On behalf of: Respondent
Witness: Hugh Richard Edward Tomlinson KC
No. of Witness Statement: First
4 November 2024

Case No. 12612-2024

BEFORE THE SOLICITORS DISCIPLINARY TRIBUNAL
IN THE MATTER OF THE SOLICITORS ACT 1974 (as amended)
B E T W E E N:

SOLICITORS REGULATION AUTHORITY LIMITED

Applicant

and

ASHLEY SIMON HURST

Respondent

WITNESS STATEMENT OF HUGH RICHARD EDWARD TOMLINSON KC

I, HUGH RICHARD EDWARD TOMLINSON KC OF MATRIX CHAMBERS, GRAY'S INN, LONDON WC1R 5LN WILL SAY AS FOLLOWS:

1. INTRODUCTION

1.1 I am a barrister at Matrix Chambers.

1.2 I have been asked by the Respondent to make this statement to deal with a number of issues concerning the practices of lawyers in relation to defamation matters.

1.3 Unless I state otherwise, the facts in this statement are within my knowledge and true. Where the facts are not within my knowledge, they are true to the best of my knowledge and belief, and I identify the source.

2. BACKGROUND

2.1 I am a member of the Bar of England and Wales and a founding member of the barristers' chambers known as Matrix Chambers. I was appointed a Queen's Counsel in 2002. I am a Master of the Bench at the Honourable Society of Gray's Inn. I have been a visiting Professor

at the London School of Economics and I am the author of a number of legal textbooks, in particular *The Law of Human Rights* (Oxford University Press, 2nd Edn, 2009).

2.2 I have been practicing at the Bar for more than forty years. I specialise in media and information law, including defamation, data protection, confidentiality, privacy cases and in human rights law. In particular, I have been instructed in numerous defamation cases over the past five decades. Although my Instructing Solicitors are, of course, responsible for the correspondence with the opposing parties, I am, very regularly, asked to advise as to the contents of such correspondence, to draft letters and to consider the contents of replies.

3. THE PRACTICE OF DEFAMATION

3.1 Defamation law is a specialist area of practice where the large majority of cases are conducted by a small number of solicitors firms and inhouse lawyers. The defamation Bar is small and specialist.

3.2 Cases against the national press and broadcast media traditionally formed a very substantial proportion of the work in this area. For ease of reference, I will refer to the national press and the broadcast media as "media organisations". In recent years, there have been increasing numbers of "internet libel" cases which involve internet media companies and individuals who publish material on social media.

3.3 It is often said that there is a division in media law between "claimant" and "defendant" practitioners. It is certainly true that the work of many solicitors' firms (and to a lesser extent members of the Bar) is predominantly on one side or the other. It is, however, rare to find practitioners who only do claimant or defendant work. There are also some practitioners that make a positive virtue of representing both claimants and defendants. Although I do act for defendants from time to time, the large majority of my practice involves representing claimants.

4. CONFIDENTIALITY IN DEFAMATION MATTERS

4.1 Until recently it has been the almost universal practice for pre-action letters in defamation cases to be marked "Not for Publication" and "Private and Confidential". I have always sought to ensure that pre-action correspondence which I have drafted or reviewed was marked in this way. If a letter is not marked "Not for Publication" then a newspaper could decide to publish it on the "Letters to the Editor" page. If a letter is not marked "Private and Confidential" then the fact or content of the letter could be published. Publication of these matters would risk causing damage to a potential claimant's interests as it would be likely to lead to further publication of defamatory allegations by other media organisations.

4.2 The purpose of pre-action correspondence is to seek to resolve issues without the need for litigation. In many cases a constructive dialogue with the media organisation can be established and litigation is avoided. If correspondence was not marked "Not for Publication" and "Private and Confidential" then its content would be more "guarded" and there would be less of an opportunity for frank and open dialogue concerning the publication complained of.

4.3 The passage from the leading practitioner text, Gatley on Libel and Slander (at para 26-007) suggests that if there is a risk that a letter may be published it should be marked in this way. However, in ordinary circumstances, there is always such a risk which is why letters are routinely marked in this way. As I have indicated, it is not just the publication of the letter itself which is of concern, but also the publication of the fact that a legal complaint has been made.

4.4 The application of such markings to pre-action letters was at least until recently a standard practice (whether pre-publication, post publication and the formal letter before action). This practice was well known and understood by practitioners. Such markings were commonly applied in defamation as well as privacy matters, irrespective of the contents of the correspondence. I cannot recall any case in which a lawyer acting for a defendant has complained about receiving a letter bearing such marking or stated that it was an improper attempt to restrict publication. I would have been very surprised by such a complaint as it would run contrary to well established practice.

4.5 I should add that, in part as a result of the present case, the practice has changed. Solicitors have become much more cautious in marking pre-action correspondence as "Private and Confidential". When this is done it is now common to include an explanation as to why the letter has been so marked. Some claimant solicitors now draw attention to the fact that they retain the copyright on their letters which should, therefore, not be published without consent.

4.6 In communications with the media organisations such markings are, in my experience, always respected. I cannot recall any case in which pre-action correspondence has been published by a media organisation. It would also, in my experience, be highly unusual for a media organisation to publish the fact or details of a letter of claim and I cannot recall a specific case in which this has happened. I have been instructed in many cases which have been regarded as highly "newsworthy" and I have not noted any difference in the practice of media organisations in relation to pre-action letters in such cases.

4.7 Where pre-action letters are sent to individuals or to internet publishers there is a greater risk that they will be published. Although recipients who have the benefit of legal advice do, in my experience, respect the established practice of keeping legal letters confidential, other

recipients do, from time to time, publish such letters This is not a consistent practice by such recipients but it is certainly a risk the sender takes into account.

4.8 It is obvious and generally understood that pre-action letters are circulated internally by media organisations. So, for example, a letter addressed to "The Editor" will often elicit a reply from the inhouse lawyer. I cannot recall any case in which it has been disclosed to the claimant's lawyers that a pre-action letter has been provided to another media organisation. It is highly unlikely that this would be done as media organisations are in competition with each other and would not wish to disclose communications concerning "live" news stories to their competitors.

5. WITHOUT PREJUDICE IN DEFAMATION MATTERS

5.1 It is commonplace for solicitors making defamation complaints to make "without prejudice" proposals to potential defendants. For example, an "open" pre-action letter is sometimes accompanied by a simultaneous "without prejudice" letter. The former seeking a full range of remedies including damages and costs and the latter indicating that the claimant is prepared to draw a line under the matter provided the published allegations are the subject of speedy correction. Media solicitors will often contact the other side by telephone and suggest a without prejudice conversation.

5.2 Without prejudice communications are by their nature confidential. It is common practice to mark without prejudice communications "private and confidential" simply to emphasise the point. I have never come across a case in which a defendant has published correspondence which is clearly "without prejudice". I have experience of cases in which there has been a dispute as to whether particular communications were, in fact, "without prejudice" and where disclosure has been threatened or made.

6. DEFAMATION CLAIMS BROUGHT BY SENIOR POLITICIANS AND/OR WEALTHY PEOPLE

6.1 Only a relatively small number of defamation claims are issued each year. Over the past 20 years the numbers have varied between a high point of 546 (in 2021) and a low point of 112 (in 2016) with an average of 229 claims issued each year. There are a much greater number of pre-action complaints which are either resolved by agreement or are not pursued.

6.2 Defamation complaints are, from time to time, brought by "senior politicians". I have been instructed in a number of such cases. Like the majority of libel complaints, a substantial proportion of these are resolved without litigation but, from time to time, proceedings are issued. For example, in 2011, Dominic Raab MP brought a claim against Associated Newspapers (see [2011] EWHC 3375 (QB)). In 2017 the then Shadow Justice Secretary,

Richard Burgon, brought a claim against News Group Newspapers. This claim went to trial and resulted in an award of damages ([2019] EWHC 195 (QB)). I have never heard it suggested that there is something improper in politicians of any type bringing libel complaints.

6.3 Since the late 1990s libel damages have, in practice, been "capped" at the level of the highest sum awarded in personal injury cases, now of the order of £325,000. In practice, defamation awards are substantially lower than this cap. The costs of a defamation action are many times greater than the likely award of damages and claims are no longer pursued for financial gain. In my experience, most libel claimants are concerned to obtain a correction or apology at the earliest possible opportunity. It is now common for pre-action letters to use wording to the effect that the claimant's "attitude to damages will be determined by the promptness of the correction or apology". This is often stated in open correspondence. The indication is that if a correction or apology can be agreed, then the claimant is likely to agreed not to seek damages.

6.4 Although many claimants would wish to leave the question of damages open (as a bargaining chip), it would not be unusual for solicitors for a claimant to state (on an open basis) that their client will not seek damages if the defendant promptly retracts.

6.5 I have never heard it suggested whether by any defendant lawyer or anyone else that there is an "expectation" that wealthy claimants should in all cases forego damages in defamation proceedings. As explained above, it may be a sensible strategy for any claimant (wealthy or not) to be prepared to forego any damages in return for any early retraction and settlement. But sometimes, particularly as the case progresses, the claimant may want a sum in damages to stand as vindication or to act as a deterrent. This is as true for all categories of claimant.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: .....

Dated: 4 November 2024

HUGH RICHARD EDWARD TOMLINSON KC