Neutral Citation Number: [2008] EWHC 870 (QB)

Case No: HQ08X00441

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 April 2008

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

DR ADU AEZICK SERAY-WURIE **Claimant**

- and -

THE CHARITY COMMISSION OF ENGLAND AND WALES **Defendant**

- -
- -

The Claimant in person
Iain Christie (instructed by the **Treasury Solicitor**) for the **Defendant**

Hearing date: 17 April 2008

- -

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.

.....

THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

The background to the application

1. In these proceedings the Defendant, the Charity Commission of England and Wales, applies to strike out the claim form and particulars of claim under CPR 3.4, as disclosing no reasonable grounds for bringing the claim and/or as an abuse of the court's process; in the alternative, there is a claim for summary judgment under CPR 24.2 on the basis that there is no real prospect of success on the claim and that there is no other compelling reason why the case should be disposed of at a trial.

2. The Claimant is Dr Adu Aezick Seray-Wurie, who lists a variety of causes of action in his claim form, including libel, breach of human rights, discrimination, harassment, abuse and misuse of power. Apart from the claim in libel, the particulars of claim shed no light by providing details of how the other causes of action are said to be made out. I need say no more about them. I reject the proposal contained in the Claimant's "further skeleton", dated 15 April 2008, that he should be given an opportunity to go away and amend (in some unspecified way). In respect of the defamation claim, the pleading does list a number of allegations which are *prima facie* defamatory, but Mr Christie, appearing on the Defendant's behalf, argues that the claim is bound to fail, and that summary judgment should be given accordingly, since the publication complained of clearly took place on an occasion of qualified privilege, at common law, and there is no sufficient basis upon which the court could make a finding of malice.

The objectives and functions of the Charity Commission

3. In order to put the application in its proper context, it is necessary to set out the statutory background. The Charity Commission for England and Wales performs statutory functions as the regulator and registrar of charities in this jurisdiction in accordance with the Charities Act 1993, as amended by the Charities Act 2006 ("the Act"). The relevant amendments took effect on 27 February 2007. That was when, in effect, the Commission as a body, having the status of a non-ministerial government department, took over responsibility from the Charity Commissioners. Under s.1B of the Act, as amended, the Commission has five statutory objectives:

    i) The public confidence objective is to increase public trust and confidence in charities.

    ii) The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.

    iii) The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.

    iv) The charitable resources objective is to promote the effective use of charitable resources.

    v) The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public.

4. Correspondingly, the defined statutory functions, under s.1C(2), include the following, which are particularly relevant for present purposes:

> "2 Encouraging and facilitating the better administration of charities;
>
> 3 Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement therein."

5. In the light of these provisions, the evidence of Ms Rachel Baxter, a solicitor in the employment of the Commission, has explained that its main activities consist of the following:

> "1 Registering charities and maintaining the Register of charities;
>
> 2 Reviewing the accounts of all charities with yearly incomes over £10,000 to identify areas where the Defendant can help a charity to improve;
>
> 3 Providing advice and guidance to charities;
>
> 4 Identifying and dealing with problems within charities."

6. She states that the Defendant provides advice to some 24,000 charities each year. There are also 50,000 calls to its Contact Centre and 12 million hits on its website. This is an important means of communication with the general public, where its publications and operational guidance are made available. One of its functions is to issue regulatory reports to help charities improve their performance and learn lessons. The reports will normally set out the conclusions on the matters investigated and identify expressly lessons which may be learnt from the particular experience.

The power to institute statutory inquiries

7. It is important to have regard to the terms of s.8 of the Act:

> "General power to institute inquiries
>
> (1) The Commission may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes …
>
> (2) The Commission may either conduct such an inquiry itself or appoint a person to conduct it and make a report to the Commission.

> (3) For the purposes of any such inquiry the Commission, or a person appointed by the Commission to conduct it, may direct any person … –
>
> (a) to furnish accounts and statements in writing with respect to any matter in question at the inquiry, being a matter on which he has or can reasonably obtain information, or to return answers in writing to any questions or enquiries addressed to him on any such matter, and to verify any such accounts, statements or answers by statutory declaration;
>
> (b) to furnish copies of documents in his custody or under his control which relate to any matter in question at the inquiry, and to verify any such copies by statutory declaration;
>
> (c) to attend at a specified time and place and give evidence or produce any such documents.
>
> (4) For the purposes of any such inquiry evidence may be taken on oath …
>
> ….
>
> (6) Where an inquiry has been held under this section, the Commission may either –
>
> (a) cause the report of the person conducting the inquiry, or such other statement of the results of the inquiry as the Commission thinks fit, to be printed and published, or
>
> (b) publish any such report or statement in some other way which is calculated in the Commission's opinion to bring it to the attention of persons who may wish to make representations to the Commission about the action to be taken."

8. Ms Baxter exhibited the Commission's guidance note CC47, called "Complaints about Charities", which explains in what circumstances it is thought appropriate to intervene in a charity's affairs. She drew attention particularly to the following sections:

> "6 The Commission's powers of intervention are specifically designed for use in circumstances where there is some grave, general risk to a charity's interests and are designed principally to protect the charity and its assets. Complaints that the Commission will take

up as regulator are, generally speaking, ones where there is a serious risk of significant harm or abuse to the charity, its assets, beneficiaries or reputation; where the use of our powers of intervention is necessary to protect them; and where this represents a proportionate response to the issues in the case.

7 We will look to complainants to show good reason, backed with evidence, for concerns that they raise with the Commission. Except where it is clearly inappropriate to do so, we will expect complainants to have tried first to resolve their concerns directly with the charity before involving the Commission.

8 By 'harm' we mean:

- serious detriment to the people or causes the charity serves;
- loss or misuse of significant assets or resources; and
- serious damage to the reputation of a charity or charities generally.

9 Circumstances in which we would see serious risk of harm include those where there is evidence of the following:

- fraud or criminality;
- maladministration putting significant assets or funds at risk;
- the charity's assets being applied in significant breach of the terms of the governing document;
- trustees acting in significant breach of the provisions of the charity's governing document or of charity or trust law;
- risk of the charity being brought into serious disrepute, for example through association with public disorder or links to terrorist organisations;
- the administration of the charity having broken down to such an extent that it is not working effectively;

> - the trustees seriously misleading the public, or the Commission, or others with an interest in the charity (e.g. funders, beneficiaries or employees) about matters of material importance;
>
> - adequate accounts not being kept;
>
> - trustees receiving unauthorised benefits from the charity;
>
> - fund-raising or administration costs that are excessive; or
>
> - the charity undertaking improper political activities."

9. Ms Baxter explained the Commission's policy towards publishing reports of inquiries. Generally the outcome of the Commission's formal inquiries will be published on its website, except in a small number of cases where it is perceived that publication would have a detrimental impact on effective regulation and/or public trust and confidence in charities. She explained that in the six-month period leading up to the date of her witness statement (29 February 2008) the Commission published 17 statements setting out the results of an inquiry. These included the inquiry report into the East End Citizens' Advice Bureaux ("EECAB"), of which the Claimant was a trustee. It was available on the website from 24 August 2007 to 21 February 2008.

The claim in defamation

10. Parts of the inquiry report into EECAB form the subject-matter of the claim in defamation. The Claimant alleges that the entire report is defamatory of him, but he cites specific passages in the particulars of claim from paragraphs 15 and 16 of the report:

> "There was evidence that Dr Seray-Wurie had conducted the Charity's interaction with its funding bodies, and the Commission, without seeking the full involvement of the other trustees. He had taken decisions unilaterally, without at times the full knowledge or involvement of the other trustees, and decisions had significantly undermined the funding bodies' confidence in the Charity's ability to deliver services. Dr Seray-Wurie claimed that he had authority as the Chair of the Trustees to take these decisions, but neither he nor the other trustees could provide any evidence to support this.
>
> ….
>
> The Commission found that Dr Seray-Wurie had authorised the use of the Charity's funds to pay for legal advice that he had then failed to pass to the Charity. Dr Seray-Wurie gave contradictory responses to the Commission about this, first

> claiming he had passed this legal advice to the Charity and later admitting that he had failed to do so. At the time of the closure of the inquiry, the Commission understood that he still had not passed a copy of the advice – paid for by the Charity – to the Trustees. Dr Seray-Wurie disagreed with the Commission's findings concerning this legal advice."

11. The Claimant suggests that the words complained of bore the natural and ordinary meaning that he had abused his position as trustee and Chair of EECAB and is guilty of serious offences of fraud. That meaning is not accepted by the Defendant, but I am not called upon to rule on the matter at this stage. It does not affect the outcome of the present applications.

The Commission's case on common law privilege

12. Ms Baxter makes clear that, if the action is allowed to proceed, it is the intention of the Defendant to enter a plea of justification. What is relevant for present purposes, however, is that it intends also to rely upon qualified privilege at common law. Parliament did not provide for a specific statutory privilege for these Commission reports. It was unnecessary to do so unless, of course, the intention was to establish an absolute privilege. It is reasonable to suppose that the legislature was content to leave the matter to be dealt with, on a case by case basis, in accordance with the long established principles governing qualified privilege.

13. In support of the Defendant's case on qualified privilege, Mr Christie made the following submissions. First, one of the Commission's important objectives is "to increase *public* trust and confidence in charities" (emphasis added). Moreover, the Commission is required "to enhance accountability of charities to donors, beneficiaries and the *general public*" (emphasis added). Thus, he submits, there is a duty to be as open and informative as possible with the public at large.

14. Secondly, the Commission's functions, also prescribed by statute, include the investigation of alleged misconduct or mismanagement in the administration of charities. There is also the need to take remedial or protective action, as required, and to draw conclusions as to lessons that may be learned for the future. These functions also are required to be open to the scrutiny of the general public.

15. Thirdly, it is relevant to have in mind the analogy between some of the powers accorded to the Commission by statute and those of courts and tribunals. In particular, there is the power to compel attendance of witnesses and production of documents. There is also the ability to take evidence on oath. These attributes again underline the importance of the Commission's duties and the need for open scrutiny.

16. Fourthly, Mr Christie emphasised the significance of s.8(6)(a), which provides for a power to cause inquiry reports to be "printed and published". While it is true that there is also provided, in s.8(6)(b), a power to publish on a more targeted basis, it is a reasonable inference that the legislature intended that there should be openness and accountability so far as the general public was concerned. Mr Christie submitted that the Commission would be failing in its duties and functions if it did not report the findings of inquiries to the wider public, unless there was a compelling case to take some other course. As I have already made clear, on the basis of the evidence of Ms

Baxter, it is the Commission's usual practice to publish such reports generally. That policy has been explained in its policy documents and interested members of the public would have a corresponding expectation that this would be adhered to.

17. It is thus submitted that there is a moral, social and/or legal duty on the part of the Commission to account for its activities, all of which are funded from the public purse. Correspondingly, there is an interest on the part of the public, or at least sections of it, to read the reports and to be kept informed as to the discharge of its functions and lessons to be learned. Reference is also made, in this context, to the protection of the free flow of information afforded by Article 10 of the European Convention on Human Rights and Fundamental Freedoms.

18. There is support for Mr Christie's argument to be found in the decision of the Court of Appeal in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840, where it was recognised that the defendant had a duty to explain its actions in relation to matters of public funding. So too, I was reminded of the decision in *Lillie & Reed v Newcastle City Council* [2002] EWHC 1600 (QB). In that case the local authority had appointed an independent review team to inquire and report, at public expense, into allegations of child sex abuse. I held that it was difficult to see why the council should not be protected in publishing the results and continued:

> "If the terms of reference can be criticised, or the particular Review Team exceeded their terms of reference … , or they made errors, or even if they were malicious, it does not seem to me that the public is any the less entitled to know what has been going on; or the council under any less of a duty to tell them."

Mr Christie argues that a similar approach should be adopted here.

19. Significance was also attached in Mr Christie's submissions to the fact that the Commission's inquiry was prompted in the first place by information it had received from the National Association of Citizens' Advice Bureaux. The report in question could therefore be seen, in that context, as a response to a complaint being communicated in accordance with statutory duties and functions. The publication by the Commission was not simply spontaneous, or made "off its own bat", since it was the appropriate authority to deal with, and take action in respect of, the National Association's concerns.

The alternative argument based on Reynolds v Times Newspapers Ltd

20. Mr Christie developed a further argument based on the reasoning in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and that of the Privy Council in *Seaga v Harper* [2008] UKPC 9 at [5]-[12]. It is probably not necessary to go into this matter, since it seems to me beyond question that the publication would attract a qualified privilege in the light of established common law principles. Nevertheless, the subject-matter of the report is undoubtedly of genuine public interest and it would be possible to arrive at the same conclusion (albeit via a longer route) by adopting the chain of reasoning generally applied in the more conventional *Reynolds* type of case; that is to say, where the defendant concerned is a journalist or publisher communicating with the world at large. It seems to be clear that these principles are not confined to

journalism, although until relatively recently they have been considered generally in that context.

21. As Mr Christie points out, however, the distinction between *Reynolds* and traditional common law privilege could be of significance when it comes to assessing the question of malice. In this case, the Claimant alleges that the words complained of were published as part of a malicious and dishonest conspiracy.

22. As is now clearly established, if the *Reynolds* criteria are satisfied in any particular case, there is no room left for considering whether the relevant defendant was malicious. On the other hand, the issue of privilege in a *Reynolds* context is often likely to be fact-sensitive, whereas conventional "off the peg" common law privilege is not: see e.g. the discussion in *Kearns v General Council of the Bar* [2003] 1 WLR 1357. Thus, an application for summary judgment is less likely to be appropriate in a case where the defence is to be based solely on the *Reynolds* criteria. In those circumstances, the defence can rarely be upheld purely as a matter of law on paper. It is necessary to examine the background to the publication, and the burden of establishing the facts lies upon the defendant. Generally, evidence would have to be given and tested at trial in order to decide whether those criteria have been fulfilled. There is no doubt here, in my judgment, as to the legitimate public interest in the subject-matter of the report, but other matters to be taken into account (from e.g. Lord Nicholls' non-exhaustive list of 10 factors) might require closer examination.

23. This is somewhat beside the point in the present case since, as I have already indicated, it seems to me to be clear against the statutory background I have set out above that the Commission was indeed under a duty to publish the information concerning its inquiry into EECAB, and the wider public had a legitimate interest in receiving that information. There is accordingly no doubt, in my judgment, that the occasion of publication here complained of was protected by common law qualified privilege. Thus, in practice, there is no need to set out the *Reynolds* criteria or consider their application in detail.

Has the Privy Council sought to confine the scope of common law privilege?

24. Mr Christie canvassed an argument (against himself) that it is possible to construe a passage in the opinion of the Privy Council in *Seaga v Harper* (cited above) at [15] as meaning that from now on, where privilege is raised in respect of a publication to the world at large, it will depend on *Reynolds* alone; that is to say, there will be no room for any other form of common law privilege. The words he had in mind are as follows:

> "[Their Lordships] are satisfied that the publication was not covered by traditional qualified privilege, for the element of reciprocity of duty and interest was lacking when the appellant knowingly made it to the public at large via the attendant media. If privilege was to be successfully claimed, it could only be under the *Reynolds* principles."

I think it is important not to take that passage out of the context of the particular facts. It so happened that the reciprocal duty and interest were lacking in that case, so that common law privilege would not apply. Since their Lordships were emphatic as to

the "liberalising" effect of *Reynolds*, it would be odd if they intended to suggest that some publications which would have been protected hitherto will now cease to be regarded as privileged. This is especially so in the light of the conclusion in *Reynolds* that the established common law approach remained essentially sound, as their Lordships noted in *Seaga* at [8]. What was proposed was a degree of elasticity which would have the effect of *extending* the scope of common law privilege. It has never before been suggested that *Reynolds* would have the effect of cutting down the protection of Article 10 rights.

25. In a statutory context such as the present, where there is clearly a duty to communicate to the general public, it would be surprising if a defendant had to prove fulfilment of *Reynolds* criteria, such as attempts at verification or opportunities for comment – unless by way of responding to a properly pleaded case of malice. Such a rule would make privilege more difficult to establish and, as I have said, render summary judgment less easy to obtain. If there were to be a fundamental shift as to where the balance is struck, as between protection of reputation and freedom to communicate, it would need to be set out unequivocally.

26. I cannot, therefore, interpret the citation in question as having the significance Mr Christie thought it might bear. It was only fair to the unrepresented Claimant, however, that he should explore the matter fully. In the event, I have held that Mr Christie is entitled to succeed on his primary case; namely that the publication of the report attracts privilege under the long established common law criteria.

Arguments based on the ECHR

27. One of the Claimant's submissions was that if the court were to uphold the defence of privilege this would amount to the granting of a blanket immunity and thus be inconsistent with his Article 6 rights. Yet qualified privilege depends on an assessment of the particular publication in its context. Also, such a plea is defeasible on proof of malice. It cannot, therefore, be described as in any sense a blanket immunity.

28. A related argument is that there should be a declaration of incompatibility in respect of the defence of qualified privilege. But that jurisdiction applies to legislation and not to principles of the common law.

29. In those circumstances, all that remains is to go on to consider the argument of whether the Claimant's allegations of malice are such as to merit a trial.

Is there a triable issue on malice?

30. Malice is always a serious allegation to make and is generally regarded as tantamount to dishonesty. I was reminded of the words of Lord Diplock in *Horrocks v Lowe* [1995] AC 135, 149-150, where a contrast was drawn between malice, in its true sense, and behaviour falling short of it – such as failing to analyse evidence correctly and arriving at a misguided conclusion. It is important to remember that the burden is difficult to discharge and that findings of malice are very rare.

31. It is accepted that the court should be wary of taking away an issue such as malice without its coming before a jury for deliberation. This step should only be taken

where the court is satisfied that such a finding would be, in the light of the pleaded case and the evidence available, perverse. On the other hand, where this is clear, it is plainly a judge's duty to prevent further time and money being expended upon a hopeless allegation: see e.g. *S v London Borough of Newham* [1998] EMLR 583, 593, *per* Lord Woolf MR (as he then was) and *Alexander v The Arts Council of Wales*, cited above.

32. It seems to be clear, in the light of these authorities, that the court should apply a test similar to that used in criminal cases in the light of *Galbraith* [1981] 1 WLR 1039.

33. It is necessary also to have regard to the principle explained in the older case of *Somerville v Hawkins* (1851) 10 KB 583; that is to say, the facts relied upon by a claimant, whether in a pleading or in a witness statement, must be capable of giving rise to the probability of malice, as opposed to a mere possibility. That principle has been approved in modern times both in the House of Lords, in *Turner v MGM* [1950] 1 All ER 449, 455, and in the Court of Appeal in *Telnikoff v Matusevitch* [1991] 1 QB 102, 120.

34. In order to survive, allegations of malice must go beyond that which is equivocal or merely neutral. There must be something from which a jury, ultimately, could rationally infer malice; in the sense that the relevant person was either dishonest in making the defamatory communication or had a dominant motive to injure the claimant.

35. It is necessary, in effect, for a claimant to demonstrate that the person alleged to have been malicious abused the occasion of privilege, for some purpose other than that for which public policy accords the defence. Mere assertion will not do. A claimant may not proceed simply in the hope that something will turn up if the defendant chooses to go into the witness box, or that he will make an admission in cross-examination: see e.g. Gatley on Libel & Slander (10th edn) at 34.18, and also the remarks made by Lord Hobhouse in *Three Rivers DC v Bank of England* [2001] 2 All ER 513, 569 at [160]:

> "Where an allegation of dishonesty is being made as part of the cause of action of the plaintiff, there is no reason why the rule should not apply that the plaintiff must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross-examination of a witness at the trial does not suffice. It is of course different if the admissible material available discloses a reasonable prima facie case which the other party will have to answer at the trial."

This is clearly applicable also where malice is pleaded.

36. Mr Christie submits that there is nothing in the Claimant's pleading, nor in his extensive witness evidence, which could begin to discharge the burden of establishing bad faith on the part of anyone involved in the Commission's inquiry or in the publication of its report. The traditional time to plead malice is in a reply, and that stage has not yet been reached. But the Claimant has made it clear in his three witness statements what he would wish to allege.

37. I have already noted that it would be the intention of the Commission, if the case goes further, to enter a plea of justification. Obviously, that does not mean that such a defence would necessarily succeed, but there is no factual basis, apart from bare assertion, which would go to support the proposition that anyone responsible for publishing the inquiry report either knew its contents to be false, at the time of publication, or was recklessly indifferent as to their truth or falsity. On the contrary, they wish to stand by the substantial accuracy of what they wrote.

38. It emerges from the content of the report itself, the whole of which was put in evidence by Ms Baxter, that a detailed investigation was carried into the affairs of EECAB and that it lasted from May 2006 to January 2007. It only came to a halt at that stage because the Claimant was removed as a trustee of another charity (for reasons which have no bearing on the present case) and thereby became automatically disqualified.

39. Various people provided evidence to the inquiry, including the Claimant himself. Pursuant to its powers of compulsion, documents were obtained and examined. There was also a meeting held at which there were present trustees together with representatives of funding bodies. The Claimant was consulted, and he was shown the report in draft and invited to comment. Some account was taken of his comments, although, of course, those compiling the report were under no obligation to set them out in full, still less to adopt or agree with them. My attention was drawn, however, to a table which had been sent to the Claimant carefully recording challenges he had made and the extent to which they were accepted or rejected. This was attached to a letter from Louise Edwards of the Commission's Compliance and Support Department, dated 24 May 2007.

40. One of the Claimant's criticisms was that he was not allowed to address the Commissioners personally (they were not replaced by the Commission until just after the close of the inquiry). That does not show malice in itself, in any event, which must be judged as at the time of publication (24 August 2007 onwards). But the proper route for challenging the exercise of the jurisdiction of the Commissioners (or latterly the Commission) under s.8 of the Act would be by using the specific mechanisms available for the purpose – not by way of alleging malice in a libel action.

41. In this case, as so often occurs, the Claimant is effectively inviting an inference of malice because the conclusions in the report do not accord with his own account and/or because he claims that those involved have been participants in a conspiracy to do him down.

42. If the Claimant were to have a realistic prospect of defeating the defence of privilege by reason of malice, he would need to set out some factual allegations going to support bad faith on the part of one or more of the individuals concerned, and/or to support his conspiracy theory. There is nothing which comes close to that. Allegations of dishonesty are taken seriously and require to be pleaded with specificity. That emerges clearly, for example, from one of the many passages cited by Dr Seray-Wurie from *Three Rivers DC v Bank of England*, and already quoted above, *per* Lord Hobhouse.

43. One of the other cases relied on by Dr Seray-Wurie was *Wenlock v Moloney* [1965] 1 WLR 1238, referred to by Lord Hope in *Three Rivers DC* at [96], which contained a salutary warning against what would nowadays be characterised as a "mini-trial". A claim for conspiracy had been struck out after a four-day hearing on affidavits and documents. Obviously, that was inappropriate, since the summary jurisdiction was never intended to be exercised "by a minute and protracted examination of the documents and the facts of the case" (*per* Danckwerts LJ at p.1244). This case is far removed from that scenario – and does not involve a mini-trial. The complaint is that there is nothing from which a case of malice can be constructed.

The final outcome

44. In the result, there is no evidence before the court which would justify me in coming to the conclusion that the material available is more consistent with the presence of malice than with its absence. Since, as I have said, the situation was clearly covered by common law privilege, there is no reason to allow this claim to go forward, as there is no realistic prospect of success; nor is there any other compelling reason why the case should be allowed to come to trial. It is important that time and money, and especially public time and money, should be prevented from being wasted.

45. In the result, the references in the claim form and particulars of claim to the other causes of action will be struck out, as disclosing no reasonable grounds. There will be summary judgment for the Defendant on the defamation claim.