On behalf of: Respondent
Witness: Edward Henry Garnier
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
LORD GARNIER

I, EDWARD HENRY GARNIER, OF 4 PUMP COURT, TEMPLE, LONDON, EC4Y 7AN WILL SAY AS FOLLOWS:

1. INTRODUCTION

1.1 I am a practising barrister at 4 Pump Court.

1.2 I have been asked by the Respondent to make this statement to set out my experiences of various customs and practices 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 was called to the Bar by the Middle Temple in 1976 and took Silk in 1995. I was appointed as an Assistant Crown Court Recorder in 1998 and as a Recorder in 2000. My practice as a barrister over the years has included corporate advisory, financial services, corporate crime and international human rights work, but historically my specialty has been in defamation, privacy, confidence, malicious falsehood, contempt and related media law cases. I am also a member of the Northern Ireland Bar and KC in that jurisdiction.

2.2 My career has not, however, been limited to the Bar . I have also pursued a parallel career in politics. By way of summary, in 1992 I was elected as the Conversative MP for Harborough. In my first parliament (1992-97) I served on the House of Commons Home Affairs Select Committee before being appointed a Parliamentary Private Secretary in the Foreign and Commonwealth Office, in the Law Officers Department and the Chancellor the Duchy of Lancaster's Office. From 1997 to 1999 I was Shadow Minister in the Lord Chancellor's Department and was then appointed Shadow Attorney General twice, between 1999-2001 and 2008-10. I was Shadow Home Office and then Justice Minister 2005-2008. In 2009 I was elected Chair of the All-Party Parliamentary Group on Privacy.

2.3 From May 2010 until September 2012, I was the Solicitor-General in the Coalition Government led by David Cameron. On leaving Government I returned to private practice at the Bar. In April 2017, I retired as MP for Harborough, a position I had held for 25 years. I have been a member of the House of Lords since becoming a life peer in June 2018.

3. EXPERIENCE OF DEFAMATION LETTERS

3.1 As a Silk since 1995, I have not typically been responsible for preparing and sending pre-action defamation letters, albeit that I will have had a supervisory role. The action may have started before I became involved and, in my experience, letters of claim or formal Pre-Action Protocol letters before action are typically completed by the solicitors, even if drafted initially by junior counsel. That said, I have been involved in plenty of cases where instructing solicitors and their clients have asked me for advice on whether they had a reasonable claim or defence and I would in those circumstances see any related pre-action correspondence. I am therefore very familiar with inter-partes correspondence in defamation disputes.

4. DEFAMATION CUSTOMS

4.1 During my nearly 50 years' experience in defamation and media law cases I have acted for claimants and as well as defendants, be they newspapers, broadcasters, book and magazine publishers or individuals. When I was a junior barrister, I represented defamation claimants and defendants on a roughly equal basis but since I took Silk I have predominantly acted for

claimants. Although, for example, letters before action have always followed a broad pattern for obvious reasons and, since the implementation of the Defamation Pre-Action Protocol, a more pronounced pattern, much that informs the drafting of these documents is dependent on a lawyer's individual style, the detailed facts of the defamation in question, and the particular concerns of the claimant.

5. CONFIDENTIALITY IN DEFAMATION CLAIMS

5.1 In my experience, it is not unusual for claimant practitioners to request that pre-action letters are treated as confidential between the parties' respective lawyers and lay clients and not for onward dissemination. In the pre-action stage, what one is usually trying to prevent is a serious allegation gaining wider publicity. If the recipient publishes the letter of complaint in a defamation case or even refers publicly to the potential claim, that can amount to the further publication of the original defamatory allegations. Plainly that is not in the interests of the potential claimant and is something the claimant's solicitors understandably wish to prevent. Equally, solicitors acting for the potential defendant usually accept the common sense of not widening the ambit of publication in case it damages the chances of a favourable settlement or is generally unhelpful to the conduct of the defence.

5.2 Accordingly, there is nothing unusual in requesting the potential defendant and their solicitors not to repeat the allegation complained of and not to republish the content of a confidential letter. That could mean that the request for confidentiality extends both to the fact of the complaint as well as the contents of the letters. To refuse to honour the request for confidentiality inhibits free discussion and breaks down trust between the parties when it is predominantly in the interests of the parties, the public and of justice for disputes to be settled as amicably, as early and as economically as possible.

5.3 As I note above each case is highly fact-specific but based on my familiarity with defamation disputes it is common to mark pre-publication, post-publication and pre-action letters as confidential.

5.4 Moreover, based on my experience, recipients of defamation complaints usually respect the confidentiality requested of them. It is true that some years ago Private Eye magazine made a point of publishing the letters before action it received in its letters column under a disobliging headline in order to ridicule the complainant or their solicitors, but I can recall very few if any occasions in the matters in which I have been involved where either the fact or the contents of a defamation letter were deliberately published pre-trial by the recipient. Of course, once the matter gets to an interlocutory hearing (if in open court) before the King's Bench Master or to trial before a High Court Judge the correspondence that is relevant to the questions in issue before the court can be seen by the public but, by and large, inter-partes

correspondence is for sound practical reasons kept private and the request for confidentiality respected by each side to the dispute.

6. DEFAMATION AND WITHOUT PREJUDICE

6.1 In my experience it is extremely common for 'without prejudice' discussions to take place in defamation disputes both prior to and after publication of the offending material. It is usually in the interests of all parties to reach an agreement before any proceedings are issued or at least before any trial takes place. This has inevitably resulted in parties engaging in 'without prejudice' communications at all stages of a dispute. Parties often send open letters in parallel at the same time. This is entirely normal practice.

6.2 In many of the cases in which I have been instructed my instructing solicitors will have received a communication (now usually by email; in earlier times by a posted or faxed letter or by telephone) simply requesting a 'without prejudice' discussion or suggesting that the parties' counsel enter into such discussions. I have often advised my instructing solicitors to approach the other side's solicitors on a without prejudice basis to see if there is any room for settlement discussions without at that stage detailing the terms of any proposed settlement. I have also been asked by my solicitors to approach the other side's counsel on the same basis. Sometimes this leads to an agreeable settlement between the parties and sometimes at least to the distillation of the issues central to the dispute and the elimination of misunderstandings and unimportant disputes that can get in the way of the proper and well-managed progress of the action.

6.3 The importance of these discussions taking place on a without prejudice basis is that the exchanges are usually inadmissible before the court save when it comes to a decision on costs. What the parties are trying to ensure is that the Judge dealing with the case is unaffected by matters which are not strictly relevant to the evidential and legal merits or lack of merits in each side's case and to prevent the Judge knowing what is going on below the surface (judges are former practitioners so from their own experience as lawyers will know about the general practice of without prejudice negotiations and payments into court but will not want or need to know what has been happening in the particular case before them). It is entirely normal for a defendant newspaper, for example, to want to settle a claim on grounds that have more to do with the commercial sense of getting rid of the claim even though it has been advised that, after great expense and investment of time, it has a reasonable chance of successfully defending the claim.

6.4 Equally, a claimant may have a strong claim but cannot afford or does not want to spend the time going all the way to trial when they could compromise the claim for an apology and the payment of reasonable costs and no damages. Although Judges are entirely capable of

keeping that sort of information out of their minds when trying the case at trial, it may leave the parties with the impression that they have won or lost because the Judge considered that the losing party lacked confidence in the merits of their case. One would no more place without prejudice correspondence into the public domain or before the Judge than one would the fact of a payment into court. Litigators know this and behave appropriately to ensure that at all stages of the dispute confidential settlement negotiations are available, and that the court is not embarrassed by being shown material which might affect its judgment of the merits of the evidence and the law in support of the parties' cases. As it happens, but this does not affect the principle, the defamation and media law Bar, like the specialist cadre of solicitors in this field, is relatively small and tend to know each other well professionally. To be instructed to discuss a case on a without prejudice basis with an opponent (who may be in the same Chambers) is a common experience, as it will be for those solicitors who practise in this area of law, and assists in the efficient running of a case.

6.5 But whether this communication be by letter, email or telephone call, it is common, sensible and complies with the overall objective of saving time and money whilst achieving justice. Of course, the holding of or the invitation to hold such discussions will depend on the nature of the dispute and parties but, in my experience, the opposing sets of solicitors and counsel have always understood the reasons, both of public policy and peculiar to the case in question, for engaging in 'without prejudice' discussions.

6.6 The use of the expressions 'Without Prejudice" or "Confidential – not for Publication" in correspondence are not of course the same as court orders and although it is not a contempt of court to breach these terms it is, at very least, professionally ill-mannered and tactically unwise to do so since it breaks down the necessary professional trust that is essential between counsel and solicitors on either side of a legal dispute. It is probably more tempting to break (or less easy to understand) the requirement to maintain the usual custom if, although the recipient is technically a lawyer, he is more accurately to be seen as a campaigner or blogging journalist with interests beyond the proper conduct of litigation.

6.7 I cannot recall an occasion in my experience when a solicitor has deliberately published without prejudice correspondence. Mr Neidle's example in this matter is a first for me. There may be others, but my understanding is that it is so rare as to be discountable. I have seen examples of counsel or solicitors mistakenly trying to include without prejudice correspondence in a trial bundle or referring to it in open court but this has been a consequence of inexperience or genuine error. If my instructing solicitors were corresponding with a firm of solicitors that broke the convention and published our 'without prejudice' correspondence I would probably find further trustworthy communication somewhat problematic. In my

experience, in litigation (and incidentally in the political world), it is that trust between professionals that is so important if the system is going to proceed properly.

7. DEFAMATION LETTERS

7.1 The way in which I approach my cases depends on a number of factors, including the client, the potential defendant, but also on the nature of the defamatory allegation. Unsurprisingly, the content and thrust of the letter depend on a number of fact-specific considerations and it does not matter whether it is drafted by me or a junior on instructions or by a solicitor.

7.2 The word "serious" is commonly deployed in litigation correspondence, for example "serious failure" or "serious breach". The essence of such correspondence is to convey the client's position, their concerns and their arguments in a forthright, cogent and persuasive manner. It does not follow that it is used to threaten. The word "threat" is highly loaded but, in my experience, it is perfectly legitimate and, indeed, common to warn a potential defendant that if they do something adverse to the complainant's interests having been given proper notice there will be consequences. In my experience this is how all disputatious correspondence is expected to proceed. It needs to be clear and firm but not rude or unprofessional.

7.3 In my nearly 50-year experience, it would not be unusual for defamation letters to include words like "serious matter" or" serious harm" or "substantial damage".

8. SENIOR POLITICIANS AND DEFAMATION CLAIMS

8.1 As explained above, I was the Solicitor-General from 2010 to 2012. If you are a Government minister there is a requirement that you cannot bring private defamation claims (or threaten them) without first informing the Government's law officers (of which the Solicitor-General is one). As the Solicitor-General from 2010 to 2012 and, incidentally, as a senior barrister noted for my experience at the media Bar, if a member of government wanted to bring claims or issue proceedings of this kind they had to consult me (or the Attorney-General) first. I recall quite a few instances when members of the Government consulted me in this way.

8.2 I am aware that there are many ways a complaint about injury to reputation can be brought without litigating. As often as not, I would advise Ministers who were determined to bring a claim to take a step back and consider things strategically. In a month's time they would still be a Minister but the allegation would be forgotten. To sue would mean devoting months, and possibly years, to the litigation without any guarantee of success when it might be more sensible to let the matter go untested rather than leaving Government to litigate. But in some instances, an allegation is so serious and the potential defendant's attitude is so obdurate that there is nothing much more that you can do than bring a claim.

8.3 I acted for Edwina Curry, the MP for South Derbyshire from 1983 to 1997, (she was not a minister at this stage) against the Daily Express in response to a serious allegation in which we were successful and obtained £30,000 in libel damages. In 1989, after being accused of war crimes in the Second World War, the Conservative politician Lord Aldington (again no longer a minister) successfully secured a record £1.5 million (plus £500,000 costs) in a libel case against Nikolai Tolstoy and Nigel Watts, the latter of whom was my client. Jonathan Aitken brought a libel claim against The Guardian in the middle of the 1990s when I was not a Law Officer but, from memory, he had to leave Government (I assume on the advice of the then-Law Officers) to pursue his claim so as not to embarrass the Government. The last two cases led respectively to success and failure, but I am not sure that Lord Aldington benefited very much from the verdict or the award in his favour. Mr Aitken lost and went to prison for perjury. The first case was settled. The second two were not but they all three demonstrate the value of without prejudice negotiations.

9. EXPECTATIONS OF WEALTHY CLAIMANTS IN DEFAMATION ACTIONS

9.1 There is no expectation that defamation claimants should not seek damages just because they are already rich and do not need the money. First, the courts can only award damages to show how false the allegation is and to vindicate the claimant. Secondly, whether a claimant accepts a settlement without damages is entirely up to them. I have been involved in cases where we have notified the other side that our client is not interested in damages but rather the speediest possible correction of and apology for the false and defamatory allegations made by the defendant. Our position thereafter often rested on the attitude of the defendant. Money is simply one aspect of the matter, but it is not my understanding that claimants are expected to disregard the right to damages purely because they are already very rich.

9.2 Many people seek damages and donate it to charity, such as the former Conservative Party Treasurer, Lord McAlpine, for whom I acted, following his successful libel claims against the BBC, ITN, George Monbiot, Sally Bercow and may other bloggers in relation to wholly untrue allegations that he was a paedophile. It is common for wealthy claimants to demand damages not so much for the money itself but to provide for a very public measure of vindication. When negotiating the terms of a statement in open court which formed part of the settlement of a defamation action it was often important to make sure that the defendant admitted that they had paid the claimant "substantial damages" as opposed only to "damages" because it signified that the libel was serious and that the defendant had publicly accepted his wrongdoing.

10. MR ZAHAWI

10.1 I do not recall ever having spoken to Mr Zahawi, either in my capacity as a barrister or during the time we were both in the House of Commons. I of course knew who he was, but I cannot recall any conversation I had with him in the seven years we were both Members of Parliament. Nor do I have any recollection of ever being instructed by or having spoken to Mr Ashley Hurst.

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: ……. Signed by: 38060228EEE046D… …….

Dated: 4 November 2024

THE RT HON THE LORD GARNIER KC