

B E T W E E N:

SOLOMON & COMPANY (ST HELENA) PLC

Plaintiff

-and-

ATTORNEY GENERAL OF ASCENSION ISLAND

Defendant

JUDGEMENT

1). This is an application by the Defendant in this case to strike out and/or to dismiss the Plaintiff's claim in full pursuant to Order 9 Rules 14 and 15 of the Civil Procedure Rules 1969. In brief the Defendant submits that the Plaintiff's claim is defective as a matter of form and of substance as summarised at paragraph 4 of the Defendant's skeleton argument.

2). The Plaintiff's claim was issued on 13th February 2020. The Particulars of Claim run to 39 paragraphs and advance four causes of action against the Defendant: malicious falsehood; misfeasance in a public office; unlawful interference with economic interests (since abandoned); and breach of contract/IMPLIED terms. Damages in excess of £400,000.00 are claimed.

BACKGROUND

3). The background to the claim is as follows. In July 2013 the Plaintiff purchased the business known as Birdies Fuel Station (the Fuel Station) on Ascension Island from Mr Harold Henry. The Fuel Station was the only outlet for the purchase of petrol and diesel to residents on Ascension.

4). The legal framework for the use and occupation of land on Ascension is helpfully and comprehensively set out in paragraphs 12-33 of the affidavit of Mr

Robert Cheeseman dated 11th June 2020 and the exhibits annexed to the affidavit. A Land Occupancy Permit (LOP) dated 1st July 2013 was issued to the Plaintiff by the then Administrator thus enabling the Plaintiff to effect the purchase of the Fuel Station from Mr Henry. The LOP is exhibited at RJC1/49 to Mr Cheeseman's affidavit. The Plaintiff thereafter operated the business of the fuel station. The Defendant additionally issued to the Plaintiff a Private Sector Business Operator's permit to allow the Plaintiff to operate the business; and a housing permit to enable the Plaintiff's employees to secure accommodation on Ascension

5). It is common ground that on 15th February 2017 the Fuel Station was inspected by representatives of WYG Management Services Ltd (WYG), a company engaged by the Foreign and Commonwealth Office (FCO) to undertake a review of Ascension's infrastructure assets. There is disagreement as to how thorough that inspection was but, be that as it may, it seems clear that WYG's representatives at least raised concerns that the site was unsafe. In consequence and on 17th February 2017 Ascension's Director of Operations, Mr Iain Robertson, issued and served on the Plaintiff an Improvement Notice (Exhibit RJC1/53-56) under the Health and Safety Ordinance 1977. It is not suggested by the Plaintiff that the Notice itself is inherently defective or that Mr Robertson was not entitled to issue the notice. Notices were served both upon the Fuel Station Manager and Ms Mandy Peters, the Plaintiff's Chief Executive Officer. The Notice to the latter was accompanied by a covering e-mail (Exhibit RJC1/102). The Notice itself on its final page at paragraph 6 specifies the Plaintiff's statutory right to appeal to the Magistrates' Court within a 14-day period if the Plaintiff considered the Notice to be unjustified.

6). According to the Plaintiff, and admitted by the Defendant (Exhibit RJC1/141 at p143; and para 15 of the Defence), in addition to issuing the Improvement Notice, on 16th February Mr Robertson had directed Ascension's fire and emergency services to ensure that all their appliances which required fuel were filled and to equip themselves with reserves in anticipation of the service of the Improvement Notice. Paragraph 7 of the Particulars of Claim pleads that they did so "having been informed by ...Mr Robertson that the Fuel Station was going to be served with a Notice to shut its operation down." It is denied by the

Defendant that Mr Robertson specifically suggested that the Fuel Station would be closed down.

7). According to the Plaintiff, and on 17th February, the same day as the Improvement Notice was served, the Fuel Station was subject to unprecedented levels of sales. The consequence was to deplete the stocks of fuel in the Plaintiff's storage tanks, particularly the petrol storage tank. The very low level of fuel in the petrol tank in particular, was a matter of concern. Between 17th February and 22nd February, it seems largely to be agreed that there were a number of meetings/telephone conversations between the Plaintiff and the Defendant or other interested parties. In particular, and with regard to meetings on site:

- on 20th February inspections and tests were undertaken by electricians employed by the Defendant and by members of the fire service. The Fuel Station's electrical supply was isolated and the quantity of fuel in each of the storage tanks was measured;

- on 21st February US Base personnel undertook gas monitor testing for venting of fumes. No fumes were identified.

In addition, and also on 20th February the Defendant issued a public notice advising the public of the temporary closure of the fuel station (Exhibit RJC1/109). On the same date, according to the Defendant, Mr Robertson reverted to WYG to seek advice on the safety implications of the Fuel Station's depleted fuel tanks and received the unequivocal advice that the tank should not be left in an empty state as it rendered "the atmospheric condition in the tank extremely volatile"

8). A further public notice was issued on 21st February (Exhibit RJC1/110) advising of the continued temporary closure of the Fuel Station. It seems that by this stage a catch-22 situation was emerging. Fuel to the Fuel Station was supplied by the company Interserve. Interserve refused to provide fuel to the Fuel Station in view of the perceived dangerous state of the Station. As already noted, the alleged volatility at the Station was principally as a result of the largely empty petrol tank. The Particulars of Claim, at paragraph 14, avers that "It is reasonably inferred by the Plaintiff that the source of the ([suggestion that the site was volatile] was AIG". That is denied by the Defendant.

9). On 22nd February the Plaintiff submitted to the Defendant its proposed action plan in response to the Improvement Notice. However, on 23rd February a further public notice was issued by the Defendant announcing the continued temporary closure of the Fuel Station and advising the public of an alternative temporary supply at the US Base Petrol Pump. On the same date Mr Robertson issued and served on the Plaintiff a Prohibition Notice (Exhibit RJC1/57) under the Health and Safety Ordinance. The Notice prohibited “the continuance of all fuel station activities” due to the “unacceptable risk of serious personal injury” until the safety concerns had been addressed and remedied; and this Notice, too, stipulates on its face (para 8) the Plaintiff’s statutory right to appeal against the Notice to the Magistrates’ Court within 14 days if the Plaintiff considered service of the Notice unjustified.

10). The Plaintiff did not exercise its right to challenge the Prohibition Notice; and again, it is not suggested that the Notice is inherently defective. Instead, the Plaintiff engaged the services of a firm called Penspen, based in America. Penspen subsequently produced a report dated April 2017 (Exhibit RJC1/116-133). The Executive Summary of the report recites its brief as follows:

“to locate and complete Earth Ground testing at the Ascension Island Fuel station.....Penspen’s responsibility was to trace the ground cabling and locate and test all ground beds associated with the fuel station.”

The Plaintiff asserts that the report is evidence that the Prohibition report at the very least was unjustified. The Defendant contends that the Report fails to address many of the safety issues identified by WYG and in any event confirms that there were indeed safety issues.

11). In consequence of the events as outlined above the Plaintiff alleges that it decided to withdraw all its business interests on Ascension which it achieved by September 2017.

12). On 4th March 2019 Solicitors on behalf of the Plaintiff sent a letter before action to the Defendant intimating that the Plaintiff would seek damages for the actions taken by the Defendant in relation to the Fuel Station which, it was asserted, was directly responsible for the Plaintiff’s decision to cease its business

activities on Ascension and the losses thereby suffered. The Defendant responded in detail by letter dated 3rd May 2019 pointing out, inter alia, that the limitation period for any cause of action based on malicious falsehood was 1 year; and in the circumstances any such claim was statute barred. The Plaintiff's claim in its entirety was rejected.

13). As already recited the proceedings were issued on 13th February 2020. The Particulars of Claim plead the following causes of action:

a). malicious falsehood, based upon Mr Robertson's statements to the fire officers and "potentially others" about the likely closure of the Fuel Station;

and allegedly widespread statements that the Fuel Station was volatile and an explosion risk (para 28, Particulars of Claim); particulars of the malice alleged are at paras 29 and 31 of the Particulars of Claim;

b). breach of implied terms of the Licence (sic) Agreement between the parties (paras 32 and 33 of the Particulars of Claim). The terms alleged are that the parties would not unlawfully interfere with each other's economic interests; would act reasonably in relation to each other; would not act arbitrarily or unfairly in their dealings with each other; and that the Defendant would not unreasonably interrupt the business and/or operation of the Fuel station during the course of the Licence Agreement;

(c). misfeasance in a public office. It is alleged (para 33 of the Particulars of Claim) that the Defendant through its servants or agents acted with reckless indifference to the illegality of its actions in spreading a rumour that the Fuel Station would soon close; engineering circumstances whereby the Fuel Station was unjustifiably closed; serving the Improvement Notice which was unjustified; serving or publishing unjustified temporary closure notices during the currency of the Improvement Notice; serving the Prohibition Notice, which again was unjustified.

(d). unlawful interference with the Plaintiff's economic interest. This cause of action has since been withdrawn by the Plaintiff.

DEFENDANT'S SUBMISSIONS

14). By its application to strike out the Plaintiff's claim, the Defendant's submissions may be briefly summarised as follows:

(a) The limitation period for the claim founded in malicious falsehood has expired and the claim is statute barred. Under Section 4(A) of the Limitation Act 1980 no action for malicious falsehood shall be brought after the expiration of one year from the date when the cause of action accrued. The cause of action accrued on the date the alleged falsehoods were published (see e.g *Edwards v Golding* [2007] EWCA Civ 416)-in this case 17th and 20th February 2017 respectively; the action was not commenced until nearly two years after the expiry of the limitation period. In this case there is no proper basis for the Court to disapply the limitation period; and in any event the Particulars of Claim in particular fail to set out any basis upon which it is suggested the limitation period should be disapplied.

(b) The ingredients required to establish malicious falsehood are:

- (i) publication by the Defendant of statements which refer to the Plaintiff or the latter's economic interests;
- (ii) which are false;
- (iii) which are published maliciously; and
- (iv) which cause either special damage or are calculated to cause pecuniary damage.

Because the allegation is such a serious one the law requires that the allegations be fully particularised as to the words complained of, the facts which establish that they are false, and the facts from which it can be inferred that they were published maliciously, as opposed, for example, that they were published negligently. The Particulars of Claim are so woefully deficient in each respect that no cause of action is demonstrated;

(c) The claim founded upon the alleged breach of implied terms of the Licence agreement is flawed in two respects. Firstly, as a matter of law, the Plaintiff has failed to demonstrate a contractual relationship between the Plaintiff and the Defendant which could support the implied terms contended for. Secondly, and even if such terms could be implied the Particulars of Claim fail to assert any matter upon which a breach of those terms could properly be found;

(d) The tort of misfeasance in a public office is the abuse of public power in bad faith falling into one of two categories:

- (i) targeted malice which is conduct by a public officer which is specifically intended to injure a person or persons; or
- (ii) untargeted malice which arises when a public officer acts knowing that he has no power to do the act and also knowing that the act will probably injure the Plaintiff or where the officer is recklessly indifferent as to the legality of the act complained of and its consequences.

Because misfeasance requires proof of bad faith or dishonesty the law again requires the allegations to be specifically pleaded. The Particulars of Claim are deficient in this respect. Furthermore, the Particulars of Claim fail to identify any abuse of power or unlawful act; and fail to plead any matter which could support an allegation of bad faith.

(e) The Defendant also submits that the Particulars of Claim are vexatious and the action amounts to an abuse of process. The Improvement Notice and the Prohibition Notice both spelt out a statutory procedure to be adopted if the Plaintiff felt that one or both were unjustified, namely a right of appeal to the Magistrates' Court within 14 days. The Plaintiff failed to exercise its statutory right to challenge these notices and this action amounts to no more than a collateral attack on a wholly lawful statutory procedure which the Plaintiff chose not to exercise at the time.

15). The above is intended merely as a summary of the Defendant's submissions. I will now deal with each in greater detail.

16). The Defendant's application has its basis in Order 9 Rules 14 and 15 of the Civil Procedure Rules 1969 which read as follows:

"Dismissal of action

14. If, in the opinion of the court, the decision of the court on an issue on a point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the court may thereupon dismiss the action or make such other order therein as may be just.

Striking out or amending pleading

15. (1) A court may at any stage of the proceedings order to be struck out or amended any pleading or any part of any pleading on the ground that it—

(a) discloses no reasonable cause of action or defence, as the case may be;

(b) is scandalous, frivolous or vexatious;

(c) may prejudice, embarrass or delay the fair trial of the action; or

(d) is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) All orders made in pursuance of this rule are appealable as of right."

17). On behalf of the Defendant Ms Callaghan QC submits that both Rules are of relevance. Under Rule 14 fall those submissions pertinent firstly to the issue of limitation; and secondly to the question of whether the Land Occupancy Permit and Private Sector Business Operator Fixed Term Permit were capable of importing any sort of implied contractual terms as contended for by the Plaintiff. These are solely questions of law and if answered in the Defendant's favour then that is an end of the matter in relation to these two issues. Ms Callaghan submits that the approach to be adopted is that indicated in the case of *Korso Finance Establishment v Wedge* [1994] Lexis Citation 3261 and summarised in the Defendant's skeleton argument at paragraph 16.

18). Under Rule 15 the Defendant challenges the adequacy of the Plaintiff's pleadings and submits that the pleadings disclose no reasonable cause of action. In this context Ms Callaghan submits that a court can find that no reasonable cause of action has been disclosed where the claim is vague or incoherent; or where the claim has no real prospect of success or is bound to fail. Furthermore, submits Ms Callaghan, certain causes of action have specific pleading requirements which if not satisfied will entitle the court to strike out the claim. Therefore, and when considering whether a reasonable cause of action has been disclosed the test is to be distinguished from the test referred to in the case of *Hughes v Colin Richards & Co* [2004] PNLR 35 where it was held that before striking out a claim the Court had to be sure that the claim would fail. That submits Ms Callaghan was a case founded in negligence where the extent of the duty of care owed was in question-a developing area of the law. In the instant case the law is clear. Finally, submits Ms Callaghan the court may strike out a claim as an abuse of process where the claim seeks to circumvent for example a statutory appeals process. Ms Callaghan submits that the court is entitled to entertain applications such as these at any stage of a claim once the pleadings have closed; and in doing so the court is also entitled to have regard to such evidence as either party may wish to file in support or opposition to such applications. The application under Rule 15 applies to all causes of action pleaded by the Plaintiff.

Limitation

19). Ms Callaghan submits, as indeed is the case, that there is no dispute that the claim for malicious falsehood is now statute barred. She points to the fact that albeit that the Plaintiff was well aware that the limitation period had expired-the Defendant had expressly pointed out the fact in its letter to the Plaintiff dated 3rd May 2019-the Particulars of Claim manifestly fail to comply with Order 10 r5 of the Civil Procedure Rules which state;

“if the action is instituted after the expiration of the period prescribed by the law of limitation, the plaint must show the grounds upon which the exemption from such law is claimed”

Those grounds are set out in Section 32A of the Limitation Act 1980 which read:

32A.— Discretionary exclusion of time limit for actions for defamation or malicious falsehood.

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

(a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.

(2) In acting under this section, the court shall have regard to all the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A—

(i) the date on which any such facts did become known to him, and

(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and

(c) the extent to which, having regard to the delay, relevant evidence is likely—

(i) to be unavailable, or

(ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.

(3) In the case of an action for slander of title, slander of goods or other malicious falsehood brought by a personal representative—

the references in subsection (2) above to the plaintiff shall be construed as including the deceased person to whom the cause of action accrued and any previous personal representative of that person; and

nothing in section 28(3) of this Act shall be construed as affecting the court's discretion under this section.

(4) In this section “the court” means the court in which the action has been brought.”

20). Ms Callaghan submits that the Plaintiff has not sought to advance any reason for the delay in this case either in the Particulars of Claim, or in its Reply or indeed through its skeleton argument. Ms Callaghan points to the case of *Bewry v Reed Elsevier* [2015 1WLR where Sharp LJ made the following observations on the court’s discretion under Section 32A:

“ The discretion to disapply is a wide one, and is largely unfettered: see *Steedman v British Broadcasting Corpn* [2002] EMLR 318, para 15. However, it is clear that special considerations apply to libel actions which are relevant to the exercise of this discretion. In particular, the purpose of a libel action is vindication of a claimant’s reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications.

These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why the disapplication of the limitation period in libel actions is often described as exceptional. *Steedman v British Broadcasting Corpn* was the first case in which the Court of Appeal had to consider the manner in which a judge exercised his discretion pursuant to section 32A of the Limitation Act 1980. Brooke LJ said, at para 41:

it would be quite wrong to read into section 32A words that are not there. However, the very strong policy considerations underlying modern defamation practice, which are now powerfully underlined by the terms of the new Pre-action Protocol for Defamation, tend to influence an interpretation of section 32A which entitles the court to take into account all the considerations set out in this judgment when it has regard to all the circumstances of the case . .

The Pre-action Protocol for Defamation says now, as it said then, at para 1.4, that

There are important features which distinguish defamation claims from other areas of civil litigation . . . In particular, time is always of the essence in defamation claims; the limitation period is (uniquely) only one year and almost invariably, a claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation: see Civil Procedure 2014, vol 1, para C6-001.

The onus is on the claimant to make out a case for disapplication: per Hale LJ in *Steedman v British Broadcasting Corpn* [2002] EMLR 318, para 33. Unexplained or inadequately explained delay deprives the Court of the material it needs to determine the reasons for the delay and to arrive at a conclusion that is fair to both sides in the litigation. A claimant who does not get on with it and provides vague and unsatisfactory evidence to explain his or her delay, or place[s] as little information before the court when inviting a section 32A discretion to be exercised in their favour . . . should not be surprised if the court is unwilling to find that it is equitable to grant them their request, per Brooke LJ in *Steedman v British Broadcasting Corpn*, para 45”.

Ms Callaghan submits that these principles are of equal application to a claim for malicious falsehood.

21). Ms Callaghan submits that not only has the Plaintiff failed to give any reason for the delay in issuing these proceedings, it is equally clear that the Defendant would suffer prejudice if the Court were to disapply the limitation period. That prejudice is set out in paragraphs 89-99 of Mr Cheeseman’s affidavit.

22). Ms Callaghan submits that the court is clearly seised of the issue of limitation. It was squarely raised in the Defendant’s defence. It has always formed a specific part of the Defendant’s application now before the Court. If the Plaintiff has chosen not to plead or set out any reason for the delay; or has failed specifically to address the issue of prejudice, then that was the Plaintiff’s choice. As it is, submits Ms Callaghan, the only pleaded basis upon which the

court is asked to disapply the limitation period is that the issues in relation to malicious falsehood are the same as the issues pertinent to misfeasance and breach of implied term; the Defendant, therefore cannot demonstrate any effective prejudice and the court should apply the exemption. But, submits Ms Callaghan, where a Plaintiff relies upon multiple causes of action, the proceedings should be brought within the earliest limitation period applicable, not the latest; and if the issues are largely the same then the Plaintiff suffers no prejudice if one cause of action is lost. In the circumstances, submits Ms Callaghan, the court should strike out the claim for malicious falsehood.

Failure to Disclose Reasonable Cause of Action

Malicious falsehood

23). It is submitted by Ms Callaghan that the parties are agreed as to what the Plaintiff must establish to make out this claim, namely the publication by the Defendant of statements which refer to the Plaintiff's economic interests; that the statements are false; they are published maliciously; and cause special damage or, if written, are intended to cause pecuniary damage.

24). Given that the claim is tantamount to an accusation of fraud or dishonesty, Ms Callaghan submits that the claim must be properly pleaded. In other words, the pleading must clearly set out the words complained of; it must set out the facts which establish that the statement was false; and set out the facts from which it can properly be inferred that the words were published maliciously. Order 9 r10 of the CPR largely reinforces that statement of general principle as it provides:

“ In all cases in which the party pleading relies upon any misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary, such particulars with dates must be stated in the pleadings.”

Ms Callaghan submits that the case of *Khader v Aziz* [2009] EWHW 2027 sets out the relevant principles. In that case Eady J said:

“As counsel have pointed out, the vagueness of the pleading is obvious. It is submitted that the formula “to other persons employed by or in control of ...” is not sufficient to satisfy the requirements of CPR 53 PD 2.4 and should be struck out on that ground alone. That is in my judgment clearly correct.”

And later in his judgement when he said:

“As to the third publication relied upon, the pleading is in these terms:

“Further or alternatively, on or about 13th April 2007, the Second Defendant wrote and published or caused to be written and published to the said Helen Minsky her letter repeating or confirming by necessary implication the words complained of and reproaching Ms Minsky for repeating the said words to the Claimant.”

The pleading would thus appear to be in breach of the requirement that the words complained of in a libel action need to be set out expressly. In an attempt to plug the gap, an order was obtained for third party disclosure against Associated Newspapers Ltd on 12 March 2009. Nothing emerged. Mr Dowd has expressly denied writing any such letter or, for that matter, communicating by any other means such as email or fax, along the lines alleged in the particulars of claim. Thus, the claim should be struck out for non-compliance with the rule that the words complained of need to be set out. It remains a bare assertion in the teeth of the evidence.

I now need to consider the question of malice, both in respect of the application to strike out the claim based on injurious falsehood and for the purpose of considering whether the defence of qualified privilege could be defeated in respect of either Defendant. It was recognised by the Court of Appeal in *Spring v Guardian Assurance* [1993] 2 All ER 273 that the test for malice is the same whether it arises in the context of libel or injurious falsehood.

The modern leading authority as to the meaning of malice is *Horrocks v Lowe* [1975] AC 135, 149-151. As to its pleading, there are stringent requirements imposed because malice is recognised as being tantamount to an accusation of fraud or dishonesty and must not be made on a merely formulaic basis. It is necessary to plead and to prove the facts from which malice is to be inferred, and it will not suffice to plead only facts which are equally consistent with the absence of malice as with its presence. This was established in the middle of the 19th century in *Somerville v Hawkins* (1851) 10 CB 583 and has been confirmed in modern times by the Court of Appeal in *Telnikoff v Matusevich* [1991] 1 QB 102 and in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840. It is recognised that mere assertion will not do (see generally *Gatley on Libel and Slander* (11th ed) at para 30.5). 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 or she will make an admission in cross-examination.

The particulars pleaded in this case are insufficient to satisfy the stringent test applied. In particular, it is made clear in the speech of Lord Diplock in *Horrocks v Lowe*, cited above, that malice is to be firmly distinguished from being emotional, misguided or uncritical. Nor is it sufficient to plead that a defendant “ought to have known” certain facts or failed to make enquiries about them. Negligence is quite different from malice.”

25). Ms Callaghan further relies on the recent authority of *HRH The Duchess of Sussex v Associated Newspapers Ltd* 2020 EWHC 1058. In that case the Defendant sought to strike out those aspects of the Plaintiff’s claim which alleged dishonesty or bad faith. In giving his judgement, Warby J said:

“ 48. I also accept the defendant’s second and distinct ground for striking out, namely that the allegations of dishonesty and malice are inadequately pleaded. The Part 16 Practice Direction requires a claimant who wishes to rely in support of his claim on any allegation of “fraud”, “misrepresentation” or “wilful default” to set out the details in the Particulars of Claim: 16PD para 8.2. These requirements are explained in

paragraphs 10.1 and 10.2 of the Chancery Guide, in terms which reflect well-established common law principles:

“10.1 ... a party must set out in any statement of case:

- full particulars of any allegation of fraud, dishonesty, malice or illegality; and
- where any inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged.

10.2 A party should not set out allegations of fraud and dishonesty unless there is credible material to support the contentions made. Setting out such matters without such material being available may result in the particular allegations being struck out and may result in wasted costs orders being made against the legal advisers responsible.”

Case law makes clear what is meant by “full particulars” of an allegation of dishonesty. The authorities, very familiar to media lawyers, include *Three Rivers DC v Bank of England* [2001] 2 All ER 513, 569 [160] (Lord Hobhouse), *McKeith v News Group Newspapers Ltd* [2005] EWHC 1152 (QB) [2005] EMLR 32 [26-27] (Eady J), *Seray -Wurie v Charity Commission* [2008] EWHC 870 (QB) [30-33], [35] (Eady J), and, in the context of allegations of malice or dishonesty against a corporate party, *Webster v British Gas Services Ltd* [2003] EWHC 1188 (QB) [30] (Tugendhat J) and *Monks v Warwick District Council* [2009] EWHC 959 (QB) [23-24] (Sharp J). The Particulars of Claim and Response fall short of the well-established requirements in a number of ways.

(1) First, and fundamentally, there is a lack of clarity about what exactly is the “dishonesty” alleged, even where that allegation is express. It seems that there are at least two allegations: one of dishonest editing or “suppression” of aspects of the letter that affected its overall meaning, and another of dishonestly misrepresenting that the Articles set out the “full text” of the Letter. The second appears to be ill-founded: Mr White pointed to one of the Articles which told the reader that Mr Markle had passed the full text of the Letter to the defendant, but could not sensibly

be read as suggesting that the entire text had been published in the Article.

(2) Secondly, it is not said who is alleged to have been dishonest. It is trite that dishonesty or malice cannot be established against a corporation by aggregating the conduct of one employee with the state of mind of another. Fairness requires the identification of the individual(s) said to have behaved dishonestly. Mr Sherborne suggested that this was an artificial question as all the articles were written by a single journalist, Caroline Graham. When I asked if he was thereby saying that she was the target of the allegation of dishonesty he equivocated, suggesting that the allegation might be broader than this. Reasonably so. As Mr White pointed out, it is not obvious that editorial decisions about which parts of the Letter to quote were taken by the reporter. So, the claimant's case on this key point is unclear.

(3) Thirdly, the statement of case fails to set out sufficient details of the facts from which the dishonest state of mind is to be inferred; no sufficient credible basis is stated for alleging dishonesty against the unidentified person(s) against whom the accusation is levelled.

Mr Sherborne submits that, if I am against the claimant on these points, the remedy is a request or order for further particulars of the claim. I do not consider that the burden of identifying what can and should be pleaded by the claimant ought to be cast on the defendant or the court.

I am satisfied that, as a matter of discretion, it is right to strike out all the passages I have mentioned. The overriding objective of deciding cases justly and at proportionate cost requires the Court to monitor and control the scale of the resources it devotes to each individual claim. Irrelevant matter should, as a rule, have no place in Particulars of Claim. There may be cases where the court would allow the inclusion of some minor matters that are, on a strict view, immaterial. But where the irrelevant pleading makes serious allegations of wrongdoing which are partly implicit, unclear, lacking in the essential particulars, and likely to cause a significant increase in cost and complexity the case for striking out is all the clearer".

26). In addition, submits Ms Callaghan, it is insufficient to plead facts which are as consistent with a lack of malice as they are indicative of malice. In support of this principle, Ms Callaghan relies on the case of *Telnikoff v Matusevitch* [1991] 1QB 102 where it was said (per Lloyd LJ):

“ The point is simple. If a piece of evidence is equally consistent with malice and the absence of malice, it cannot as a matter of law provide evidence on which the jury could find malice.”

Ms Callaghan submits that the particulars pleaded are defective/flawed for the following reasons:

- (a). in relation to the first allegation relating to a false statement, the Plaintiff avers two different versions. At para 7 of the Particulars of Claim it is alleged that Mr Robertson told the firefighters that the Fuel Station was to be served a Notice “to shut its operation down”. At para 28(1) that the fuel station would be shut “at some point”. Ms Callaghan submits that these pleaded allegations do not amount to the same thing. The first suggests a permanent closure, the second a temporary one. If temporary then the statement was true as remedial work was in fact necessary which the Plaintiff itself acknowledges-see para 12 of the Particulars of Claim.;
- (b). the Particulars fail entirely to deal with the Improvement Notice and whether and if so on what basis it was unjustified; and if unjustified the basis upon which it was issued maliciously;
- (c). there is no fact pleaded to establish that the statement made by Mr Robertson was made maliciously;
- (d). the recipients of the false statement alleged at para 28(i) are not identified; this is simply not acceptable where this cause of action is relied upon and is in any event important. If the only persons to whom Mr Robertson spoke were the firefighters then Mr Robertson cannot have been responsible for the subsequent panic buying, relied upon by the Plaintiff as an indication of malice;
- (e). there is no fact pleaded to establish that the statement was in fact false;
- (f). the panic buying itself was not inherently damaging to the Plaintiff’s business;

- (g). the allegation at para 29(iii) is a bare assertion. Not a single fact is pleaded to support it and as such offends the principles applicable to pleading in cases such as this;
- (h). the allegation of falsehood at para 28(ii) is at odds with the pleading at para 16 where the reason for the volatility is referred to by the Plaintiff itself;
- (i). as already observed, para 28(ii) is wholly inadequate in its lack of particularity;
- (j). no fact is pleaded which conceivably establishes that the statement alleged at para 28(ii) is false. The Plaintiff places reliance on the Penspen report but the report nowhere addresses the volatility of the petrol tank as at February 20th 2017;
- (k). para 29 (ii) purports to establish malice in relation to the volatility of the tank, but does no such thing. It merely describes the consequence of the statement having been made;
- (l). even on its pleaded case the Plaintiff accepts (para 17) that the Defendant both offered to and in fact provided the Plaintiff with material assistance to address the safety concerns. Such a circumstance is entirely consistent with an absence of malice.

27). In the circumstances, submits Ms Callaghan, the pleadings are so deficient and inadequately particularised as to disclose no reasonable cause of action in regard to the claim of malicious falsehood; their inadequacy alone is fatal to the Particulars of Claim; and it is appropriate to strike out the claim at this stage.

Misfeasance in a Public Office

28). Ms Callaghan submits that to establish this claim the Plaintiff must prove that the person(s) identified was/were public officers; was/were motivated by malice of one of two types; targeted malice -i.e., conduct specifically intended to injure. This sort of case involves bad faith in the sense of the exercise of public power for an improper or ulterior purpose; or untargeted malice-i.e., where the public officer acts knowing that he has no power to do the act, knows that the

act will probably injure the plaintiff, or is recklessly indifferent as to the legality of the act and its consequences. Finally, the act must injure the Plaintiff.

29). Ms Callaghan submits that as with malicious falsehood and because the claim involves an allegation of bad faith, it must be properly pleaded. She refers to the cases of *Cannock Chase DC v Kelly* [1978] 1 WLR 1 and *Carter v Chief Constable* [2008] EWHC 1072. In the former Megaw LJ said:

“bad faith, or, as it is sometimes put, “lack of good faith,” means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant. If a charge of bad faith is made against a local authority, they are entitled, just as is an individual against whom such a charge is made, to have it properly particularised. If it has not been pleaded, it may not be asserted at the hearing. If it has been pleaded but not properly particularised, the pleading may be struck out.”

This was echoed by Tugendhat J in *Carter* (supra) where he said (at paras 67 and 68):

“allegations of misfeasance in public office are amongst the most serious-short of conscious dishonesty-that can be made against..any public official. An allegation of bad faith must be properly particularised”. The judgement of Warby J in the *Duchess of Sussex* case is of relevance to this cause of action as well.

With those principles in mind Ms Callaghan submits that the pleadings fail properly to identify the servants or agents it is alleged have been guilty of misfeasance; fail to identify the acts they are alleged to have done; and the facts pleaded fail to support either targeted or untargeted malice.

30). Ms Callaghan points out that para 33 of the Particulars of Claim identifies no specific individual. However, if Mr Robertson is the servant referred to then

no fact is pleaded to establish that he spread rumours; or that he “engineered the circumstances alleged at para 33(ii). No fact at all is pleaded to support the allegation that the Improvement Notice was “unjustified”. The Plaintiff’s Reply (para 42) belatedly purports to identify Mr Robertson and the then Administrator, Marc Holland, as the persons responsible but on the entirety of the pleadings this is the first occasion upon which Mr Holland has been identified at all, and still no act is attributed to any individual. Ms Callaghan concedes that it is perfectly permissible to plead targeted and untargeted malice in the alternative; but doing so, she submits, does not relieve the Plaintiff from properly pleading the case.

31). Ms Callaghan further submits that para 33 of the particulars fails to identify any respect in which the Improvement Notice, the Public Notices or the Prohibition Notice were unjustified. If the Penspen report is relied upon then it was not addressing circumstances as they existed in February 2017 or the specific concern as to volatility and its cause, namely the low level of fuel in the petrol tank. The plaintiff therefore fails properly to address why the notices were unjustified and even more particularly how they were motivated by malice; and in the absence of lack of justification the respects in which it could be said that they were unlawful.

Breach of Contract/Implied terms

32). Ms Callaghan advances three submissions on this aspect of the Plaintiff’s claim: in the first place the pleadings fail to establish any contract at all between the Plaintiff and the Defendant; in any event the pleadings are so incoherent as to fail to disclose any cause of action; and finally, there is no arguable breach of contract.

33). As to the first Ms Callaghan submits that a close examination of the relationship between the parties demonstrates that there was never a contract between the Plaintiff and the Defendant. For the purposes of the business of the Fuel Station the Plaintiff was granted the LOP and the Business Permit.

These were bare permissions. They involved no negotiation between the parties, they involved no consideration, they imposed no obligation on the Defendant and granted the Plaintiff no right other than permission to occupy the site of the fuel station for the purposes of operating the business there. The Defendant had no involvement in the terms of the sale of the business by Mr Henry to the Plaintiff. There was nothing that could conceivably be construed as having conferred upon the relationship between the Plaintiff and the Defendant any contractual relationship at all. No implied terms either of the type contended for or at all therefore arose, or, as a matter of law, could have arisen and the claim should therefore be struck out under Order 9 r14.

34). Ms Callaghan further submits that the Plaintiff's case is in fact so incoherent as disclosing no reasonable cause of action. Para 32 of the Particulars of Claim purports to attach to a Licence Agreement the implied terms contended for. The Prayer to the Particulars claims "damages for breach of contract. Paragraphs 3 and 6 of the Reply reiterate the existence of a contractual relationship. Paragraph 32 of the Plaintiff's skeleton argument, however, states that "The claim for breach of implied terms is a claim for a breach of a Licence Agreement.....not a claim for breach of an identified contract." But, submits Ms Callaghan, any allegation of a breach of implied necessitates the existence of some sort of contractual relationship.

35). Confusingly, submits Ms Callaghan, the Plaintiff then seeks to introduce the notion of a covenant of quiet enjoyment. A covenant of that sort arises as between a landlord and tenant, not a relationship pleaded at all and concludes at paragraph 38 of the skeleton by saying "there is no claim for breach of contract" but for breach of implied terms analogous to the covenant for quiet enjoyment arising from the grant to the Plaintiff of an interest in land. But, submits Ms Callaghan, if the Permit granted an interest in land then the Plaintiff must be asserting a contractual relationship, as a lease or tenancy gives rise to a contractual relationship.

36). The true construction, submits Ms Callaghan, is in accordance with the conclusions reached in *R v Data Broadcasting* [2010] EWCA 1243. That was a case involving the grant of licences under the Broadcasting Act 1990. Cranston J analysed them as follows:

“In my view these licences are not contracts. A contractual analysis distorts their juridical character. The licences are public law instruments. They constitute statutory authorisation permitting the licensees to undertake activities which would otherwise be unlawful and, in this case, place them under particular obligations, breach of which exposes them to the risk of the imposition of statutory financial penalties or ultimately to revocation of the licenses. In granting them, the licensing authority acts pursuant to its statutory duties and functions, and there is no intention to enter into any private law legal relations with the licensees. There is no express agreement between the parties in the contract sense. In the main the conditions in the licences are derived directly from statutory provisions.”

That, submits Ms Callaghan, is precisely the nature of the permits in the present case.

37). Furthermore, submits Ms Callaghan, the Particulars of Claim are in any event so inadequately pleaded as to demonstrate any breach of the sort alleged by the Plaintiff even assuming that the terms contended for by the Plaintiff can properly be implied. The Defendant in general, and Mr Robertson in particular was the designated Authority under the Health and Safety Ordinance to enforce safety issues where such arose. Mr Robertson had concerns as the Notices indicate on their face. Under the doctrine of derogation from grant the Defendant could not have entered into an agreement with the Plaintiff implied terms of which would have prevented the Defendant from enforcing its statutory duty with regard to safety. Ms Callaghan refers to the case of *Molton Builders Ltd v Westminster City Council* (1975) 30 P&CR 182.

Abuse of Process

38). Ms Callaghan's submissions on this aspect of her application can be summarised shortly. At the end of the day, and if the Plaintiff's claim is to succeed, the Plaintiff will have to establish that the Improvement and Prohibition Notices were unjustified. Both those Notices stipulate the recipient's statutory right to appeal to the Magistrates' Court within 14 days if the recipient considers the Notice to be unjustified. In respect of neither Notice did the Plaintiff exercise that right of appeal. Indeed, no attempt was made by the Plaintiff to exercise that right out of time, even after the receipt of the Penspen report. The claim now issued by the Plaintiff is, therefore, a collateral attack on the statutory procedure laid down for challenging the validity of these notices and as such amounts to an abuse of process and the claim should accordingly be struck out under Order 9 r15 (i)(d) of the CPR.

39). Ms Callaghan submits that the Plaintiff has demonstrated no justification for failing to avail itself of its statutory right of appeal. The effect of the Plaintiff's failure is to seek to circumvent the statutory time limit-an effect the Plaintiff has not sought to deny. That, submits Ms Callaghan is an abuse of process as demonstrated by the case of *Autologic Holdings plc v Inland Revenue Comrs* [2006] 1 AC 118. That case concerned statutory provisions for tax-payers to challenge assessments of tax made by Inland Revenue Commissioners. The plaintiff had sought to circumvent the statutory provisions by seeking a remedy by which, in effect, the court was asked to assess the tax alleged to be due. Lord Nicholls of Birkenhead, giving the majority judgment, said:

“Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted,

would be to negative an assessment otherwise than in accordance with the statutory code. Thus, in such a case the High Court proceedings will be struck out as an abuse of the courts process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayers court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation. This approach accords with the views expressed in authorities such as *Argosam Finance Co Ltd v Oxby (Inspector of Taxes)* [1965] Ch 390, *In re Vandervells Trusts* [1971] AC 912 and, more widely, *Barraclough v Brown* [1897]AC 615.”

39). Ms Callaghan further refers to *Copper v Chaney* [2010] Lloyds Reports 593. That was a case where suspected proceeds of crime had been seized. Under the Proceeds of Crime Act 2002 Parliament had granted the Magistrates’ Court the jurisdiction to determine its detention and forfeiture. The Applicant brought proceedings in the High Court seeking a declaration that he was the beneficial owner of the cash. During the course of his judgement, Lewison J held:

- a. that Parliament had provided an express remedy in cases such as these;
- b. the only purpose of the application was to gain a litigation advantage in the proceedings before the Magistrates’ Court;
- c. In those circumstances bringing the claim in the High Court was a classic case of abuse.

Lewison J quoted the passage on Lord Nichols’s speech referred to above and said:

“The principle is not confined to specialist tribunals. It also applies where Parliament has allocated jurisdiction to a court of summary jurisdiction, such as a Magistrates’ Court”.

Lewison J went on to quote a passage from the case of *Glaxo Group Ltd v IRC* [1995] STC 1075:

“It is not easy to discern any clear dividing line between High Court proceedings which are, and those which are not objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court’s jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment; but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction.....In my judgement the use of the procedural machinery of court A to achieve a result in court B where court B is a domestic court of competent jurisdiction is properly characterised as a collateral objective”.

40). Ms Callaghan submits that the jurisdiction of the Magistrates’ Court in this case was to determine whether the Improvement Notice and Prohibition Notice were justified-precisely the issue which in essence this court is being asked to decide. It is therefore an attempt to avoid the consequence of having failed to use the statutory process provided for by the Health and Safety Ordinance, and which the Defendant has given no reason for not using. It is, submits Ms Callaghan, a classic abuse of process.

THE PLAINTIFF’S SUBMISSIONS.

41). On behalf of the Plaintiff, Mr Willems QC submits that the bar for striking out a claim on a summary application is an extremely high one. When the Particulars of Claim are scrutinised, the following can clearly be extracted:

- (i). The WYG examination which was carried out on 15th February was a basic one (para 6). Even the Executive summary to the WYG report accepts that the inspection was a visual one only;
- (ii). On 17th February the firefighters attended the fuel station to fill their vehicles, having been informed by Mr Robertson that the fuel

station “was going to be served with a Notice to shut its operation down” (para7). That, submits Mr Willems, is a pleaded fact:

- (iii). The Defendant admits Mr Robertson spoke to the firefighters and instructed them to fill their vehicles as AIG would shortly be serving the Improvement Notice; (para 8)
- (iv). Within a very short space of time the Plaintiff was receiving calls from residents asking if the fuel station had been condemned (para9);

Pausing there, Mr Willems submits that the suggestion that the fuel station was going to be condemned can only have come from one source- Mr Robertson-and given the size of Ascension’s population, it is hardly surprising that panic buying resulted;

- (v). in fact, the Improvement Notice is dated 16th February, in other words the day before the firefighters and the Island’s population were spoken to. The resultant and foreseeable panic buying had the effect of depleting the Plaintiff’s stocks stored in the fuel tanks (para 14);
- (vi) Interserve had been made aware of the Improvement Notice “and refused to deliver further fuel supplies believing that the site was now volatile”. It is “reasonably inferred by the Plaintiff that the source of this latter suggestion was the AIG”. (para 14)
- (vii). At a meeting on 20th February AIG “continued to fail to produce any evidence of venting or emissions that would deem the fuel station was unsafe yet alleged that the site was volatile due to the low stocks.
- (viii). At no stage was it ever suggested by WYG that there was a risk of explosion which was clearly false.

Pausing once more, Mr Willems then referred to an e-mail from Mr Robertson to Ascension’s Administrator dated 15th February which is at RJC1/16 to Mr Cheeseman’s affidavit where words such as “condemned” appear thus supporting the contention that it was indeed Mr Robertson who let it be known that the fuel station was to be condemned. By

contrast neither the subsequent e-mail to Ms Peters (RJC1/17), or the Improvement Notice itself (RJC1/11) suggested that the fuel station was in such a dangerous condition that it should be condemned or that its condition posed a risk of explosion. Indeed, the Improvement Notice specifically did not suggest that the fuel station would have to be shut.

- (ix). The improvements required and the lack of any suggestion that the fuel station posed an imminent risk to anyone led the Plaintiff reasonably to conclude that no closure would be necessary, or if necessary, for no more than perhaps half a day; and that the necessary work could be undertaken within that timeframe.
- (x). The Improvement Notice itself allowed the Plaintiff 30 days in which to effect the work. How then, asks Mr Willems rhetorically, was it that the firefighters and the island population were informed that the station was to be shut, or even condemned? How was it that Interserve refused to fill the petrol storage tank on the basis of an explosion risk? Why was there a run on the stocks of fuel? The only realistic explanation, submits Mr Willems is that this information emanated from the Defendant and probably from Mr Robertson.
- (xi). Without any objective evidence to support these assertions, there is the clear inference that they were false;
- (xii). Falsity is a strong indication of malice for what other explanation can there be for the dissemination of false information?
- (xiii). there is pleaded objective evidence of its falsity in the form of the Penspen Report-see paras 22-25 of the Particulars of Claim.
- (xiv). To compound matters, the Defendant then went on to serve the Prohibition Notice which effectively fulfilled what Mr Willem's submits was the Defendant's objective all along, namely to shut down the fuel station; but which was a notice as flawed and as false as the earlier notice.
- (xv). As a result of the "wrongful enforced closure" (para 26) the Plaintiff withdrew its business interests from Ascension with the resultant losses claimed in the Particulars of Claim.

42). Mr Willems submits that that is the summary above represents a proper analysis of the claim and the manner in which it has been pleaded and against which the issues raised by the application must be decided.

Limitation.

43). Mr Willems accepts that the issue of limitation is to be determined under Order 9 r14 which has already been set out. He does not accept that the Plaintiff has breached Order 10 r5. Although he accepts that the Particulars of Claim do not plead to the failure to issue within the limitation period, he submits that the Reply does. In any event, under Or9 r14 the Court has the discretion to make any Order that the court considers to be just. If the Court considers that the Plaintiff should address this issue in greater detail then it is open to the Court and proportionate for the Court to order that further pleadings on this specific issue be delivered.

44). Mr Willems further submits that the Defendant seeks to raise the issue of limitation at the wrong time. The Court is currently not seised of this issue which ought to be dealt with by conducting a limitation trial when both parties have served evidence relevant to limitation. In any event, submits Mr Willems, to exclude the Plaintiff's claim on limitation alone, the court would need to be certain that the Defendant would be prejudiced were the limitation period to be disapplied. In this case no real prejudice can be demonstrated. The fact that Mr Robertson's e-mails may have been deleted is irrelevant as on the Defendant's own evidence the deletion occurred before the limitation period had expired so any prejudice is not referable to the expiry of the limitation period. Furthermore, the issues raised with regard to misfeasance and breach of implied terms are precisely the same as the issues relevant to malicious falsehood; those causes of action are brought within their limitation periods; so, the same evidence will be before the court in any event.

Striking out of Pleadings

Malicious Falsehood

45). Mr Willems submits that under the principles to be applied when considering whether to strike out under Or9 r15, it is important to distinguish between the true test under Or9 r14 and its English counterpart CPR 3.4 and the test which would be applied on an application for summary judgement under English CPR 24 which has no counterpart in Ascension law. CPR 24, he submits is similar to the former Rules of Supreme Court 14A which entitled a court to grant summary judgement where a claim or defence had no realistic prospect of success. For the purpose of reaching a decision, the Court was entitled to look at any evidence filed by the parties either in support of, or in opposition to, the application. By contrast and under Or9 r14 (as with English CPR 3.4) the Court, in deciding whether the pleadings disclose a reasonable cause of action, must assume that the primary facts as pleaded are true. Before concluding that the pleadings disclose no reasonable cause of action:

“ the court must be certain that the claim is bound to fail. Unless it is certain the case is inappropriate for striking out” see *Hughes v Colin Richards and Co* [2004] EWCA Civ 266.

46). Mr Willems goes on to refer to the cases of *Bord Na Mona Horticulture v British Polythene Industries and others* [2012] EWCA 3346 and the *Duchess of Sussex* case already referred to. In the former, the facts of which are of no relevance, Flaux J said:

“ So far as the application to strike out is concerned, I accept Mr Beal’s submission that Mr Lasok’s submissions overlook two important qualifications, one of general application and the other specifically referable to competition claims. First, the court will not grant an application to strike out a claim unless it is certain that the claim is bound to fail: see *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, and where

any defect in a statement of case is capable of being cured by amendment, the court should refrain from striking out unless it has afforded an opportunity to the party to amend its statement of case. That is a point which becomes of relevance when considering the so-called follow-on claim in paragraphs 27 and 28 of the Particulars of Claim.

In the latter Warby J said:

“The application notice relies on [Rule 3]sub-rules (a) and (b) and the Court’s inherent jurisdiction. The statements of case and the parties’ arguments also call for consideration of sub-rule (c). The core principles are clear:

(1) Particulars of Claim must include “a concise statement of the facts on which the claimant relies”, and “such other matters as may be set out in a Practice Direction”: CPR r 16.4(1)(a) and (e). The facts alleged must be sufficient, in the sense that, if proved, they would establish a recognised cause of action, and relevant.

(2) An application under CPR 3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should “grasp the nettle”: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725, But it should not strike out under this sub-rule unless it is “certain” that the statement of case, or the part under attack discloses no reasonable grounds of claim: *Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266 [2004] PNLR 35 [22]. Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment.

(3) Rule 3.4(2)(b) is broad in scope, and evidence is in principle admissible. The wording of the rule makes clear that the governing principle is that a statement of case must not be “likely to obstruct the just disposal of the proceedings”. Like all parts of the rules, that phrase must be interpreted and applied in the light of the

overriding objective of dealing with a case “justly and at proportionate cost”. The previous rules, the Rules of the Supreme Court, allowed the court to strike out all or part of a statement of case if it was “scandalous”, a term which covered allegations of dishonesty or other wrongdoing that were irrelevant to the claim. The language is outmoded, but I agree with Mr White that the power to exclude such material remains. Allegations of that kind can easily be regarded as “likely to obstruct the just disposal” of proceedings.”

47). Even though evidence in some cases may be admissible in principle, Mr Willems submits that I should be particularly cautious in the present case not to conflate the approach under Or9 r14 with an approach under English CPR 24 in circumstances where the Defendant has disclosed some evidence, self-selected-in the form of the exhibits attached to Mr Cheeseman’s affidavit but where full disclosure has not yet been undertaken; disclosure which might in due course reveal a truer picture of the Defendant’s motives. There should be particular concern in this case given the Defendant’s failure to disclose the WYG report until the issue of this application and the apparent discrepancy on the face of the report which seems to suggest that the report was prepared on a date which pre-dates the basic, visual inspection undertaken by WYG. It seems to be suggested by Mr Willems that the Court should infer that the Defendant has in the past been underhand in its disclosure and draw the further inference that disclosure may well reveal further skulduggery.

48). Mr Willems submits that the analysis of the pleadings already outlined clearly discloses a reasonable cause of action in each of the causes of action relied upon. For malicious falsehood the pleadings properly aver:

- (i). publication by the Defendant of statements (Mr Robertson’s comments to the firefighters and members of the public) referring to the Plaintiff’s business;
- (ii). The falsity of the statements (paras 7 and 28 of the Particulars of Claim); whether the words were as alleged at para 7 or as at para 28 or both it is possible to assert that even the words alleged at

- para 28 are false as there was nothing in the Improvement Notice indicating that closure was a necessity;
- (iii). if the words were false then malice is the only logical explanation for the reasons set out at para 29;
 - (iv). They were clearly designed to cause the Plaintiff economic damage.

49). It must further be borne in mind, submits Mr Willems that at the time when the Notices were issued there was no written report from WYG. There was therefore no evidence in relation to the risk of explosion. It was only after Mr Robertson statements which caused the panic buying; and which itself caused the depletion of the petrol stocks that the Defendant was then able to say that a risk of explosion had arisen; a risk which the Defendant caused in circumstances which enable the Plaintiff reasonably to aver that it looks as though that risk was engineered by the Defendant. This is so particularly taking into account the fact that fuel sales since this time have been undertaken by the Defendant.

Misfeasance

50). A similar outcome is achieved if the same exercise is taken with regard to the claim of misfeasance. The pleadings clearly aver that Mr Robertson was a public officer. The conduct complained of is clearly in the exercise by Mr Robertson and Mr Holland of their public functions. The Plaintiff is perfectly entitled to plead targeted malice and untargeted malice in the alternative; and in respect of the former bad faith has been pleaded; as to the latter reckless indifference is specifically pleaded-see para 33 of the Particulars of Claim.

51). In any event, submits Mr Willems, even if in some respects the pleadings are presently lacking, it would be wrong to approach the requirement that allegations of bad faith be fully pleaded as if this were a statutory requirement. Mr Willems submits that the case of Khader, relied upon by Ms Callaghan ought to be approached with caution. That was a case where the application before Eady J was for summary judgement and his words ought therefore to be regarded as obiter. The true test, submits Mr Willems, is to be divined from the

leading case of *Horrocks v Lowe* [1974] AC 135. In his speech (at p149) Lord Diplock said:

“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 what he published was true this is generally conclusive 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...”

And in the case of *Kaye v Robertson* [1991] F.S.R 62 (CA) per Glidewell LJ:

“Malice will be inferred if it be proved that the words were calculated to produce damage and that the defendant knew when he published the words that they were false or was reckless as to whether they were false or not.”

52). Mr Willems submits that this is one of those cases from which malice can properly be inferred from the primary facts alleged and as pleaded. The test, submits Mr Willems is whether the matters pleaded raise the probability of malice.

53). In the alternative, submits Mr Willems in the skeleton argument, although it was not pursued specifically in oral submissions, even if the pleadings might be considered as inadequate in some respects, the Court has the power to order the service of further or better particulars or to permit a party to amend its pleading under Order 9 Rules 3 and 9. That, submits Mr Willems would be the proportionate and correct course of action if the pleadings are inadequate.

Breach of Contract/Implied Terms.

54). Mr Willems submits that in 2013 it is beyond any doubt at all that the Plaintiff and Defendant reached a commercial arrangement, to use a neutral word. In the negotiations leading to that arrangement, it is plain that the both parties envisaged mutuality of obligation. So much is plain from the language

used and as can be seen from the exchange of e-mails between Ms Peters of the Plaintiff on the one hand and Mr Colin Wells, the then Administrator on the other. Thus (RJC1/4) in June 2012 one sees an exchange of e-mails where both parties refer to “terms and conditions”. In his e-mail of 05/08/12 Mr Wells even refers to a “contract”. The Plaintiff submitted a business plan for the Defendant to consider (RJC1/5). In due course the Defendant granted a 10-year permit to operate; and in June the Defendant confirmed that it would grant the three permits necessary-the LOP, the Private Sector Business Operator Permit and a Housing Permit. This “arrangement” submits the Plaintiff clearly constituted an agreement into which it is equally clearly permissible to infer the incorporation of implied terms. It is remarkable, submits Mr Willems, for the Defendant now to seek to argue that it was under no obligations whatsoever to the Plaintiff. The implication of these terms does no more than amount to the equivalent of a covenant of quiet enjoyment and/or terms necessarily to be implied in order to give the “arrangement” business efficacy. Furthermore, the grant of these permits/licences amount to the grant of an interest in land over which the Plaintiff had exclusive possession. It is unrealistic, submits Mr Willems, for the Defendant to suggest that it had no obligations to the Plaintiff; and howsoever those obligations are described, once admitted the pleadings clearly disclose a cause of action on breach. The Defendant had granted the Plaintiff a 10-year licence. The Defendant was clearly not entitled effectively to engineer the unlawful termination of that licence within that period. If the Prayer to the Particulars misdescribes the relationship then that is not fatal to the claim.

Abuse of Process

55). As to the Defendant’s application with regard to abuse, Mr Willems submits that the jurisdiction of the Magistrates’ Court and that of the Supreme Court are different. Under the Health and Safety Ordinance the Plaintiff could not have recovered damages. Had the Plaintiff exercised its right of appeal to the Magistrates’ Court and had shown the Notices to be unjustified it would then and in any event have been necessary to bring proceedings in the Supreme Court for damages. To that extent this case is properly to be distinguished from the cases referred to by Ms Callaghan. Furthermore, the 14-day time limit provided for by the Notices would not have permitted the Plaintiff to have exercised its

right of appeal. The Improvement Notice gave the Plaintiff no indication of urgency. With the service of the Prohibition Notice the Plaintiff's business was closed down. There was no agency on Ascension able or willing to assist the Plaintiff. The Plaintiff therefore was obliged to seek expertise off island and went to America to that end. Penspen's report was only obtained in April by which time the 14-day time limit had expired. This is not a case where the Plaintiff has sought a litigation advantage by having done what it did. The Plaintiff acted reasonably and with reasonable expedition. It was nevertheless unable to meet the time limits imposed by the notices and by seeking a remedy now through the Supreme Court, the Plaintiff is not abusing the process of the Court.

56). In conclusion submits Mr Willems the pleadings disclose a reasonable cause of action in respect of each such cause pleaded. If any further confirmation were necessary that triable issues arise in respect of each rendering it impossible for the Court to say that the Plaintiff is certain to fail, it is only necessary to look at the Defence and the incidence throughout the defence of non-admissions and denials of primary facts alleged by the pleadings. The Defendant's application should therefore be dismissed in its entirety.

DECISION

Limitation

57). I deal first with the issue of limitation with regard to the claim for malicious falsehood. I say immediately that I find it astonishing that nowhere has the Plaintiff sought to advance an explanation for the delay in issuing proceedings in this case. If it was simply the fact that the Plaintiff was unaware that there was a one-year limitation period, then the Plaintiff was specifically informed of the fact by the Defendant's letter of pre-action reply dated 3rd May 2017 (RJC1/29). It nevertheless still took the Plaintiff in excess of 9 months to issue proceedings and even so, in what in my view is a clear breach of Order 10 r5 of the CPR, the Plaintiff wholly failed even to acknowledge that the limitation period had expired, let alone advance an explanation for the delay. The expiry of the limitation period was pleaded by the Defence (para5(a)), but in its Reply

the Plaintiff again wholly failed to address the issue of delay. Nor has the issue been dealt with by the Plaintiff either in its skeleton argument or its oral submissions. No proposed amended Particulars have been tendered which purport to give an explanation. The Plaintiff has merely submitted:

- (i). that the Court is not seised of the issue. The proper course is to conduct a limitation trial;
- (ii). There is no prejudice to the Defendant as the issues pertinent to malicious falsehood are identical to the Plaintiff's other causes of action which have been brought within their limitation periods.

58). As to the former I am quite satisfied that the Court is properly seised of the limitation issue. It forms and always has formed part of the Defendant's application, an application which the Court consented to hear. It was for the Plaintiff to respond to the application and to advance the reasons for delay. In failing to do so, as the Plaintiff has repeatedly done, I am driven to conclude that the Plaintiff has no reason, or no proper reason for the delay. The extract quoted in the case of *Bewry* (supra) per Brooke LJ in the case of *Steedman v BBC* seems particularly apposite to the present circumstances where NO explanation has been given at all.

59). I do not accept the absence of prejudice either. It is a constant theme of the cases dealing with allegations of malice that the allegation is a very serious one to make. There may be aspects to an allegation of malice which are different to allegations of bad faith, illegality or reckless disregard. Furthermore, the allegation of malice in this case is directed specifically and only at Mr Robertson whereas the allegation of misfeasance is made against both Mr Robertson and Mr Holland. Mr Robertson was entitled to have this allegation raised timeously. Mr Cheeseman details the respects in which the Defendant suggests it is now prejudiced having to answer this allegation. It may be that Mr Robertson's e-mail account had been deleted before the expiry of the limitation period but if so, and from his point of view in having to recall matters it would have been much better to have undertaken that exercise in recollection at some point before 17th February 2018, rather than over a year later. Additionally, had this claim been brought promptly the question of the extent to which the Penspen report actually addresses the issues raised by the Improvement Notice and

Prohibition Notice and the question of malice or otherwise demonstrated by the contents of those notices may well have been easier to determine. It seems to me therefore that the Defendant has to an extent, at least, been prejudiced; and when therefore it comes to an exercise of my discretion and as per Brooke LJ, the Plaintiff should not be surprised that I am unwilling to find that it would be “equitable” to disapply the limitation period given the Plaintiff’s persistent failure to provide any explanation for the delay. Indeed, it would, I am satisfied, be entirely inequitable to the Defendant now to disapply the limit. I therefore accede to the Defendant’s submissions on this ground of application and strike out the claim for malicious falsehood.

60). The conclusion I have reached in relation to limitation renders it strictly unnecessary for me to deal with Ms Callaghan’s second submission in relation to this head of claim, namely that it is so inadequately pleaded as to disclose no reasonable cause of action. I nevertheless will deal with it as there is an overlap between the principles relevant to these submissions and those pertinent to misfeasance.

Striking out of Pleadings

Malicious Falsehood

61). The authorities to which I have been referred and which I have set out earlier in this judgement make it plain to me that in cases alleging malice there is an absolute requirement on the Plaintiff fully to plead its case. I extract the following principles in such cases:

- (i). The Plaintiff must plead and prove the facts from which malice is to be inferred;
- (ii). It is not sufficient to plead facts which are equally consistent with the absence of malice as with its presence;
- (iii). Mere assertion will not do;
- (iv). The Plaintiff may not be permitted to proceed simply in the hope that something may turn up;

- (v). Malice is firmly to be distinguished from the misguided or negligent.
- (vi). A pleading such as a false statement was made “to other persons” will not do;
- (vii). Where an inference of malice is alleged the Plaintiff must plead the facts on the basis of which the alleged inference is justified;
- (viii). An allegation of malice should not be made unless there is credible material to support that contention;
- (ix). Where the Plaintiff has failed adequately to plead the case the court may strike out the pleadings as failing to disclose a reasonable cause of action provided that the Plaintiff has had the opportunity of curing the defect(s) by amendment.

62). When I apply those principles to this head of claim I am driven to the conclusion that the pleadings are inadequate in the manner alleged by the Defendant. I have already endeavoured to set out the respective analyses of the Particulars of Claim and the Reply of the Defendant on the one hand and the Plaintiff on the other. I do not propose to rehearse them again. Suffice it to say that I prefer the analysis advanced by Ms Callaghan and for the reasons she advances I agree that the Plaintiff’s pleaded case on malice is so inadequately particularised as to disclose no reasonable cause of action, given the specific pleading requirements of a cause of action based on malice. In particular, I do not see any credible material upon which the allegation is made and to this very limited extent I have considered the evidence. The Plaintiff’s allegation of falsity is largely, if not wholly, dependant upon the Penspen report. Without it, any allegation of falsity directed against Mr Robertson is a bare assertion and anything he is said to have said or done is in my view equally consistent with having acted in good faith as in bad. There is perhaps one exception-the alleged statement at para 7 of the Particulars, but that allegation is at least potentially inconsistent with the allegation at para 28(i) and therefore is in itself bad on the principles of pleading to which I have referred.

63). I have quoted the Executive summary of the Penspen report. Whilst I accept that the report within the scope of the work undertaken did not “ identify any conditions that [the technicians] felt represented a hazard or safety threat to

the performance of their work” inexplicably the technicians do not appear to have been asked to address the issues raised in the Improvement or Prohibition Notices, or, if they were, nowhere does the report address those issues, or at least the majority of them. It seems to me therefore that in addition to general inadequacy, there is also no really credible material before me which supports the allegation of malice.

64). I have considered also the question of whether the inadequacies could be addressed by amendment. Mr Willems adverted to amendment in his skeleton argument but did not pursue the issue in his oral submissions. Certainly, the Plaintiff has not sought to proffer an amended Particulars of Claim so it is difficult to gauge how the deficiencies could be cured or whether they could in fact be cured. But had the Plaintiff sought leave to amend the Particulars of Claim it seems to me that in those circumstances I would have had to have had some regard to the matters of evidence which were alleged to form the basis of the proposed amendments and had I done so I would simply have reached the same conclusions I have reached in the foregoing paragraph. I would have concluded therefore that no amendment would be capable in fact of pleading the case on a proper basis.

65). It is appropriate at this point to deal with Mr Willems’ submissions on disclosure and the caution he submits I should exercise, particularly to the extent that full disclosure has not taken place, the disclosure hitherto has been self-serving, that there is a discrepancy with the WYG report; and that full disclosure may provide a fuller picture of the Defendant’s true motives.

66). I confess I find it unattractive to suggest, if indeed it is suggested, that Mr Cheeseman, an officer of the Court, has behaved in an inappropriate way, presumably to mislead the Court, by self-serving disclosure. There is absolutely no evidence to support any such suggestion. I find nothing sinister in the apparent discrepancy on date in the WEYG report. There are likely perfectly innocent explanations-for example that 8th February was the date on which WYG arrived on the island and commenced their inspections of which the fuel station was but a small part. In this context I merely observe that Mr Willems himself submitted that there was nothing in the WYG report suggesting that the

condition of the fuel station presented a risk of explosion. In fact, the third paragraph of the Executive Summary explicitly makes that suggestion. If the date on the report is an error, I merely observe that we are all prone to error-making; and finally to the submission that if the matter is permitted to proceed then full disclosure may well reveal more about the Defendant's true state of mind, that is a submission which comes close to if not falls squarely within a submission that the Plaintiff should be permitted to continue simply to see whether anything turns up.

67). In conclusion, therefore, and irrespective of the ruling on limitation, I would also have struck out the claim for malicious falsehood on the basis that the pleadings disclose no reasonable cause of action.

Misfeasance

68). The pleading requirements for misfeasance are in essence the same as those for malicious falsehood and I approach the defendant's application on misfeasance by adopting the same principles as I applied to the pleadings for malicious falsehood. Again, I am satisfied that the pleadings do not satisfy the strict pleading requirements identified for the reasons submitted by Ms Callaghan and summarised at paragraphs 29-31 of this judgement. The observations made in relation to the pleadings relevant to malicious falsehood apply equally and I am therefore satisfied that the pleadings disclose no reasonable cause of action and that this head of claim should also be struck out. Equally, and for the reasons given in relation to the malicious falsehood claim, I do not consider that the flawed nature of the pleadings could adequately be corrected by amendment, even if leave to amend had been sought.

Breach of Contract/Implied Terms.

69). I am quite satisfied that, as a matter of law no contract was ever entered into between the Plaintiff and the Defendant. As Ms Callaghan points out, the background which led to the issue of the three permits evinces no intention to create legal relations necessary to establish the existence of a contract; there is no evidence of consideration; and there is absolutely no evidence of mutuality

of obligation. To the contrary, it is clear that this was simply a question of the imposition by AIG of what would be expected of the Plaintiff. It seems plain that even the question of the duration of the various permits was a matter solely for AIG to determine, although the Administrator may have listened to any representations made. I recognise, as Mr Willems points out, that Mr Wells and Ms Peters may have used phrases or words such as “terms and conditions” and “contract” but they were not lawyers. These permits, I am satisfied were precisely of the same nature as those analysed by Cranston J in *R v Data Broadcasting* (supra) and I reach the same conclusion as the Learned Judge there did. I do not consider that it is necessary to import terms such as these into the arrangement between the Plaintiff and the defendant in order to give the arrangement business efficacy. The Plaintiff was protected in tort if the Defendant acted unlawfully as the Plaintiff has sought to demonstrate; and in any event and as Ms Callaghan submitted, either there was a contract or there was not. If not no question of implied terms arises. I am satisfied that there was no contract and that is so whether under a commercial relationship between the parties or some quasi landlord and tenant relationship which I see no basis for either.

70). Given the conclusion reached above, there is no strict necessity to deal with whether the pleadings disclose a reasonable cause of action; but had I had to do so I would have held that the pleadings are so incoherent as to disclose no reasonable cause of action. The Particulars of Claim plead a breach of contract. The Reply (para3 and 6) reiterates the contractual nature of the relationship. The Plaintiff’s skeleton, however, then submits that the claim is for breach of implied terms of a licence agreement and not for any breach of any particular contract and then goes on to introduce the notion of breach of covenant of quiet enjoyment under an interest in land granted to the Plaintiff. Suffice it to say that I agree with Ms Callaghan that the Plaintiff itself seems to be confused about its relationship with the Defendant. In reality all that the Plaintiff was granted was a bare permission.

Abuse of Process

71). Given that the conclusions I have reached dispose of the Plaintiff's claims in their entirety it is not strictly necessary that I deal with this aspect of the Defendant's application but I will do so for completeness sake. There is absolutely no doubt that the Improvement Notice and the Prohibition Notice provided the Plaintiff with a statutory right of appeal if it was felt that one or both were unjustified. There is no doubt that the Plaintiff failed to do so. The Plaintiff now submits that the right could not then be exercised as there was no expertise able or willing on Ascension to assist with the task of demonstrating that the Notices were unjustified; and that the 14-day time limit could not therefore be adhered to. In any event, submits Mr Willems, the jurisdiction of the Magistrates' Court and Supreme Court are not the same. The Magistrates' Court would have had no jurisdiction to award damages had the Notices been shown to have been unjustified; and therefore, the Plaintiff would have been obliged in any event to initiate proceedings in the Supreme Court.

72). I am satisfied that the main consideration before the Supreme Court in this case would be to determine the issue of whether the Notices were justified. That was the precise function allocated to the Magistrates' Court under the Health and Safety Ordinance. The only outstanding and, in my view separate issue that might have been outstanding was an assessment of quantum. It is easy to discern the rationale for the statutory right of appeal-it is there swiftly to resolve health and safety issues as they arise and it is wholly desirable that such issues should be resolved swiftly. Had the Plaintiff sought to exercise its right of appeal but the time limit was such as not to enable the Plaintiff to gather the expert evidence it required, then it is to be anticipated that the Magistrates' Court would have exercised its discretion to allow the Plaintiff reasonable time to obtain such evidence; and in this context I observe that the Penspen services were secured

and their technicians on Island by the end of March. How much better it would have been had the justification or otherwise of the Notices been tested then rather than four years later, which one presumes is exactly the intent behind the statute and the provisions relevant to appeal.

