. The most relevant paragraphs for present purposes are paragraphs 2-4 and 12 of response 1-3, and response 5. Those I will quote:

“2. In paragraph 7 of the particulars of claim the claimant pleads its reliance on section 3(1)(b) of the Defamation Act 1952, which expressly provides that there is no requirement for the claimant to plead or prove financial loss to succeed in a claim for malicious falsehood. The claimant will rely on the facts and matters set out in paragraph 8 of the particulars of claim in support of its case on probably damage under section 3(1)(b) of the Act.

3. In addition, the claimant has also pleaded a claim for general damages, including a general loss of business, the best particulars of which it can give at the present time are set out in paragraphs 8.1 to 8.8 of the particulars of claim. Those matters will be amplified in the claimant’s evidence for trial but are sufficient to enable the defendants to understand the case they are expected to meet and certainly for the purposes of pleading to this in their defence (nor do they provide any basis for arguing otherwise).

4. Further, the defendants have unreasonably withheld from the claimant crucial information as to the identity of the recipients of the messages despite the claimant requesting this information on five separate occasions. This has significantly hampered and continues to hamper the claimant’s ability to plead a full case on the loss and damage that it has suffered as a result of the defendants’ publication of the messages. The overall volume that a broker client of the claimant trades through the claimant can vary from time to time and it is therefore difficult for the claimant to identify over a short period of time and without any further information whether a change in volume traded through the claimant is attributable to a change in that client’s overall trading activity or whether it is as a result of other factors (such as publication of the messages). In the circumstances and particularly given the defendants’ refusal to provide the identity of recipients of the messages, the claimant is not yet in a position to provide meaningful information of the nature sought.

12. The defendants' unreasonable refusal to disclose at this stage this most basic but crucial information notwithstanding the fact that they will be required to do so under the CPR in due course, not only prevents the claimant from ascertaining the full extent of the damage that publication of the messages has caused, but also prevented them from taking meaningful steps to mitigate that damage."

Response 5: "As can be seen from the request itself sub-paragraph 8.7 explicitly states that losses are currently accruing and that they are 'not yet amenable to calculation'. The claimant will provide such losses when it is able to do so as already stated. In the circumstances, this is not a valid request for further information and is either a matter for submission or an impermissible attempt at cross-examination."

12. The response did not satisfy the defendants who issued the present application on 7<sup>th</sup> June this year. The application is founded on the simple proposition that the particulars of claim "fail to identify any loss or damage and therefore disclose no reasonable grounds for bringing a malicious falsehood claim founded – I interpose that it might perhaps better have said, "which must be founded" – upon special damages."

13. The defendants do not seek to strike out the claim for general damages under section 3 of the Defamation Act 1952. Indeed they say there is no injustice to the claimant in being confined to that claim because section 3 was introduced precisely to meet the dilemma which this claimant currently faces.

14. The focus of the application has been the pleading and evidential requirements for a malicious falsehood claim at common law. The parties agreed that these are found in the case of *Ratcliffe v Evans* [1892] 2QB 524. That was a case where the malicious falsehood complained of was an announcement in a local newspaper that the claimant firm had ceased trading. The claimant said that this had caused a general fall off in trade and the Commissioner admitted such evidence before the jury. The defendant appealed saying that such evidence was inadmissible. I quote from the submissions made by counsel for the appellants and which are quoted at page 525 of the report:

"In such an action there must in order to support it be an express allegation of some particular damage."

15. The Court of Appeal rejected that submission. At page 532 of the report, Bowen LJ said:

"The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort have been insisted upon for centuries." [I will omit the cases referred to in support of that proposition.] "But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject matter." [Again I will omit the authorities cited.] "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves, which produced the damage and the circumstances under which these acts are done must regulate the

degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles, to insist upon more would be the vainest pedantry.”

16. As noted in MacGregor on Damages, 21<sup>st</sup> Edition, at paragraph 51-034, that summary remains the case today: “Overall in relation both to the particularity of special damage in the initial statement of case or schedule of loss and to the further information demanded of an allegedly insufficient particulars of claim the courts are realistic and accept that the detail must be tailored to the facts. The position remains much as was laid down by Bowen LJ in *Ratcliffe v Evans*.”
17. Turning, then, to the application there are quite obviously two areas of omission in the particulars of claim and the further information supplied. The first is that the claimant does not allege a single specific instance of the loss of a particular customer or trade or transaction. The second is that although a general loss of business and a reduced trade volume from clients who had reacted adversely to the messages are both pleaded, they are pleaded formulaically and no details whatsoever are given. This is despite the statement that the losses are currently being assessed, and the promise of particulars in due course. It is also despite a request for further information directed to this very omission.
18. On the face of it, these are plainly deficiencies in pleading that would justify striking out the claim for malicious falsehood at common law because the particulars of claim simply do not disclose the pecuniary damage which is a necessary ingredient of the cause of action. A claimant in that position must usually be satisfied with its claim under section 3 of the 1952 Act.
19. I would adopt the statement made by the United States Court of Appeals for the 8<sup>th</sup> Circuit as reflecting the requirements of English law. The case is cited as a footnote to the passage in the 12<sup>th</sup> Edition of Gatley dealing with the degree of particularity required of a plea of special financial damage. The full name and citation of the American case is *Eric Bowman Remedy Co. v Jensen Salsbery Laboratories* 17F [2D 255]. It states:

“If the plaintiff desires to predicate its rights to recover damages upon general loss of custom it should have alleged facts showing an established business, the amount of sales for a substantial period preceding the publication, the amount of sales subsequent to the publication, facts showing that such loss of sales form the natural and probable result of such publication and facts showing that the plaintiff could not allege the names of particular customers who withdrew or withheld their custom.”
20. I observe that the latter part of those requirements are not relevant to this case but the rest of the learned judge’s remarks are very much in point. That is not this case either on a general level or in relation to any particular account or client. The explanation offered by the claimant was the defendants’ failure to

identify all of the publishees of the messages. Hence Mr. Sherborne submitted that the claimant could not attribute any diminution in business to the messages and could not sign a statement of truth. He said, (I have to say slightly unconvincingly), that it was in this sense that the losses were not yet “amenable to calculation”. In relation to the statement in paragraph 8.6 of the particulars of claim, “the claimant has already experienced clients reacting adversely to the messages, including by reducing their trade volume”, he said that there was in fact one client who had reduced its trade volume but that the claimant was unable to attribute this to the messages because it did not know whether this client was a publishee. These remarks were a reflection or elaboration of what the claimant had already said in the responses to the request for further information, namely, that it was “difficult for the claimant to identify over a short period of time and without any further information whether a change in volume traded through the claimant is attributable to a change in that client’s overall trading activity or whether it is as a result of other factors, such as publication of the messages”.

21. As Mr. Rushbrooke observed in his reply to Mr. Sherborne’s submissions, a simpler way of putting it was that the claimant was unable to demonstrate any financial loss. He paraphrased Mr. Sherborne’s submissions as “we don’t know if they got the messages and we can’t say whether the reduction in volumes is down to them anyway.” I do not think that that paraphrase was unfair or inaccurate. It focuses attention on Mr. Sherborne’s wider submission, which is that it would be unjust to require a claimant to do more than this claimant has done in circumstances where the defendants have refused to divulge details of all the publishees – information which is in their hands and which the claimant cannot obtain from its own clients without risking the very mischief which they wish to avoid. He suggested that one solution to this was for the court to order disclosure of the publishees and thereafter set a deadline for the particulars of special damage. He submitted that a requirement to plead that special damage now was precisely the pedantic approach deprecated by the Court of Appeal in *Ratcliffe v Evans*.
22. After careful reflection I am afraid I do not agree.
23. First, I can see no valid reason why the claimant, if it has suffered a loss of business, cannot plead that loss, at least provisionally or indicatively, in the manner suggested in *Macgregor and Gatley* at the passages and with the footnote that I have cited. I do not regard the objections raised in the response to the request for further information and by Mr. Sherborne orally as a sufficient reason not to do so. The response does not say that the claimant cannot discharge this burden. It says variously that the claimant is hampered, or that it is difficult, or that particulars sought may not be full or meaningful. None of these expressions excuses the claimant from giving any particulars at all of a necessary ingredient of its case (without which indeed it has no case).
24. Second, I do not accept the oral submission, not found in the response to the request for further information, that the claimant would be unable to sign a statement of truth because it would not be able to say confidently that financial loss was attributable to the messages. That submission was hard to square with the statement of truth already found at the foot of the particulars of claim

which contained paragraph 8 and its unequivocal opening assertion of causation. Further, and as I have already observed, there could be no objection to a statement of truth appended to particulars or a schedule which were provisional or indicative.

25. Third, nor was I impressed with Mr. Sherborne's submission that the claimant did not want to assert a loss of business from a client or a group of clients only to be met with the triumphant rejoinder from the defendants that those clients were not publishees. At the risk of stating the obvious, that your case may turn out to be wrong is not a justification for not pleading it in the first place.
26. Fourth, although I could see the initial attraction of cutting the Gordian Knot by myself ordering disclosure of the publishees, I do not think that that would be a proper thing to do. There is no application by the claimant for disclosure and the defendants cannot reasonably be expected to respond to one made on the hoof. Had there been such an application it would have been controversial. Neither counsel could give me any example of disclosure having been ordered in circumstances such as the present. Both agree that there was some analogy with the case where the claimant claims in defamation in respect of words which he or she cannot precisely specify. Such information is required from the defendant only in rare and narrowly circumscribed circumstances, the guiding principle being that a claimant must show that he or she has a good cause of action but is unable to find out the precise form in which to specify it. An order will not be made enabling the claimant to "fish for a case". There may be circumstances, (I am not going to try to specify them in advance), where a claimant in a malicious falsehood claim could, with a properly framed and supported application, obtain disclosure of the publishees of messages such as the present ones. But the evidence in support of such an application would have to condescend to more detail than is contained in any of the material that I presently have. That is perhaps a reflection of or another way of expressing the defendant's objection to the claimant's pleaded case. The claimant's pleaded case is lacking in an essential feature.
27. It remains to deal with some subsidiary points. It is acknowledged by the defendants that after disclosure the claimant may need to revive its claim for malicious falsehood at common law by way of amendment. That is, at the moment, speculative. It cannot change the fact that the case as currently pleaded is defective. It is also acknowledged that some of the material in paragraph 8 may be relevant to the claimant's section 3 claim. Given that paragraph 8 is as presently framed a "further or alternative" claim to the section 3 claim, that should not operate as a deterrent to striking out that whole paragraph and indeed the response to the request for further information. If the claimant wanted to reword or refashion some of the material in that paragraph in support of or as particulars of the section 3 claim, then it must serve an amended statement of case on the defendants for possible agreement and failing agreement apply to amend.
28. Lastly, (I say "lastly" despite the fact that the claimant took this as a threshold point), although I suspect that there is an element of tactics in the defendant's application, that is no answer to the fact that a fundamental objection to one



half of the claim is well-founded. That objection has reduced the scale of the claim from the hundreds of thousands of pounds to the tens of thousands.

29. For the reasons which I have tried to express, I will strike out the passages of the claim which are specified in the defendants' notice of application.

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**This judgment has been approved by the Judge.**

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