On behalf of: Respondent
Witness: David Jonathan Engel
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
DAVID JONATHAN ENGEL

I, DAVID JONATHAN ENGEL OF 60 CHISWELL STREET, LONDON EC1Y 4AG WILL SAY AS FOLLOWS:

1. INTRODUCTION

1.1 I am a solicitor and partner at Addleshaw Goddard LLP.

1.2 I have been asked by the Respondent's solicitors to provide this statement to set out my experience of custom and practice in defamation claims and complaints, in relation to a number of specific points.

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 joined Theodore Goddard (as it then was) as an articled clerk in September 1993 and qualified as a solicitor in September 1995, when I joined what was then the media litigation team at the firm. Since then I have specialised in defamation, privacy, breach of confidence and related causes of action (e.g. harassment and data protection). I became a partner in Theodore Goddard in 2001 and since 2008 have led what is now the Reputation & Information Protection team at Addleshaw Goddard (as it became following the merger of Addleshaw Booth & Co with Theodore Goddard in 2003).

2.2 I am currently personally ranked for reputation and privacy law in the two principal legal directories: *Legal 500* ranks me in their 'Hall of Fame' and *Chambers* ranks me in their Band 1. In addition, I am ranked by *The Spear's 500* directory (which ranks advisers to high net worth individuals across many advisory disciplines) as a 'Top Flight' reputation lawyer, which is their category for the top 10 such lawyers across the UK.

2.3 For most of my early career (roughly 1995 to 2008), I worked primarily, though not exclusively, on cases in which we were defending the media in publication cases. These were mostly claims in defamation, the law of privacy at that time being in its infancy. From approximately 2008, the focus of our practice has shifted to acting for companies and individuals who are victims of misreporting or press intrusion, or facing the threat of it.

2.4 As a result, I have experience of both sides of what is now (though this was not always the case) quite a marked divide between defendant and claimant-side work in this area of law.

3. LIFECYCLE OF A DEFAMATION COMPLAINT

3.1 In my experience, there is a wide variety of complaints in publication cases. There are a number of different potential causes of action; defendants vary from mainstream media organisations to pressure groups and lone online bloggers; and claimants also vary from large companies to ordinary individuals caught up in some newsworthy event. In other words, there are a number of variables against which any assessment of 'custom and practice' in these types of cases has to be made.

3.2 Typically, and at risk of over-simplification, engagement with the media (or other publisher or author of the content in question) moves through a number of stages. First, there is the pre-publication phase which generally involves either responding to an enquiry put to the client

by a journalist or otherwise engaging with the publisher in relation to threatened unlawful publication.

3.3 Next is the post-publication phase. My involvement at this stage would either be because we have only been instructed after the programme has been broadcast, article published or content posted online, or because content has been unlawfully published notwithstanding the pre-publication phase.

3.4 The post-publication phase can itself be sub-divided into three stages. Typically, the first stage will involve trying to resolve the dispute, e.g. by correcting, taking down and/or publishing an apology, before sending a formal letter of claim pursuant to the Pre-Action Protocol for Media and Communications Claims (the "Pre-Action Protocol"). This could be by way of open or without prejudice correspondence and telephone conversation or by a combination of the two.

3.5 If it does not prove possible to resolve the issue at that stage, the next stage would be to send a formal letter of claim which complies with the Pre-Action Protocol. Such a letter would generally signal to the recipient that if the dispute cannot be resolved, litigation or some other quasi-legal process (e.g. a complaint to the Independent Press Standards Organisation (IPSO) or Ofcom) is likely to follow. Of course there are occasions, for example because of the urgency of the situation, when it is necessary to move immediately to a formal letter of claim. However, it is in my experience highly unusual to send a formal letter of claim in defamation threatening litigation prior to publication. Different considerations would apply in a privacy or breach of confidence case where a pre-publication injunction may be an option.

3.6 Quite often, sending the formal letter of claim, perhaps combined with without prejudice discussions, will result in a negotiated resolution. But if it does not, then it may be necessary to issue a claim form and start proceedings, or, if applicable, make a formal complaint to IPSO or Ofcom.

4. CONFIDENTIALITY IN DEFAMATION COMPLAINTS

4.1 At the pre-publication stage, it may be necessary to mark correspondence as “private and confidential”. I also commonly mark such letters as “not for publication”. That is because in order to demonstrate that the allegations being put to our client are false or misleading, and that their publication would therefore be unlawful, it is often necessary to share with the intended publisher information which is confidential and/or private. Marking correspondence as "not for publication" probably has little legal force, but it is a convention honoured by reputable media organisations and their lawyers which again facilitates the provision of information with a view to resolving the issue.

4.2 I do not think I have ever marked a formal letter of claim as private and/or confidential where the intended claim is in defamation. If the claim is in privacy or confidence, and the purpose of the letter is to put the recipient on notice of e.g. a potential application for an immediate injunction to restrain publication of confidential and/or private information, then it may well need to be so marked.

4.3 I do, however, recall - when acting for defamation defendants in the past - seeing incoming correspondence from claimant lawyers, including open correspondence after litigation was under way, marked as private and/or confidential.

5. WITHOUT PREJUDICE LABELLING

5.1 In media disputes, I often first try to seek a resolution by engaging in without prejudice discussions with the publisher, typically with its in-house legal team. On the whole (there are one or two exceptions) I have found that media organisations' in-house or external lawyers are open to trying to resolve the situation by this means, thereby avoiding potentially costly and resource-consuming litigation. Such correspondence, calls or meetings would be without prejudice.

5.2 When initiating such without prejudice discussions, I would not necessarily start by setting out proposed settlement terms in a letter or email. I may simply mark it without prejudice and suggest, for example, a conversation over the telephone on a without prejudice basis. In my experience, that is understood by recipients as a proper and sensible way to have without prejudice discussions and both the discussions and the initial communication are considered to be without prejudice.

5.3 It has always been my understanding that correspondence sent and discussions held on a without prejudice basis are confidential, at least until settlement is reached. It would not be open to a solicitor on the other side unilaterally to waive such confidentiality. If I marked a letter as without prejudice, I would expect it to be treated in confidence by the recipient. For this reason, I would not usually mark it as confidential in addition to without prejudice since I would take its confidentiality as read.

5.4 In my experience, the confidentiality of without prejudice correspondence was and continues to be respected by in-house media lawyers. Indeed, I can think of no occasion when without prejudice correspondence sent to an in-house or external media lawyer was published.

6. CORRESPONDENCE CONCERNING COMPLAINTS IN DEFAMATION

6.1 In the course of my career, I have sent and received numerous pre-action letters concerning complaints and claims in defamation, written in different styles and with varying degrees of assertiveness.

6.2 I have read the email sent on 16 July 2022 from the Respondent to Dan Neidle which I note was marked without prejudice and stated:

> "*I am available to discuss if you change your mind on a having a phone call. That could well save time and expense on both sides.*"

6.3 That suggestion is very much along the lines of without prejudice correspondence I have often seen. That email also includes the following wording:

> "*It is up to you whether you respond to this email but you are not entitled to publish it or refer to it other than for the purposes of seeking legal advice. That would be a serious matter as you know*".

6.4 I am told by the Respondent's solicitors that the SRA contends that the above wording constituted an "implicit threat" and that "A threat of this kind appears to be unprecedented in communications giving notification of a defamation claim in the absence of any suggestion that the claim also involves confidential or private information".

6.5 In the first place, as explained above, a without prejudice email of this kind does not constitute "notification of a defamation claim". As mentioned, such notification is given by way of a letter of claim which complies with the requirements of the Pre-Action Protocol.

6.6 Secondly, in my experience words such as "serious" and "seriously" are not uncommon in correspondence about complaints and claims in defamation. It does not seem to me unusual or intimidating in any such correspondence to remind a fellow professional that breaching the confidence in without prejudice correspondence would be unlawful (and a breach of his regulatory obligations) and therefore serious. The point is not specific to defamation complaints and requires no specialist knowledge of defamation litigation for a solicitor, or former solicitor, to understand.

7. PUBLICATION OF LEGAL CORRESPONDENCE BY MEDIA ORGANISATIONS

7.1 In my experience, it would be unusual for a media organisation to publish or even refer to a legal letter of complaint sent to it. For obvious reasons, they are not usually anxious to advertise shortcomings in their journalism.

7.2 In my experience, where legal correspondence in relation to defamatory content is sent to the legal department at a media organisation, it is common for the in-house lawyers to share it with the editor, the managing editor and/or the journalist concerned, as well as external solicitors or barristers instructed by them. That includes where any such correspondence is labelled without prejudice or confidential because the duty of confidence is owed by the corporate entity, and therefore by any of its employees. Similarly, where such correspondence is addressed to the editor or the individual journalist concerned, it is commonplace for them

to share it with their legal department. Personally, I would generally address such correspondence to the editor, who has ultimate responsibility for what is published, and copy in the legal department and sometimes the relevant journalist. Other than that, I am unaware of the extent of internal communication of such correspondence.

7.3 I am not aware of any standard practice in this regard. Nor am I aware that it has been suggested that it would be improper to mark correspondence concerning a complaint in defamation as confidential, whether because that would inhibit internal communication of the letter or because of any custom and practice of making such correspondence public.

8. DEFAMATION COMPLAINTS BY SENIOR POLITICIANS

8.1 Over the years I have acted for a few politicians of varying degrees of seniority, including two then serving Cabinet Ministers. To the best of my knowledge, it is far from unusual for politicians to engage media lawyers to protect their reputations. My approach when representing politicians is no different from that when acting for other types of client.

9. WEALTHY CLAIMANTS AND DAMAGES

9.1 I am told by the Respondent's solicitors that it is the SRA's position that letters of claim in defamation "commonly state" that if the defendant retracts promptly, the claimant will not seek damages, and that "this is particularly so with wealthy public figures, where the expectation is that they should seek to avoid bringing a defamation claim unless strictly necessary and they do not need the money".

9.2 That assertion certainly does not accord with my own experience, nor with practice and procedure in publication claims.

9.3 First, under the Pre-Action Protocol[1], it is incumbent on all parties to avoid litigation unless strictly necessary. It is not an expectation which applies only to "wealthy public figures"; it applies to every potential claimant.

9.4 Secondly, a letter of claim which did not seek damages would seriously prejudice the claimant's position in the event that the case proceeded to litigation and trial. Apart from anything else, it is long established as a matter of English law[2] that an award of damages (and therefore by extension payment of damages as a term of settlement) is the remedy which provides the injured party with vindication, which is of course, in both a legal and practical sense, the entire purpose of a complaint or claim in defamation. It also serves as something

[1] Paragraph 2.1 (c)
[2] See e.g. *Gatley on Libel and Slander*, 13th ed., §1-010

of a deterrent going forward[3]. Whether or not the claimant "needs the money" does not enter into it. As I often remind my clients, even a successful libel action is very rarely cash positive.

9.5 It is certainly not unheard of for claimants, wealthy or not, to offer on a without prejudice basis not to insist on damages, by way of *quid pro quo* for a prompt retraction. But that is obviously different from making such an offer in open correspondence, which I cannot recall ever having seen.

9.6 In reality, different claimants have different objectives. For some it's all about the retraction and apology; for others the priority is for the inaccurate and damaging content to be taken down; for others, ensuring that they are not left out of pocket as a result of the infringement of their legal rights is what matters. In my experience, there is no correlation between their priorities and whether or not they are "wealthy public figures".

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: 4th November 2024

DAVID JONATHAN ENGEL

[3] *Gleaner Co Ltd v Abrahams* [2003] UKPC 55