Neutral Citation Number: [2008] EWHC 68 (QB)

Case No: HQ07X01937

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2008

Before :

RICHARD PARKES QC
Sitting as a Deputy Judge of the Queen's Bench Division

- -

Between :

Dr Jide Akinleye	**Claimant**
- and -	
East Sussex Hospitals NHS Trust	**Defendant**

- -
- -

The Claimant appeared in person
Harvey Starte (instructed by **Weightmans**) for the **Defendant**

Hearing dates: 17 December 2007

- -

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.

.....

RICHARD PARKES QC

Richard Parkes QC :

The application

1. This is an application for summary judgment under CPR 24.2 by the Defendant, East Sussex Hospitals NHS Trust, in a libel action brought by the Claimant, Dr Akinleye. The Defendant contends that, with pleadings, disclosure and witness statements complete, the court should find that the publication complained of occurred on an occasion of qualified privilege at common law, and that there is no real prospect of the Claimant showing that publication was malicious.

2. CPR 24.2 provides that the court may give summary judgment against a claimant or defendant on the whole of the claim or on a particular issue if (a) it considers that (i) the claimant has no real prospect of succeeding on the claim or issue; .... and (b) there is no other compelling reason why the case or issue should be disposed of at a trial. The prospect of success must be realistic rather than fanciful. The summary procedure should not be used where there are issues of fact which require to be investigated at trial.

3. The application was heard on 17th December 2007, which was the date fixed for the start of the trial of the action. The Claimant failed or was unable to attend court on the date originally fixed for the hearing of the application, 5th November 2007, and again on the adjourned date, 8th November 2007, so with the agreement of Mr Justice Eady, Judge in charge of the Jury List, I ordered that the trial date be vacated and that the hearing of the application be adjourned to the date on which the trial would otherwise have started.

The parties

4. The Claimant is Dr Jide Akinleye, who between 4th April and 20th May 2005 worked in the cardiology department at Eastbourne District General Hospital, a hospital managed by the Defendant trust. Although medically qualified, he was working as a locum basic grade technician supplied by an agency, carrying out support functions, including exercise testing and Holter tape analysis. After he left the Defendant's hospital, the Claimant worked as an agency-supplied echocardiographer at Fairfield General Hospital, managed by Pennine Acute Hospitals NHS Trust ("Pennine") between 23rd May 2005 and 7th December 2005. The then acting medical director of Pennine was Dr Ruth Jameson.

The circumstances of publication

5. On 23rd December 2005 the Defendant's medical director, Dr David Scott, was contacted by Dr Jameson. The initial contact was by telephone call, which was followed by an e-mail. Dr Scott was told by Dr Jameson that Pennine had terminated the Claimant's contract because of concerns raised about the quality of his work as an echocardiographer, that they were in the process of reviewing his work to identify whether there were any patient safety issues, and that they were contacting other trusts where Dr Akinleye had worked to find out if any issues had come to light about his work. She said that she would ask her personal assistant to send him a preliminary report on the case. This, therefore, was a request made by Pennine to the Defendant trust for information about any concerns which the Defendant had about the Claimant.

6. Shortly after the conversation between Dr Scott and Dr Jameson, Dr Jameson's personal assistant, Cheryl Greenwood, sent Dr Scott the promised email, with an attachment which set out Pennine's work in progress on the Akinleye case, headed "Echocardiography Clinical Incident - Ref No.1205: Overview of Initial Clinical Concerns and Findings from Subsequent Review of Echos". This document listed a number of concerns about Dr Akinleye's clinical competence, and stated that those concerns, together with the fact that Dr Akinleye did not (contrary to Pennine's understanding of what they had been told by the locum agency) hold accreditation with the British Society of Echocardiographers, had led to the termination of his employment. According to the document, forty-one of Dr Akinleye's echo recordings had been reviewed in critical terms after his departure by other echocardiographers on Pennine's staff, but could not be replicated in full fresh reports because of shortcomings in the quality of the original work.

7. Dr Scott had never heard of the Claimant, and needed to make enquiries of those who had managed him while he worked for the Trust. He forwarded Cheryl Greenwood's e-mail to the Defendant's senior general manager, Joanna Smith (now Howlett), with a request that she, in conjunction with Venetia Sanders, the Defendant's Clinical Incident Coordinator, should make enquiries about the Claimant and respond to him, Dr Scott, as soon as possible. He asked her to ascertain whether the Claimant had worked for the Defendant trust, the dates of his employment, the nature of his work, and whether there was any risk to patients seen by him. Ms Smith forwarded the e-mail to Mr Michael Higson, manager of the cardiology department at Eastbourne District General Hospital, asking whether Dr Akinleye was "the guy who there were concerns over rent etc" (sic), and for information about the dates of his employment and what he did. Mr Higson responded by e-mail on 30th December 2005, and Dr Scott forwarded Mr Higson's response by email on the same day to Cheryl Greenwood at Pennine for the attention of Dr Jameson. Dr Scott also copied the e-mail to a number of staff members at the Defendant trust. Dr Scott's email simply told Dr Jameson that she would find below the results of the Defendant's enquiries and that he was proposing no further action at the present time, and asked Dr Jameson to let him know if she required further information.

8. Mr Higson's response to Joanna Smith, as forwarded to Pennine by Dr Scott, was in these terms:

> "Jide Akinleye worked here as a locum basic grade technician from 4th April 2005 to 20th May 2005. He was provided by the agency Mediplacements as a reputedly a doctor (sic) working temporarily as a basic grade technician while his registration was being processed.
>
> His duties included performing exercise tests and the fitting and analysis of ambulatory recorders. His standard of work was adequate (but not exceptional or even good). We supervised him closely and did not have any specific worries over clinical issues.
>
> He did NOT at any point perform echo-cardiography here as he was not presented as an echo trained technician and clearly had very limited knowledge of this subject. While he was here he

did go on a weekend echo course and he did say that he hoped to work in echo in the future. Before he left he told us that he had got an agency post doing echo in a hospital (? Peterborough) where they had agreed to give him a trial performing echo under supervision. We were very surprised at this.

He is not the person over whom we had the problems regarding the non-payment of rent but I did hear that he also left owing unpaid rent.

He did also come under suspicion by security over the theft of the echo machine. There was no evidence to support this other than he left (sic) at the same time the machine disappeared.

Hope this helps.

Mike Higson"

The statements of case

9. The Particulars of Claim do not set out the words complained of, but it appears from paragraph 9 that Dr Akinleye complains of the elements of Mr Higson's email which stated that his work was not good, that he had limited knowledge of echocardiography, that he was suspected of theft of an echo scanning machine, and that he owed rent. Pressed with a request for further information, Dr Akinleye responded on 8th November 2006 that the imputations of which he complained were as follows, and I quote:

    - His work was not exceptional or even good (Professional incompetence)
    - His knowledge of Echo-cardiography was limited (Professional incompetence)
    - He was suspected of the theft of the Echo Machine (Criminal Conduct)
    - He did not pay rent and he owed rent when he left (Moral Conduct).

10. The Claimant does not plead the defamatory meanings which he says that the e-mail bore, but it is reasonably clear that he complains that the e-mail will have been understood to mean that he was professionally incompetent, that he was suspected of criminal misconduct, namely theft, and that he had behaved immorally in failing to pay rent which he owed.

11. It has not always been clear to whom Dr Akinleye complains that the Defendant published Mr Higson's email. Paragraph 12 of his Particulars of Claim allege that it was circulated (he does not say by whom) to the Department of Health, which in turn passed the information to seven NHS hospitals. In his further information of 8th November 2006, Dr Akinleye alleged that the email was copied to a Professor John Ashton, and to Dr Gary Cook of the Department of Health Public Health Unit in Manchester. On 23rd January 2007 Master Yoxall ordered the Claimant to answer request (1) of the Defendant's request for further information, namely to identify each and every publication of the e-mail complained of, identifying the persons to whom

the e-mail was said to have been published and making clear how the Defendant was said to have made or caused such publication. By a response dated 29th January 2007 Dr Akinleye alleged only that it was published to Dr Ruth Jameson, medical director of Pennine. That is his pleaded case, and it was the basis on which the application was argued (without objection) by Mr Starte. I only mention this point because in Dr Akinleye's skeleton argument he asserted that the email was copied to Dr Gary Cook of the Department of Health in Manchester. It was not made clear whether he contended that this further publication was the responsibility of the Defendant, as opposed to Pennine, but the point was not argued at the hearing (except to the extent that publication was asserted in the skeleton argument) and it would not have been open to Dr Akinleye to argue it.

12. The Defence admits that publication. It denies that the words complained of were defamatory of the claimant, and it also denies that the words were capable of bearing meanings which included professional incompetence or that the Claimant had committed or had justifiably been suspected of theft. There is a plea of justification, in the meanings that the Claimant had failed to pay rent that was due and owing and that on no better evidence than that he had left his employment at Eastbourne District General Hospital at the same time that an echo machine had disappeared from the hospital, he had come under suspicion by hospital security of involvement in the theft of the machine. More to the point for present purposes, it is pleaded that the publications of the e-mail were on occasions of qualified privilege, as being made pursuant to a social and moral duty, and/or in the furtherance of a legitimate interest to persons sharing that interest, and/or having a corresponding duty or interest to receive those statements.

13. The Claimant has served two documents which are in substance Replies to the Defence. The first is dated 16th February 2006, and is concerned as much with the behaviour of Pennine as with that of the Defendant trust. The only passage which could fairly be construed as a reference to malice is that in which Dr Akinleye makes the point that the Defendant could have replied much more economically to Pennine's request but instead "felt it was wise and an opportunity to take revenge due to the issue of the unpaid rent. It was an opportunity too good to be missed".

14. Ordered by Master Yoxall on 14th March 2006 to serve a proper Reply, Dr Akinleye served a document headed Reply to Defence, erroneously dated 16th February 2006, which was again substantially concerned with allegations against Pennine, but enlarged upon the allegation that the Defendant trust sought to take revenge due to unpaid rent. Dr Akinleye complains in this Reply that the response to Pennine's request should have been simple, brief and straight to the point, as was the case with the other hospitals contacted by Pennine, namely that the Claimant did not perform any echocardiograms on patients in the Defendant's Hospital. On his case, the Defendant felt that this was an opportunity to take revenge over the issue of unpaid rent which had created ill will, spite and resentment after he had left. He also alleges that the Defendant exceeded the bounds of qualified privilege by writing that his work was not exceptional or even good and that his knowledge of echocardiography was limited, and by suggesting that he was involved in the theft of the echo machine. It was untrue to say that his work was not exceptional or even good, given that he had a reference from the Defendant which said his work was good; it was untrue to say that his knowledge of echocardiography was limited, because he was employed by the

Defendant in a different role, and the Defendant was not in a position to comment on a matter which its staff did not assess while the Claimant was working with them. As for the theft of the echo machine, referring to that in an e-mail to Pennine was malicious, unnecessary, vindictive and reckless.

Issues

15. There is no dispute as to the circumstances in which the e-mail was published, which are as I have set them out above. The issues between the parties concern whether, on those undisputed facts, the publication of the words complained of took place on an occasion of qualified privilege, and (if so) whether the Claimant has any real prospect of defeating that defence by proving that the publication was malicious.

Qualified privilege

16. Mr Starte, for the Defendant, submitted that the e-mail was sent in response to an authoritative request by the medical director of one NHS trust to the medical director of another NHS trust for any information relevant to concerns about the claimant during his employment by the Defendant. He contended that, on the information to which Dr Scott was called on to respond, the matter under investigation by Pennine was potentially a situation in which a rogue practitioner had gained employment as an echocardiographer on false pretences as to his qualifications and experience, and then, for some six months, exposed cardiac patients, potentially suffering from life-threatening conditions, to the serious risk of incompetently performed and reported echocardiograms. In the circumstances, he argued, the publication by Dr Scott to Dr Jameson must have been on an occasion of qualified privilege, because Dr Scott had a duty to respond to Dr Jameson's legitimate enquiry, and Dr Jameson had a legitimate interest in knowing the answer to that enquiry. In so far as authority was required, he relied on paragraphs 14.20-14.21 of *Gatley* on Libel and Slander, 10th edition.

17. Dr Akinleye accepted that the occasion was one to which qualified privilege attached. His concerns were that the email written by Mr Higson, and forwarded by Dr Scott to Dr Jameson, was "excessive and out of scope": it should not have mentioned questions of unpaid rent, theft of a machine or (since Dr Akinleye had not been working as an echocardiographic technician) his supposedly limited knowledge of echocardiography. In other words, he argued that the privilege was vitiated by the inclusion of material which was logically irrelevant to the enquiry from Pennine. He relied on the fact that other hospitals had replied to Pennine in very much more concise terms, essentially confining themselves to stating that he had not been employed as an echocardiographer and had done no patient scans.

18. Mr Starte's answer to that submission was that the privilege attaches to the occasion of publication, and that any words which are published on that occasion will be *prima facie* privileged unless they are not in any reasonable sense germane to the subject matter of the occasion, as Gray J put it in *Maccaba v Liechtenstein* [2005] EMLR 206 at [10-13]. Gray J recalled the warning given by Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at 151E, namely that the court should be wary of applying an objective test of relevance to every part of the defamatory words published on a privileged occasion, because otherwise the protection afforded by the privilege would be illusory. Lord Diplock explained that as regarded irrelevant matter the test was not

whether it was logically relevant but whether in all the circumstances it could be inferred that the Defendant did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. In Mr Starte's submission, none of the words used by Mr Higson could be said not to be germane and relevant to the occasion, since in the circumstances of an investigation into an serious issue of public safety, involving questions of the competence, integrity and professionalism of the Claimant, the broadest range of information readily available about the Claimant was not merely germane to the occasion, but positively called for.

19. In my judgment Dr Scott plainly had a duty to respond to Dr Jameson's entirely proper request for information about Dr Akinleye, and Dr Jameson had a legitimate interest in learning what the Defendant trust had to tell her about him. Pennine faced a potentially very serious situation in which an echocardiographer had been found not to have the accreditation which he had been believed to have, and had been found to show professional incompetence, including the taking of off axis views and incorrect measurements, to such a degree that it was not even possible for his peers to provide fresh reports based on the echo recordings which Dr Akinleye had made. In consequence, the cardiac conditions for which at least some patients were seen by Dr Akinleye were not accurately reported to cardiologists, whose ability to diagnose their patients depended at least in part on Dr Akinleye's work. There was therefore a very serious potential danger to patient safety, and it is plain that Pennine was bound to contact all Dr Akinleye's former employers, both to inform them of potential problems which other Trusts might need to investigate, but also to obtain any information which might be of assistance in forming a view about the risks which Dr Akinleye's performance posed. As the editors of *Gatley* put it at paragraph 14.21, "Where a person is asked a question about a matter by or on behalf of someone who appears to have a legitimate interest in knowing the answer, the law has recognised that he is under a duty to answer, and that the occasion is privileged". There is no need for further citation: this is a classic case of qualified privilege at common law, and, as I have said, Dr Akinleye did not dispute that.

20. The real question here is whether all the matters raised by Mr Higson in his email are relevant to Dr Jameson's enquiry, and, if not, what the consequence is. Plainly, Dr Akinleye's standard of work as an echo technician was relevant, and he did not argue otherwise. In my judgment, there is no doubt that Mr Higson's view of Dr Akinleye's knowledge of echocardiography was also relevant. It makes no difference that Dr Akinleye was not employed by the Defendant as an echo cardiographer: his skills in that field, so far as Mr Higson was aware of them, went to the core of Pennine's enquiry. The issues of his having left owing unpaid rent and his having come under suspicion for theft of an echo machine are more difficult. On one level, they do not relate to the nature of Dr Akinleye's work nor to risk to patients. However, I believe that Mr Starte is right to say that in the face of a serious enquiry into matters which posed a real risk of danger to cardiac patients, the Defendant trust was entitled - possibly even bound - to communicate to Pennine any information which might be relevant to an assessment of Dr Akinleye's integrity and professionalism, in order to help them to form a complete picture. (That, I note, was the view formed by Dr Scott, in deciding to pass on to Pennine the whole of Mr Higson's email). If that is right,

then the “excessive” material (to use Dr Akinleye’s term) can be seen as satisfying even an objective test of logical relevance to the enquiry. That, of course, would be too high a test, for the reasons which Lord Diplock gave in *Horrocks v Lowe*. In my judgment, that material plainly satisfies the requirement that it be in a reasonable sense germane to the subject matter of the enquiry, and in consequence it seems to me that the judge at the trial of this action would be likely to hold that the words complained of as a whole were protected by qualified privilege. Put another way, there is no real prospect of the Claimant succeeding on the issue of qualified privilege at trial.

Malice

21. I now turn to the issue of malice. For what malice entails, I can do no better than refer to the following passage in the speech of Lord Diplock in *Horrocks v Lowe* [1975] AC 135, 149H to 151B:

> “So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. “Express malice” is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.
>
> The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.
>
> Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, “honest belief”. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious

assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more.

Even a positive belief in the truth of what is published on a privileged occasion - which is presumed unless the contrary is proved - may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill will towards the person he defames. If this be proved, then even positive belief in the truth of what is published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true.

Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that 'express malice' can properly be found."

At p151D, Lord Diplock reminds judges that the burden of affirmative proof of malice is not one that is lightly satisfied.

22. It is clear from Lord Diplock's speech that it is difficult (even if theoretically possible) for a claimant to prove malice based on a dominant motive of spite, if he cannot show that the defendant had no honest belief in the truth of the words complained of: see also *Branson v Bower* [2002] QB 737 at [8], and *Meade v Pugh* [2004] EWHC 408 (QB) at [25]. It is also clear that the claimant must prove not simply that the defendant's motive in publishing was personal spite or a desire to injure, but also that it was the dominant motive, or that the defendant did not believe that his words were true.

23. Malice is quintessentially a jury issue, but in appropriate circumstances the judge can and should prevent the issue from going to a jury. The relevant principles are well established. In *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 [37], May LJ stated the approach to be taken where the issues involve questions of fact for a jury in these terms: ".....it is open to the judge in a libel case to come to the conclusion that the evidence, taken at its highest, is such that a jury properly directed could not properly reach a necessary factual conclusion. In those circumstance, it is the judge's duty, upon a submission being made to him, to withdraw that issue from the jury. This is the test applied in criminal jury trials: see *R v Galbraith* [1981] 1 WLR 1039, 1042c. In my view, it applies equally in libel actions". Similarly, in *Spencer v Sillitoe* [2002] EWCA Civ 1579, [2003] EMLR 10 at [23], Buxton LJ said "The question in a case such as the present comes down to whether there is an issue of fact on which, on the evidence so far available, the jury could properly, and without being perverse, come to a conclusion in favour of the claimant". This usually means that the court must provisionally resolve all apparent conflicts of fact in the claimant's favour, although there are important caveats, for example where the claimant's evidence is "fatally incoherent or self-contradictory": see *Webster v British Gas Services Ltd* [2003] EWHC 1188 (QB) at [17], per Tugendhat J.

24. As to the standard which the evidence of malice must satisfy, in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 at [32] May LJ approved the following statement of the law, taken from the 8th edition of *Gatley*: "In order to enable the plaintiff to have the question of malice left to the jury, it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than with its non-existence. It is not sufficient if it falls short of that and is consistent only with a mere possibility. To direct a jury to consider mere possibilities in such a case would be practically to destroy the protection which the law throws over privileged communications". As Eady J put it recently in *Blackwell v News Group* [2007] EWHC 3098 (QB) [14], the court must ensure, at whatever stage is appropriate, that the court's time is not wasted by allowing a plea of malice to go forward if either the plea itself or the evidence in support of it does not disclose a case more consistent with the presence of malice than with its absence.

25. Finally, in this case the Defendant trust is of course a body which may be vicariously liable for defamation published by an employee. But, as Mr Starte rightly submitted, the Claimant must identify a person or persons for whom the Defendant is liable who participated in publication of the words complained of and who did so with the necessary malicious motive: *Webster v British Gas Services Ltd* [2003] EWHC 1188 (QB), [30].

26. Against that background of law, I now consider the strength of the Claimant's case on malice. I have the advantage, since witness statements were exchanged some months ago, of having read all the evidence which would be called at trial, including the Claimant's own evidence, except to the extent that the Claimant relies on summaries of the areas of evidence which he hopes that certain witnesses will be able to deal with at trial.

27. I have set out the pleaded case on malice above. As pleaded, it is not directed at any individual, and is expressed in terms of general assertion. The essence of it appears to be the assertion that the Defendant's response to Pennine was expressed more widely

than necessary in order to take revenge on Dr Akinleye because he had left rent unpaid. Why the matter of unpaid rent should have been a matter of such concern either to Mike Higson, the author of the response, who managed the cardiology department, or to Dr Scott, who as medical director forwarded Mr Higson's response to Pennine, is not made clear.

28. Exchange of witness statements was ordered by Master Yoxall for 22nd June 2007. The Claimant emailed the Defendant's solicitor on 28th June 2007 stating that he had no witness statements to serve, but would bring two witnesses in person to trial. The eventual outcome was an application by the Defendant to Master Yoxall, who ordered on 27th July 2007 that unless the Claimant served the witness statements of fact on which he intended to rely (or witness summaries within CPR 32.9) by 25th August, his claim would be struck out. This order prompted the Claimant to serve a witness statement dated 16th August 2007.

29. In that witness statement, the Claimant contends (paragraph 35) that the contents of Mr Higson's email were excessive, negligent, and (in some respects) "frankly dishonest". Dr Akinleye does not give further details of the dishonesty. What he does say about the four areas of concern in Mr Higson's email can be summarised as follows.

    (1) **His standard of work was adequate (but not exceptional or even good)**: Mr Higson should not have said that Dr Akinleye's work was not exceptional or even good, given that Dr Akinleye received a reference from Anne Topham of the cardiology department at Eastbourne Hospital saying that his work was good. (I interpose here that it is the Defendant's case that the supposed reference from Ms Topham is a forgery, and a witness statement by Ms Topham to that effect has been served by the Defendant. That is not a question which I can decide on this application. For present purposes I must assume that Ms Topham did indeed provide the reference).
    (2) **He did not at any point perform echo-cardiography here as he was not presented as an echo trained technician and clearly had very limited knowledge of this subject**: Mr Higson was wrong, irresponsible and spiteful to comment on an issue which had not been tested, since Dr Akinleye never performed echo scans and was not employed to do so, and his knowledge of the subject was never tested by the department.
    (3) **He did also come under suspicion by security over the theft of the echo machine:** neither he nor the agency was contacted about the missing machine, and it was wrong to refer to it in the email.
    (4) **He is not the person over whom we had the problems regarding the non-payment of rent but I did hear that he also left owing unpaid rent**: Dr Akinleye contends that he did not legally owe rent, and this information was not necessary. It is the unpaid accommodation bill which is said by Dr Akinleye in his witness statement, as in his Replies, to lie at the root of the "excessive" contents of the email, by generating "spite, ill-will and displeasure" which provided the motive.

30. Dr Akinleye does not suggest any particular general animus towards him on Mr Higson's part. In his Particulars of Claim he describes him as very supportive and helpful and a great teacher to whom, when Dr Akinleye left, he was very grateful. The picture in his witness statement is a little less enthusiastic: there, Dr Akinleye

describes Mr Higson as happy to teach when he was free from other commitments, but as a person who (so Dr Akinleye was told by another staff member) preferred staff who "tended to patronise him and exalt his knowledge, experience and managerial skills", which Dr Akinleye did not do. He found Mr Higson "cold and frosty" after a week's absence. Mr Higson did not fault his work, but did not seem to engage him in conversation to the extent that he did the other agency staff. On 16th May 2006, he told Dr Akinleye that his job would have to end on 20th May because of budgetary problems, but said he was more than happy to write Dr Akinleye a good reference for his next job.

31. However, Dr Akinleye believes that Mr Higson later caused him a further injury. He suggests that Mr Higson was sent an excellent reference which he, Dr Akinleye, received for work at Homerton Hospital in London and that Mr Higson then informed Pennine in the first week of September 2006 that Dr Akinleye was working at Homerton, whereupon Pennine told Homerton about their concerns about his clinical incompetence, and Homerton terminated his appointment. This is said to be "further proof of conspiracy to cause me harm, vexation, vendetta and maliciousness"

.

32. The first witness statement of 16th August 2007 was followed by a second, undated, witness statement, which (as appears from the witness statement of Mr Martin Forshaw in support of the application) was received by the Defendant's solicitors under cover of a letter dated 14th September 2007. This appears to be a revised and expanded version of the first statement. Much of the new material emphasises the Claimant's skill and experience in echocardiography. Several paragraphs deal with the implausibility of the idea that Dr Akinleye could have taken the missing echo machine. Dr Akinleye asserts that his request for a cardboard box weeks earlier to block draughts in his room, together with his interest in echocardiography and the time of his leaving the hospital, "provided a significant opportunity for Mike Higson to divert the blame on me and not on the carelessness of Mike Higson". He also asserts, without stating the evidential basis of the assertion, that the machine went missing "well before" he left the hospital, and that the dates were changed to fit the date when he left.

33. In his second statement, Dr Akinleye substantially develops his allegations about Mr Higson's conduct so far as it related to his position at Homerton Hospital. It will be recalled that in his first statement, he asserted that Mr Higson had informed Pennine that he was working at Homerton, as a result of which he lost his job there. Now, Dr Akinleye asserts that Mr Higson, "still seething in spite and malice", a "malevolent and spiteful man with conspiracy to cause me further harm", contacted Homerton Hospital between 2nd and 6th September 2006 and informed them that Dr Akinleye was under investigation by the Department of Health for the "incident" that occurred at Fairfield General Hospital (i.e. while he was employed by Pennine), and that while at Eastbourne he did not pay his rent. Mr Higson is also said to have contacted the accommodation office at Homerton Hospital to check if Dr Akinleye owed rent there also. Dr Akinleye maintains in his revised statement that his appointment was terminated as a result of Mr Higson's disclosure (not, as before, as a result of Pennine contacting Homerton). Mr Higson, in his second witness statement in response to these assertions, denies that he has ever contacted Homerton Hospital or any other NHS organisation about the Claimant, and Richard Gourlay, general manager for the Directorate of General and Emergency Medical

Services at Homerton University Hospital, has made a witness statement stating that the information about Dr Akinleye, which suggested that there might be clinical concerns about the standard of his echocardiography, did not come from Mr Higson. Mr Gourlay exhibits a letter of claim by Dr Akinleye dated 28th March 2007 sent to Homerton Hospital, and it is to be noted that at paragraph 10 of his letter Dr Akinleye states that he was told by two Homerton staff members, Dawn Coates and a "Ms Asina", that the information that he was under investigation by the Department of Health over the Pennine matter came from Pennine. There is no mention in the letter of Mr Higson. I should add that Dr Akinleye did not suggest that the letter was not authentic.

34. Dr Akinleye served a yet further revision of his witness statement under cover of a letter to Mr Forshaw's firm, Weightmans, dated 20th September 2007. This third statement purports to have been signed on 24th August 2007, but that can hardly be right, since it is plain that it is a revision of the second statement, which was served on Weightmans under cover of a letter dated 14th September 2007. As Mr Forshaw suggests, there may be significance in the fact that 25th August 2007 was the date fixed by Master Yoxall, on pain of striking out, for exchange of witness statements. However, I do not think that there is anything of substance in the additional material.

35. On the day of the hearing of the application, I received from Dr Akinleye a lengthy document headed "1. Statement in Case 2. Skeletal Arguments". The "Statement in Case" might appear to be a further witness statement, but for the fact that it is undated and contains no statement of truth. I think that the only fresh matter of significance is that at paragraph 44 Dr Akinleye says this: "On the morning Monday, at 10am, 11th September 2006, after I had scanned 2 patients on the Monday Clinic List, my appointment was terminated by Homerton Hospital. Dawn Coates and Asima Hussein the Unit deputy manager, made it clear that they were contacted by Mike Higson, initially in the morning of 6th September 2006, because my agency sent my CV and reference to East Sussex for employment after the Homerton job ends". The phrase "made it clear" is unfortunate, because it does not explain whether Dr Akinleye is saying that they gave him the information in express terms, or whether their conduct or manner or the words that they used led him to the conclusion that they had been contacted by Mr Higson. Whatever it means, this is the first indication given by Dr Akinleye as to how he could possibly have known that Mr Higson had been in contact with Homerton Hospital. Why he was not able to identify the sources for this allegation in his second or third witness statement, why he did not think it right to mention it at all until he served his second witness statement, and why he did not refer to it in his letter before action to Homerton, remain unanswered questions.

36. Mr Starte must have received this document at least some days before the hearing, because his solicitors were able to obtain a witness statement from Hasima Hussain, assistant general manager of the Business and Planning Directorate of General and Emergency Medicine at Homerton University Hospital, dated 14th December 2007, who is plainly the person referred to by Dr Akinleye as "Ms Asina" and "Asima Hussein". In that witness statement, Ms Hussain states that on 8th September 2006 she was told by Richard Gourlay that information had been received from a third party (not the Defendant trust) that concerns had been raised about the quality of Dr

Akinleye's work at a trust where he had previously been employed. Together with Dawn Coates, she spoke to Dr Akinleye on 11th September 2006 and told him that they were terminating his locum contract because concerns had been raised about his competence which needed to be investigated in the interest of patient safety. Neither she nor Dawn Coates told Dr Akinleye that they had been contacted by Mr Higson. The concerns about him were not passed to them by Mr Higson or anyone else from the Defendant trust.

37. Mr Starte's first point on the issue of malice was that the only person identified as responsible for the publication of the Higson email is Dr Scott. It is certainly true that, on the uncontested evidence, it was Dr Scott, the medical director, who decided to respond to Dr Jameson's enquiry by forwarding the email to Pennine. Mr Higson's email was sent internally to Joanna Smith, who forwarded it to Dr Scott, who took the decision to send it as it stood to Pennine, because he felt it appropriate to pass on all the information held by the Defendant which would help Dr Jameson to form a complete picture of Dr Akinleye. It is also true, as Mr Starte submitted, that no case is asserted, and that there is no evidential case in prospect that could support a case, which impugns Dr Scott's good faith in acting as he did in passing on the information supplied by Mr Higson. In short, there is no case in malice against Dr Scott.

38. However, it is fairly clear that Dr Akinleye's case is that Mr Higson published the email to Pennine: in other words, that he is responsible in law for the republication of his email by Dr Scott to Pennine. That is not a question on which I have been asked to rule, and it is an issue for trial. Mr Starte submitted that there is no case in prospect on which a jury could properly find that Mr Higson's publication of the email was malicious. He addressed the elements of the email one by one, by reference to the second Reply.

39. Firstly, Mr Starte referred to Mr Higson's words that Dr Akinleye's standard of work was adequate, but not exceptional or even good. It should be remembered that Mr Higson went on to say that his team had supervised Dr Akinleye closely and did not have any specific worries over clinical issues. In Mr Starte's submission, which I accept, there is no evidence that Mr Higson did not honestly hold that opinion of Dr Akinleye's standard of work, and it is nothing to the point that on Dr Akinleye's case Ann Topham provided him with a reference (the authenticity of which is of course disputed) assessing his technical ability and professional standards as good, because Ms Topham's opinion is no evidence of Mr Higson's own assessment.

40. The second matter was Mr Higson's observation that Dr Akinleye's knowledge of echocardiography was very limited. This was said in the context that Dr Akinleye did not at any point perform echocardiography at Eastbourne as he was not presented as an echo trained technician. Mr Starte submitted, correctly in my judgment, that there is no evidence whatever that this was not Mr Higson's honest view.

41. The third matter was the reference to the theft of the echo machine. It will be remembered that Mr Higson's words were that Dr Akinleye came under suspicion by security over the theft of the echo machine, but that there was no evidence to support this other than the fact that Dr Akinleye left at the same time that the

machine disappeared. Mr Starte argued that - contrary to Dr Akinleye's suggestion that Mr Higson was trying to implicate him in the theft - Mr Higson actually undermined such a suggestion by making it clear how limited the evidence was to justify any suspicion of him. There is some force in that argument: if Mr Higson truly wanted to implicate Dr Akinleye in the theft, he would have used rather different words. But the question is: is there any evidence that Mr Higson did not believe the truth of what he said? But for Dr Akinleye's assertion in his second witness statement that the machine went missing well before he left Eastbourne, there would be no evidence at all. So how far does this assertion alter the position? Mr Starte's submission was that it makes no difference at all. Firstly, Dr Akinleye's assertion that the machine went missing well before he left, and that the date when the machine went missing was then changed to fit in with the date on which he left, is not a charge which is levelled against Mr Higson. It is not suggested that Mr Higson knew that the machine had gone missing earlier, or that any records had been altered to his knowledge. Secondly, he submitted that these allegations by Dr Akinleye were pure unsubstantiated assertion, unsupported by any evidential basis for making them, and that Dr Akinleye would barely even be able to put the allegations to Mr Higson in cross-examination. Thirdly, he reminded me that Mr Higson has dealt with the allegations by producing the hospital records, which show that the machine was last used on 20th May 2005, the day Dr Akinleye left the hospital. That, of course, begs the question as to whether they might have been altered.

42. In my judgment there is considerable weight in these submissions. It is true that Dr Akinleye did not suggest in his evidence that Mr Higson knew that the machine had gone missing earlier, or that he was a party to falsification of records; nor did he do so in his submissions to me. Indeed, in his submissions he made the point that the records were not password secure and that anyone might have altered or manipulated them. It might with difficulty be argued that the tenor of his witness statement - for example, the assertion that his request for a cardboard box weeks earlier to block draughts in his room, together with his interest in echocardiography and the time of his leaving the hospital "provided a significant opportunity for Mike Higson to divert the blame on me and not on the carelessness of Mike Higson" - is such that it is implied that Mr Higson knew that the machine had gone missing earlier, or was a party to falsification of records. I would be very slow to find that so serious a charge could properly be made by implication, and I do not believe that the implication is there. But even had Dr Akinleye made that suggestion in terms, I would find it very difficult indeed to place any weight on such assertions. As I have said, on an application of this kind the court must provisionally resolve all apparent conflicts of fact in the Claimant's favour. However, I could not regard an unsupported assertion of gross dishonesty and forgery, made for the first time in this revised witness statement, without any explanation as to how the witness could possibly be in a position to know the truth of the very serious matter which he asserts, as giving rise to a genuine conflict of fact with the evidence of Mr Higson and the records which he produces. In *Webster v British Gas Services Ltd* [2003] EWHC 1188 (QB) at [17], Tugendhat J gives examples of important caveats to the rule that all apparent conflicts of fact should be resolved in favour of the claimant, for example where the claimant's evidence is "fatally incoherent or self-contradictory", and to those I would add pure unsupported assertions such as these. It is easy to forget in all this that Mike Higson did not "put the blame" on Dr

Akinleye in his email, as Dr Akinleye asserts: he said only that Dr Akinleye had come under suspicion by security over the theft of the machine, and warned that there was no evidence to support that other than the fact that he left at the same time that the machine disappeared. In my judgment, there is no evidence fit to go to a jury that Mr Higson did not honestly believe that Dr Akinleye had come under suspicion, to the very limited extent which he explained, for the theft of the echo machine.

43. The fourth matter was the reference to unpaid rent. Dr Akinleye argued that this information was not necessary and was incomplete, and that Mr Higson should have included information about the disgraceful state of his room and about what he called the "precise sequence of events in the accommodation bill payment", by which I take him to mean primarily the fact that no invoice was sent to him or the locum agency until after he left. I disagree, but even if that were correct, it would have no bearing on the question whether Mr Higson honestly believed that Dr Akinleye left owing unpaid rent. It must be remembered that in this respect Mr Higson was replying to the specific enquiry by Joanna Smith as to whether Dr Akinleye was "the guy who there were concerns over rent etc", to which Mr Higson answered that he was not the person over whom they had problems regarding non-payment of rent, concluding "but I did hear that he also left owing unpaid rent". There is no evidence whatever that Mr Higson did not honestly believe that his answer was true. Indeed, Dr Akinleye's own evidence was that the rent was not paid and that he offered to settle the bill by instalments. That does not, of course, determine the question of whether the legal liability to pay was his or the agency's, but it does serve to illustrate how far removed the evidence is from any suggestion that Mr Higson could not honestly have believed that rent was owed.

44. Thus far, my conclusion is that there is no evidence fit to go to a jury that Mr Higson did not honestly believe the truth of the words which he used in his email. Such evidence as there is does not come near raising a probability of malice.

45. The question then arises, is there evidence that Mr Higson's dominant motive in publishing the words complained of was personal spite against Dr Akinleye or a desire to injure him? The motive suggested by Dr Akinleye is that Mr Higson wanted to take revenge against him because of his unpaid rent. It was not explained by Dr Akinleye why this should have been a matter of concern to Mr Higson, whose responsibilities were to manage the cardiology department, not staff accommodation. In his submissions, Dr Akinleye suggested that the issue of the unpaid rent annoyed Mr Higson because it meant that his department would not get favours from the accommodation department for the housing of future staff, but this was pure speculation. There is no evidence - only Dr Akinleye's assertion - that such a motive operated on Mr Higson at the time when the email was sent, let alone that it was the dominant motive for his acting as he did.

46. In case I am wrong in concluding that what Dr Akinleye argued was the "excessive" material in the email was reasonably germane to the subject matter of the enquiry, I ought to consider, in accordance with p151E-H of Lord Diplock's speech in *Horrocks v Lowe*, whether the references to unpaid rent and to Dr Akinleye coming under suspicion for theft of the echo machine justify an inference that Mr Higson either did not believe his words to be true or, though believing them

to be true, realised that these matters had nothing to do with the duty on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. As Lord Diplock warned, judges and juries should be slow to draw such an inference. For my part, I see no justification whatever for such an inference. I have already made clear that the reference to unpaid rent was a response to an express query from Joanna Smith, and that the reference to Dr Akinleye having come under suspicion for theft of the echo machine was immediately rendered close to innocuous by the qualification that the only basis for the suspicion had been the coincidence of Dr Akinleye having left on the day that the machine disappeared. If those references did in fact go beyond the requirements of the occasion of privilege, I see no grounds for inferring lack of belief by Mr Higson in the truth of his words, nor a desire to vent personal spite or any other improper motive against a locum employee whom he had known for only a matter of weeks and against whom there is no evidence that Mr Higson had any animus.

47. Could such a motive be inferred from Mr Higson's alleged contacts with Homerton Hospital nine months later? That was the effect of Dr Akinleye's argument. Dr Akinleye maintained that Mr Higson was so consumed by spite and malice against him that he was determined, some nine months after the email was sent, to damage his standing at Homerton Hospital. The premise of that argument is that Mr Higson was eaten up with spite and malice at the time when the email was sent, to such an extent that nine months later he did his utmost to do Dr Akinleye down. There is no evidence that Mr Higson had such feelings for Dr Akinleye when the email was written, so the task of proving a dominant improper motive at the time by inference from behaviour nine months after the event is bound to be an uphill one. Indeed, I asked Dr Akinleye in the course of his submissions what exactly could be learned about Mr Higson's state of mind in December 2005 from the fact that (if he did) he contacted Homerton in September 2006, and had no answer.

48. Mr Starte pointed out that the Homerton allegations were not made in the Reply, and did not surface for the first time until Dr Akinleye's second witness statement, which was served on 14th September 2007. In his first witness statement, Dr Akinleye contended only that Mr Higson contacted Pennine in early September 2006 to inform them that he was working at Homerton. Mr Starte argued that even if that was true, it would add nothing of weight to a case in malice against Mr Higson, because it would be consistent with a continuing concern to ensure that the Pennine enquiry was comprehensive.

49. But the second witness statement, Mr Starte submitted, contradicted the first, because Dr Akinleye now alleged (in terms of pure assertion) that it was Mr Higson (not Pennine) who first contacted Homerton, and moreover told them not just about the Pennine investigation but also about his non-payment of rent at Eastbourne, and in addition contacted Homerton's accommodation office to check if Dr Akinleye owed rent there also. Moreover, the second witness statement contradicted Dr Akinleye's own letter to Homerton dated 28th March 2007, exhibited by Mr Gourlay, which complained that on 6th September 2006 Dawn Coates and "Ms Asina" explained the termination of his appointment as being caused by their receipt of information from Pennine, not from the Defendant trust, which is not said to have played any part. As for the "statement in case", served a few days before the

hearing of the application, in which Dr Akinleye maintained for the first time that he was told by Dawn Coates and Asina Hussein on 6th September 2006 that they had been contacted by Mike Higson, and then later by Pennine, Mr Starte submitted that this evidence (if it should be regarded as such) was incredible, because of its contradictory nature, because it was introduced so very late in the day (when, on Dr Akinleye's own account, he had known of it since September 2006), and because it is contradicted by Mr Gourlay and Ms Hussain herself.

50. As far as concerns the allegation that Mr Higson contacted Homerton to inform the hospital about the Pennine investigation, I accept Mr Starte's submission that even if this were correct, it would have been a proper action on Mr Higson's part, given the concerns which Mr Higson knew to exist about Dr Akinleye's clinical competence, and would raise no questions about an improper motive, let alone amount to evidence which raised a probability that his dominant motive nine months earlier had been to injure Dr Akinleye. It is noteworthy that, as Dr Akinleye himself explained, his work was subsequently investigated by Homerton, after which the Department of Health circulated an alert letter to NHS employers and agencies supplying staff to the NHS, warning them to contact Homerton Hospital before offering him employment. That serves to underline the importance that concerns about clinical competence should be freely communicated to NHS employers.

51. Notwithstanding the highly unsatisfactory nature of the evidence that Mr Higson contacted Homerton, I would have been prepared to regard it as representing a conflict of evidence which should provisionally be resolved in Dr Akinleye's favour, given that at the eleventh hour he provided a glimmering of an evidential basis for it. However, even on that basis, as I have said, it provides no evidence of improper motive.

52. However, the claim that Mr Higson explored questions of unpaid rent with Homerton is not a matter which I am prepared to resolve in Dr Akinleye's favour, because (as well as sharing the other weaknesses of the Homerton evidence) it remains wholly in the realm of unsupported assertion. As Mr Starte pointed out, Dr Akinleye's "statement in case" does not maintain that the two women told him of Mr Higson's supposed allegations about unpaid rent, nor did Dr Akinleye assert that in argument. On the contrary, paragraph 46 of the "statement in case" suggests that the claim is a matter of supposition, for Dr Akinleye there mentions his surprise that after he left Homerton he received an email from the accommodation officer to inform him that they were refunding overpaid rent. He concludes: "It was at this stage that this must have been Mike Higson again telling Homerton I owed rent in my placement with them". Even had there been good evidence that Mr Higson had behaved as alleged, it would not in all the circumstances raise a probability that in writing the email nine months before Mr Higson had been influenced by a dominant improper motive, whether of injuring Dr Akinleye or otherwise.

53. My conclusion is that the evidence, taken at its highest, does not raise a probability of malice, but remains in the realm of mere (and distinctly improbable) possibility, of a kind which could not properly be left to a jury. Dr Akinleye has no real prospect of showing that the publication complained of was malicious. No other reason, compelling or otherwise, was suggested as to why the case should go to

trial. Given my conclusion on qualified privilege, I grant the Defendant summary judgment, and the action is dismissed.