SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2024] SC GLA 37

GLW-A909-23

JUDGMENT OF SHERIFF S REID

in the cause

ASHTON PROPERTIES (GLASGOW) LTD

Pursuer

against

UNITE THE UNION

Defender

Pursuer: Campbell, Advocate; Mellicks, Solicitors, Glasgow
Defender: Kennedy, Advocate; Allan McDougall, Solicitors, Edinburgh

GLASGOW, 27 September 2024

The sheriff, having resumed consideration of the cause:

1. Sustains the defender's preliminary plea (plea-in-law number 1) in part only, whereby, Excludes the following averments from probation: (i) in article 21, the whole of paragraph (b) thereof; (ii) in article 21, the words "and (b)" where they appear in paragraph (c) thereof; (iii) the whole of articles 24, 25 & 26; (iv) in articles 27, 28, 30 & 31, the words "and Mr Simpson's comments" where they appear in the first lines thereof; and (v) in article 32, the words "and Mr Simpson's comments" where they appear throughout that article of condescendence; *quoad ultra* Repels the defender's said preliminary plea;
2. Reserves the pursuer's preliminary pleas;
3. Reserves the issue of the expenses of the debate procedure;

4. Appoints the sheriff clerk to assign a Hearing on the issue of expenses and to determine further procedure; and Directs that the said Hearing shall proceed remotely by way of telephone conference call before Sheriff S. Reid.

NOTE

[1] This is an ordinary action of damages for defamation. The pursuer alleges that defamatory statements were made about it in two written communications (known as "tweets") on a Twitter social media account operated by the defender. The communications are referred to here as "the First Tweet" and "the Second Tweet" (items 5/12 and 5/14 of process, respectively). In short, the defender stated in the Tweets that employees of the pursuer "will no longer be paid the real living wage and will be reduced to minimum wage".

[2] The action called before me for debate. The debate was focused on a single issue: on a proper reading, what is meaning of the impugned communications?

[3] The pursuer contended that the ordinary reader of the Tweets would understand them to mean that the wages of the pursuer's employees were being reduced; the defender contended that the ordinary reader of the Tweets would understand them to mean that the wages of the pursuer's employees were being reduced from one wage scale to another wage scale. The distinction, though subtle perhaps, is important because, while there is no real dispute that the employees' wages were indeed being changed from one wage scale to another wage scale, the pursuer contends that the employees' wages were in fact increased (not "reduced"), albeit the wages may not have increased by as much as might otherwise have been the case if the employees had remained on the original wage scale.

[4] In order to narrow the issues for determination at debate, counsel helpfully agreed the following: (i) if the pursuer's contended meaning was correct, the Tweets would indeed be defamatory; (ii) conversely, if the defender's contended meaning was correct, the pursuer's averments would be irrelevant and the action would fall to be dismissed. It was also agreed that certain specific averments of the pursuer fell to be excluded from probation (as highlighted in yellow on a working version of the certified copy record tendered at the debate).

The pleadings

[5] The material pleadings can be summarised as follows.

[6] The pursuer owns and operates a restaurant bar called Brel. It avers that from 23 August 2021 until 1 April 2023 it paid its employees the "Real Living Wage". The "Real Living Wage" is averred to be an hourly wage rate set by an entity called the Living Wage Foundation. There was no statutory obligation upon the pursuer to pay the "Real Living Wage" to its employees. There was also no contractual obligation to do so. The employees' contracts of employment are said to have specified a contractual hourly rate which was less than the "Real Living Wage". From 23 August 2021 until 1 April 2023, the pursuer avers that it "voluntarily topped up" its employees' contractual entitlement in line with the "Real Living Wage". In 2020/2021, the "Real Living Wage" was £9.50 per hour; in 2021/2022, the "Real Living Wage" was £9.90 per hour; from 1 April 2023, the "Real Living Wage" increased to £10.90 per hour (article 5).

[7] On 20 March 2023 the pursuer avers that it informed the Brel employees that, from 1 April 2023, their wages would increase. However, they would not receive the "Real Living Wage". Instead, the pursuer avers that it informed its employees that they would all be paid

the "National Living Wage", being "the statutory minimum wage for individuals aged 23 or older" (article 6). The pursuer avers that approximately 60% of its Brel employees are, in fact, younger than 23. For the year 2023/2024, the "National Living Wage" was £10.42 per hour; this is higher than the "Real Living Wage" for the preceding year (2022/2023), which was £9.90 per hour; therefore, the pursuer avers that the wages paid to all Brel employees from 1 April 2023 had increased.

[8] An industrial dispute then arose. With the assistance of the defender in its role as trade union, a formal collective grievance was submitted to the pursuer by some of the Brel employees (articles 6-18).

[9] This brings us to the impugned communications.

[10] On 27 June 2023 the defender posted the following tweet ("the First Tweet") (item 5/12 of process) on its Twitter account (article 19). The First Tweet states:

> "BREAKING
>
> Workers at Brel in Glasgow have been told that they will no longer be paid the real living wage and will be reduced to minimum wage.
>
> Our reps shall be meeting @itisoncom tomorrow to appeal.
>
> The parent company made £5.5m in 2021 (most recent figures)."

[11] On 27 June 2023 that the defender's employee, Mr Simpson (for whom it is said the defender is vicariously liable) posted a separate tweet ("the Second Tweet") (item 5/13 of process) on his Twitter account (article 22). It is said to have "amplified" the First Tweet. The Second Tweet, which had the First Tweet "embedded" within it, states:

> "This company makes millions from the hard work of our members who've been told that they're just not worth that extra 48p.
>
> Tomorrow is the last chance for @itisoncom to overturn this heartless decision and invest some of their profit into the people who created it".

[12] The First and Second Tweets are averred by the pursuer to have been "widely viewed"; they are said to have attracted negative reviews and comments from third parties on various social media platforms and national newspapers (articles 28-31); and they are averred to have resulted in loss and damage to the pursuer in the form of reputational damage, cancelled bookings and lost custom (article 33).

[13] The pursuer avers that the First and Second Tweets have the same meaning, namely, that the wages of workers at Brel were being reduced. The pursuer avers that this meaning was false. It avers that, in fact, the workers' wages were increased with effect from 1 April 2023 (article 32).

[14] Various other ancillary issues are in contention. For example, the pursuer avers that the Tweets incorrectly conflate the pursuer with another company (called It Is On Limited), which has the same managing director and majority shareholder (articles 4 and 32); and the pursuer avers that the Tweets significantly misrepresent the recorded profits of the pursuer and its parent company. These issues are not materially relevant to the narrow point that came to be focussed at debate.

The diet of debate

[15] The diet of debate was assigned on both parties' preliminary pleas. To their credit, in advance of the diet parties' counsel had sought to narrow the scope of the debate. A copy of the record had been prepared which highlighted in yellow certain averments for the pursuer which were the subject of challenge by the defender (as either irrelevant or lacking in specification) and upon which the pursuer was no longer insisting. Of consent, I was invited to sustain the defender's preliminary plea (plea-in-law number 1), to the extent of excluding those averments from probation.

[16] By agreement, the submissions at debate were focused on a single key issue, namely, the relevancy of the pursuer's averments concerning the meaning ascribed to the impugned statements in the First and Second Tweets. Counsel assisted further by agreeing the following propositions: (i) that the meaning that had been averred by the pursuer was that the pursuer had reduced the wages of workers at Brel; (ii) that if that averred meaning was indeed the correct meaning of the Tweets (or either of them) then that meaning was capable of bearing a defamatory imputation; (iii) in that event, the action would require to proceed further (probably to an evidential hearing, though the pursuer reserved the right to insist upon a further debate on the pursuer's extant preliminary plea); (iv) conversely, that, according to the defender, the proper meaning of the First and Second Tweets was that the wages of workers at Brel had been reduced from one *scale* (the "Real Living Wage" scale) to another *scale* (the statutory "minimum wage" scale); and (v) that if the defender's contended meaning was correct, the pursuer's averments would be irrelevant, and the action would fall to be dismissed.

[17] A note of agreed legal propositions was also tendered. I am grateful to both counsel for their skill and pragmatism in so narrowing the issues in dispute.

[18] The pursuer also challenged the relevancy and specification of certain averments in the defender's answers (as shown underlined on the working version of the closed record tendered at the debate). However, due to time constraints it was agreed that the pursuer's preliminary plea would be reserved meantime.

The defender's submissions

[19] The defender insisted upon on its preliminary plea (plea-in-law number 1) and sought dismissal of the action. Counsel adopted the defender's rule 22 note (item 12 of

process) under exception of paragraphs 1, 4 (third paragraph), 6 and 9. He argued that the purpose and function of the "Real Living Wage" and the statutory "minimum wage" (including the "national living wage") are all matters of "public information", and therefore within judicial knowledge. A dispute had arisen over an announced wage change with effect from 1 April 2023. Since August 2021, the pursuer's employees had previously been paid the "Real Living Wage". The statutory "minimum wage" was a different and less generous wage scale, with varying bands or categories depending on age. Under the statutory minimum wage, a higher band (which, according to the defender's counsel, had been "rebranded" as "the national living wage") applied to employees who were over 23 years of age. Irrespective of the terminology, the pursuer's employees were no longer to be paid the "Real Living Wage" scale, but were instead "reduced" to the statutory wage scale. The difference between the highest bands of the two scales was said to be £0.48 per hour. Accordingly, it was submitted that the impugned statement (that workers would no longer receive the real living wage but would be "reduced" to minimum wage) was "self-evidently true or substantially true". Counsel acknowledged that the situation was clouded to some extent by the fact that there had been a change in the prevailing rates within the two wage scales, coinciding with the change in the pursuer's financial year.

[20] It was also submitted that the pursuer's averred meaning (that the wages were being "reduced") was ambiguous as it did not adequately specify whether the *hourly payment* was being reduced or merely that the *scale of pay* was being reduced. That specification issue apart, if the former meaning was asserted, the defender submitted that it was not supported by the terms of the First Tweet which (on a proper reading) referred only to a reduction in *scale of pay*. It was "self-evidently true" that there had been such a reduction. Accordingly, the pursuer's action should be dismissed or the averments excluded from probation.

[21] As for the Second Tweet, it was argued that the pursuer was erroneously seeking to rely on this communication as a stand-alone ground of action, rather than as merely "amplifying" the spread of the First Tweet. The defender argued that the pursuer had failed to attribute any defamatory meaning to the wording of the Second Tweet itself. Besides, the Second Tweet was said merely to express Mr Simpson's opinion of the circumstances set out in the First Tweet.

[22] In supplementary oral submissions, the defender's counsel reiterated that the pursuer's averred meaning of the Tweets (ie that the pursuer had reduced the employees' wages) was recorded in article 21(a) of condescendence. (He understood that part (b) of article 21 was no longer insisted upon and he submitted that part (c) was merely descriptive of a "context", and not a stand-alone asserted meaning.) This interpretation of the pursuer's averments was said to be consistent with article 32 (in which the pursuer also avers that the First Tweet falsely represents "that the pursuer reduced the wages of Brel employees"). The pursuer's averred meaning was said to be irrelevant because, on a proper reading, the ordinary reader would understand the Tweets to mean that the pursuer's employees were merely being reduced from one wage *scale* to another. If the Tweets had said that the hourly rate had been reduced by, say, £1 per hour that would have been untrue. But neither Tweet says that. Both Tweets, on a proper reading, refer only to *scales of pay*. Understood in that way, the Tweets were said to be true.

[23] Counsel acknowledged that the Second Tweet may have "amplified" the First Tweet (in the sense that it was "increased in noise" by further dissemination); that such amplification may be relevant to the issue of quantum in respect of the First Tweet; but he submitted that the pursuer's averments gave no fair notice as to how any additional content within the Second Tweet was defamatory. To characterise the Second Tweet as a

stand-alone defamation was "just clouding the issue". Besides, he submitted that the additional content within the Second Tweet, such as it was, was properly characterised as fair comment by Mr Simpson on the embedded First Tweet, thereby engaging the statutory defence of "honest opinion" (Defamation & Malicious Publication (Scotland) Act 2021, section 7).

[24] Lastly, I was invited to exclude from probation the averments in articles 12 to 18 of condescendence. These averments were said to relate to the minutiae of the industrial dispute between the pursuer and its employees and were irrelevant to the meaning of the impugned communications. Insofar as those averments touched upon Mr Simpson's alleged motivation, they were also irrelevant to quantum in the context of a corporate pursuer.

The pursuer's submissions

[25] For the pursuer I was invited to repel the defender's preliminary plea (other than to the extent of excluding from probation the pursuer's averments as highlighted in yellow on the working record). I was invited to reserve the pursuer's preliminary pleas (pleas-in-law 1 and 2) pending determination of the defender's preliminary plea.

[26] The pursuer submitted that the proper approach to the issue was as follows: (i) the court should determine the meaning of the words used; (ii) the court should decide if that meaning is capable of being defamatory, (iii) the onus then shifts to the defender to aver and prove a relevant defence; and (iv) in the present case, two defences are averred, namely truth and "honest opinion" (section 7(1), Defamation and Malicious Publication (Scotland) Act 2021).

[27] Counsel explained that, as a matter of fact, with effect from 1 April 2023, the pursuer had *increased* all employee wages from £9.90 per hour to £10.42 per hour (the latter rate

being the "National Living Wage"). The pursuer did not *reduce* employee wages. Of the pursuer's employed staff, 60% were under 23 years old at the relevant time, but still received the National Living Wage, despite not being entitled to it. Reference was made to the pursuer's third inventory of productions (item 6/17 of process), comprising a UK Government website screenshot depicting the "national minimum wage" and the "national living wage" rates from 1 April 2021. I was urged not to conflate "national living wage" and "minimum wage". It was submitted that the defender's assertion in the Tweets that the pursuer's workers were being "reduced" to "minimum wage" was self-evidently not true when the prevailing hourly rates were considered (*a fortiori* for at least 60% of the pursuer's staff who, despite being under 23, were being increased to the "national living wage", which was more than the "minimum wage"). Self-evidently, the pursuer was making an increase in wages, not a reduction. It was also said that there was a "tipping system" in place, and that those tips were also expected to increase. Further, it was submitted that the defender's Tweets conflated three distinct legal persons: the pursuer, Itison Limited and Dada Events Limited (the pursuer's parent company), due merely to a commonality of shareholding and officers between the three.

[28] The Tweets were said to comprise separate stand-alone grounds of action, though the essential meaning of each was the same, namely that the workers' wages were reduced (in the context of an employer that had allegedly made £5.5 million of profit). The Second Tweet was said to "embed" the First Tweet and to add Mr Simpson's further comments. While the First and Second Tweets were said to carry the same meaning, the pursuer's counsel acknowledged that it was conceivable that two different conclusions could be reached in relation to each Tweet.

[29] Looking at the first Tweet, the pursuer's counsel submitted that the meaning, to an ordinary reader, would be that the workers' wages (or hourly rate) were being reduced (article 21). It was submitted that this was evidently not true. Further, the false assertion (that the wages or hourly rate were being reduced) was uttered in circumstances where the parent company was doing "really well" with a profit of £5.5 million, which was also not true. I was invited to focus on the use of the word "reduced" in the Tweets. It was wrong to understand this as merely a reduction "in scale", when the court places itself in the shoes of the ordinary Twitter user. It was submitted that the user of social media, such as Twitter, must take care because a posted communication (such as a "tweet") will be understood in a casual and impressionistic way. It was submitted that the First and Second Tweets would not be read as a reduction in scale; they would be read as a reduction in wages (in the context of a company that was making a lot of money, but was choosing to pay less to its employees). Likewise, the references to the pursuer's parent company having "made" £5.5 million would be read by the ordinary Twitter user as meaning that the parent had made "profit" of £5.5 million, not merely "revenue" of £5.5 million (from which costs and liabilities would require to be met).

[30] Looking at the Second Tweet, it was submitted that the express reference to "profit" hammered home the true meaning of the Tweet (namely that the £5.5 million referred to profit, not turnover). The reference in the Second Tweet to a "48 pence" difference in pay did not assist the defender because it was not clear whether the 48 pence referred to a difference in "scale" or in "actual pay". Counsel acknowledged that a reasonable reader would know that different scales exist (namely, the statutory "minimum wage" and the non-statutory "real living wage"), but he submitted that they would not be familiar with the detail. Further, the pursuer's averments in articles 12 to 18 were said to be a relevant

response to the defender's defence of "honest opinion" because they provided relevant context, specifically shedding light on whether Mr Simpson genuinely held the asserted "opinion" imputed to him. Counsel submitted that Mr Simpson could not honestly have believed the (pursuer's) asserted meaning, standing his direct involvement in the collective bargaining procedure (both as a representative of the defender and as the author of the Tweets), all viewed in the context of Mr Simpson's knowing threat to cause more damage to the pursuer's business. For these reasons, the averments in articles 12 to 18 were said to be relevant.

[31] The pursuer's counsel conceded that if his submission on the meaning of the Tweets was wrong, that would put an end to the pursuer's case. The defence of truth was only relevant if the pursuer was correct in its averred meaning. In that event, a proof would be required to ascertain *inter alia* (i) whether there had indeed been a reduction in wages; and (ii) whether the parent company's profit was £5.5 million or only £260,789.

The defender's supplementary submissions

[32] In supplementary submissions for the defender, counsel submitted that the reference to the alleged "£5.5 million" (turnover or profit) should not assume a greater significance than it merited. The key issue was the meaning of the word "reduced". That was said to be a self-contained issue. In the defender's submission, it simply meant a reduction in wage scale. Since the pursuer had pled only one defamatory meaning (namely, that the wages of workers at Brel had been reduced: article 21), the pursuer's case must fail. The "context" referred to in paragraph (c) of article 21 (namely, the parent company's alleged profit of £5.5 million) did not alter the single averred defamatory meaning. It was submitted that if the meaning of the "£5.5 million" reference were to feature heavily in the court's thinking,

then that issue may be difficult to resolve at debate because the rest of the Tweet would require to be considered, including the conversation that followed from third parties. The whole conversation would have to be looked at. Nevertheless, for the purposes of the debate, the defender's counsel was content to concede, that if the proper meaning of the Tweets was that the employees' wages (or hourly rate) were being reduced, then such a meaning would be defamatory; and, to that extent, it would not be necessary to look at the disputed issue of the meaning of the reference to "£5.5 million" (although that issue may be relevant to the magnitude of any alleged loss at a subsequent proof before answer).

[33] The defender's counsel also observed that the pursuer had contended (in submission) that the Tweets were defamatory because employees under 23 years of age were not reduced to the minimum wage, but this was not part of the pursuer's *averred* defamatory meaning in relation to the First Tweet. In any event, it was said to be still unclear how the content of the Second Tweet added anything defamatory to the content of the First Tweet. The defender's counsel acknowledged that the defence of honest opinion was not applicable to the First Tweet, but it did apply to the Second Tweet. Further, it was submitted that the onus was on the pursuer to show that what the defender said was not honest opinion and that the defender did not genuinely hold the opinion stated; but there was said to be no averment that Mr Simpson did not genuinely believe the opinion conveyed. Insofar as articles 12 to 18 sought to disclose some form of "intention" to cause deliberate harm (or threat to do so) they were said to be irrelevant to quantum because the pursuer, as a corporate pursuer, could not claim solatium.

[34] The parties referred to *Sim* v *Stretch* [1936] 2 All ER 1237, 1240; *Russell* v *Stubbs* 1913 SC (HL) 14, 20; *James* v *Baird* 1916 SC (HL) 158, 163 and 165; *Wildcat Haven Enterprises* v *Wightman* 2020 SLT 473, 481; *Campbell* v *Ritchie & Co* 1907 SC 1097; *Leon* v *Edinburgh Evening*

News 1909 SC 1014; *Macleod* v *Newsquest (Sunday Herald) Limited* 2007 SCLR 555 and *Stocker* v *Stocker* 2020 AC 593.

The three-stage process

[35] In a defamation action, a three-stage process is discernible. Firstly, it is for the pursuer to state definitely, in averment, the meaning or meanings which he alleges the impugned words bear (*Russell* v *Stubbs Ltd* 1913 SC (HL) 14, 24). In that way the pursuer puts that alleged meaning in issue. Where the words complained of are not "obviously and on the face of it defamatory" the pursuer may put the meaning in issue by averring that the meaning is to be inferred from the words used, or on the basis of circumstances extrinsic to the words used which disclose, by reasonable inference, the offending imputation (*McCann* v *Scottish Media Newspapers Ltd* 2000 SLT 256, 261C-D).

[36] Secondly, the court must then decide whether the words used (and the inferences they are said to bear) would have conveyed to the ordinary reasonable reader the averred meaning or meanings contended for. Put another way, it is for the court to determine the true meaning of the words used. In Scotland, contrary to the position in England, a pursuer is restricted to the meaning(s) averred. In other words, it is not open to the court to substitute an alternative defamatory meaning for that averred by the pursuer (*Russell* v *Stubbs*, *supra*, 20 per Lord Kinnear; *James* v *Baird* 1916 SC (HL) 158, 163 and 165). Therefore, if, at the second stage of the process, the court determines that the true meaning of the words is different from the pursuer's averred meaning, the pursuer's claim fails.

[37] Thirdly, once it has been determined whether the words used can bear the averred meaning(s) complained of by the pursuer, the remaining question is whether that meaning is defamatory. Whether the statement complained of is reasonably capable of bearing a

defamatory meaning is also question of law for the court (*Russell* v *Stubbs*, *supra*).

A statement is taken to be defamatory if it causes harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons) (Defamation and Malicious Publication (Scotland) Act 2021, section 1(4)). This modern statutory reformulation is based on Lord Atkins familiar common law test in *Sim* v *Stretch* [1936] 2 All ER 1237, 1240: "Would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?"

[38] In the present case, the first and third stages are not in dispute: the pursuer has averred a contended meaning (stage 1) and the parties have agreed that, if that averred meaning is indeed the correct meaning, it would be defamatory (step 3). The only issue for determination by me is whether the words used (and the inferences they are said to bear) would have conveyed to the ordinary reasonable reader the meaning averred and complained of by the pursuer (step 2).

The law

[39] Having identified the issue for determination, the key question is not: "What does this statement mean?" That would lead too easily to abstraction. The correct question is: "What would the words used convey to the 'ordinary reasonable reader'?" In addressing that question, the context and circumstances of the statement are significant (*Stocker* v *Stocker* 2020 AC 593). In a case such as this, the fact that the offending statement was a post on a social media platform is critical. I shall return to that particular context shortly.

[40] In the meantime, it may be helpful to revisit the well-recognised principles that have emerged over many years to assist the courts in defamation actions in deciding what meaning should be attributed to words used in offending statements. In *MacLeod* v

Newsquest (Sunday Herald) Ltd 2007 SCLR 555, [12]-[15]), these rules were summarised as follows:

(1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the material once. Although there are dicta which express the question for the court in terms of whether the words are "capable of the defamatory meaning ascribed to them" (*Russell* v *Stubbs Ltd*, *supra*, page 20; *Sim* v *Stretch*, *supra*, 1240), the word "capable" must be read in a special sense. The question is not simply whether the material is theoretically capable of bearing the asserted meaning. Attention must focus on the "reasonable, natural or necessary" interpretation of the words (*Russell* v *Stubbs Ltd*, *supra*, 23 per Lord Shaw of Dunfermline). When the matter is one of inference, it is the inference of the reasonable person that forms the test. It is never a matter of how the words were actually "intended to be construed". Rather the test is an objective one: whether the circumstances "provide grounds for a reasonable inference" that the meaning contended for was intended (*Gollan* v *Thomson Wyles Co*, page 604).

(2) The material complained of must be read as a whole. It is not sufficient for a pursuer to rely merely on selected excerpts from the communication and to provide his own commentary on those parties extracts. Therefore, a claimant cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage (*Charleston* v *Newsgroup Newspapers Ltd* [1995] 2 AC 65, 70). So, if, in one part of a publication, something disreputable to the claimant is stated, but that is removed by the conclusion by another part of the communication, "the bane and antidote must be taken

together" (*Chalmers* v *Payne* (1835) 2 Cr MR 156, 159 cited with approval in *Charleston*, *supra*).

(3) Any "strained and sinister" interpretation is to be left out of account (*Russell* v *Stubbs Ltd*, supra, 23).

(4) Any inference that might be drawn by the "unusually suspicious" person is to be disregarded (*Lewis* v *Daily Telegraph Ltd* [1964] AC 234, 259).

(5) The hypothetical reasonable reader (or viewer) is not naïve but he is also not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking. But he must be treated as being a person who is not avid for scandal and someone who does not and should not select one bad meaning where other non-defamatory meanings are available (*Gillick* v *British Broadcasting Corporation* [1996] EMLR 267 referred to with approval by Lord Macphail in *MacLeod* v *Newsquest (Sunday Herald) Ltd*, *supra*).

(6) While limiting its attention to what the defender has actually said or written, the court should be cautious of an over-elaborate analysis of the material in issue.

(7) A television audience would not give a programme the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article.

(8) Again in deciding what impression the material complained would have been likely to have on the hypothetical reasonable person, the court is entitled (if not bound) to have regard to the impression that it made on it.

(9) The court should not be too literal in its approach.

(10) When considering the meaning of an impugned statement, the intention of the maker of the statement is irrelevant.

(11) In determining whether a statement is defamatory, the published item must be read as a whole. For example, the defamatory nature of a newspaper headline is capable of being negated by reading the text of the article (*Campbell* v *Ritchie & Co* 1907 SC 1097; *Leon* v *Edinburgh Evening News* 1909 SC 1014).

[41] The advent of the 21st century brought with it "a new class of reader: the social media user" *(Stocker*, *supra*, [41]). When an allegedly defamatory statement is made on social media, that fact is in itself a significant contextual circumstance in the interpretation of the statement. The correct approach to the interpretation of such social media communications is explained by the Supreme Court in *Stocker* (paras [39] - [45]). Most significantly, social media must be recognised as being a casual medium. It is fast-moving. It is in the nature of conversation rather than carefully chosen expression. So "it would be wrong to engage in elaborate analysis of a 140 character tweet" (*Monroe* v *Hopkins* [2017] 4 WLR 68, para [35], cited with approval in *Stocker*, [42]). An "impressionistic approach" is much more fitting and appropriate to the medium. It is "very important" not to be "over-analytical" (*Monir* v *Wood* [2018] EWHC 3525, para [90] per Nicklin J cited with approval in *Stocker*, [44). People tend to scroll quickly through social media. They do not pause and reflect. They do not ponder on what meaning the statement might possibly bear. Their reaction to a communication is impressionistic and fleeting. The meaning that an ordinary reasonable reader will receive from a tweet is likely to be more impressionistic than, say, from a newspaper article which (simply in terms of the amount of time that it takes to read) allows for at least some element of reflection and consideration. The essential

message that is being conveyed by a tweet is likely to be absorbed quickly by the social media reader (*Monir*, [90]; *Stocker*, [44]).

[42] That said, this impressionistic approach must take account of the whole tweet (or post, as the case may be) and the context in which the ordinary reasonable reader would read it. That context includes (a) matters of ordinary general knowledge and (b) matters that were put before that reader via the social media platform, such as parts of a wider conversation in which the offending communication appeared, and which the hypothetical ordinary reader is likely to have read (*Monroe,* [35]; *Stocker*, [42]). This may include an earlier tweet or reply which was available to view on the same page as the offending material, or earlier material, if it is sufficiently closely connected with the impugned communication (*Wildcat Haven Enterprises* v *Wightman* 2020 SLT 473, 481J, following *Monroe, supra*).

The First Tweet

[43] Applying these principles, what would the words used in the First Tweet convey to the ordinary reasonable reader? It stated: "Workers at Brel… have been told that they will no longer be paid the real living wage and will be reduced to minimum wage." The defender's counsel argued that the meaning conveyed to the ordinary reasonable reader would be that workers were being "reduced" from one *wage scale* to another *wage scale.* In other words, the wage scales may have changed (with a reduction from one scale to a less generous scale), but the ordinary reader would not understand that to mean that the wages themselves had reduced.

[44] It was an attractive argument, but I am not persuaded that it is correct. It requires too subtle an analysis for the casual, fast-scrolling, flitting and fleeting social media user. It proceeds upon an over-elaborate analysis, not an impressionistic reading.

[45] In my judgment, the meaning conveyed by the First Tweet to the ordinary, reasonable Twitter user is that the workers' wages were being "reduced". They were to be paid less. They were to get a pay-cut. That is the inescapable, impressionistic meaning conveyed to the ordinary reasonable social media user.

[46] This conclusion rests on three key features of the Tweet. Firstly, the critical word in the statement is "reduced". The ordinary natural meaning of the word "reduced" is to make something smaller or less in amount. It is the opposite of "increased".

[47] Secondly, the key word "reduced" appears in close proximity to the word "wage" (which itself appears twice). This conveys the irresistible impression to an ordinary reader of the Tweet that it is the "wage" to be "paid" to the Brel workers that is being "reduced".

[48] The words "wage scale" do not appear in the tweet at all; the tweet does not state merely that a wage scale is to be "changed" (in some neutral or benign sense); and the tweet certainly does not say that, notwithstanding a "change" in wage scale, the workers' wages will actually increase due to a recent or coinciding review of the rates payable under the new wage scale, albeit that increase may be less than would otherwise have been paid if the workers had remained on the original wage scale. All of this is an over-elaborate, over-analytical gloss on the tweet, skilfully decorated upon it by the defender's counsel in the more reflective, more thoughtful, more interrogative context of a court pleading. It is not an interpretation that emerges on a casual and impressionistic reading by the ordinary social media user, who scrolls, reads, and "passes on" (*Stocker, supra*). The context of the impugned statement (appearing as it does on a social media post) is critical.

[49] Thirdly, another contextual consideration points in favour of the pursuer's contended meaning. The "context" in which the ordinary social media user would read the tweet includes "matters of ordinary general knowledge" (*Stocker*, para [42], citing *Monroe*). In the first place, I take it to be within the "ordinary general knowledge" of the ordinary reasonable social media user that Parliament has legislated for an obligatory "minimum" hourly wage rate to be paid by employers to workers depending on their age and status. Beyond that general understanding, I would not impute to the ordinary reasonable social media user any more detailed knowledge of the statutory "minimum wage" regime (such as the precise hourly rate or rates prevailing from time to time; or when those hourly rates may have been reviewed, increased or reduced). The "ordinary general knowledge" to be attributed to the ordinary social media user is more high-level and general in nature. In the second place, I take it to be within the "ordinary general knowledge" of the ordinary reasonable social media user that the "real living wage" is a minimum hourly wage; that it is an hourly wage that is recommended to be paid by employers to workers; that it is higher (that is, more generous) than the statutory minimum wage; but that it is non-statutory and non-binding. Again, beyond that general understanding, I would not impute to the ordinary reasonable social media user any more detailed knowledge of the real living wage (such as the precise hourly rate or rates prevailing from time to time; or who fixes that wage; or what considerations are taken into account in recommending that wage).

[50] Therefore, reading the First Tweet in this wider context of a high-level "ordinary general knowledge" of the "real living wage" and the statutory "minimum wage", the ordinary reasonable Twitter reader would understand the First Tweet to mean that workers at Brel will no longer be "paid" the (higher, more generous) real living wage but will instead be "reduced" to the (lower, less generous) statutory minimum wage. But the essential

meaning remains the same: the workers' wages were being "reduced". They were to be paid less. They were to get a pay-cut. The meaning to be taken from the First Tweet is no more elaborate than that. Accordingly, the pursuer's averred meaning is indeed the meaning that would be conveyed to the ordinary reasonable reader of the First Tweet.

[51] If the defender had wished to communicate a more subtle meaning, Twitter was not the place to do it. In the bear-pit of social media, nuance is lost amidst the babble of the online throng and the blizzard of the infinite scroll.

The Second Tweet

[52] The Second Tweet reproduces (or "embeds") the First Tweet. They have the same meaning, as explained above. Accordingly, again, the pursuer's averred meaning correctly articulates the meaning that would be conveyed to the ordinary reasonable reader of the Second Tweet.

[53] The following additional statement appears in the Second Tweet: "This company makes millions from the hard work of our members who've been told that they're just not worth that extra 48p…" On an impressionistic reading, the reference in the Second Tweet to "that extra 48p" would simply be understood as the quantified "reduction" in the "wage" to be paid to the Brel workers, as earlier described in the First Tweet. The ordinary reasonable social media user would be aware of the "real living wage" and the statutory "minimum wage"; he would be aware that the former is higher than the latter; but he would not be imputed with knowledge of the precise difference between those hourly rates (or the dates of review or fluctuation of those rates). What would be taken from this Second Tweet is that the workers' wages were being cut ("reduced") - and that that cut equated (rightly or wrongly) to 48 pence per hour.

The defence of truth

[54] It is a defence to defamation proceedings for the defender to show that the imputation conveyed by the statement complained is "true or is substantially true" (2021 Act, section 5(1)). This replaces the previous defence of *veritas*. The burden of proof is on the defender to establish the truth of the imputation. Where the statement conveys "two or more distinct imputations" it is sufficient for the defender to show that the imputation that caused the "serious harm" is true or substantially true, provided the other imputations have not themselves caused serious harm (2021 Act, section 5(2)). The defender does not have to prove that every word published was true. He has to establish the "essential" or "substantial" truth of the sting of the libel (*Chase* v *News Group Newspapers Ltd* 2002 EWCA Civ 1772; *Gatley*, 12-002).

[55] Standing the averments, the truth of the impugned statements would be a matter for proof.

The defence of "honest opinion"

[56] In respect of the Second Tweet only, the defence of "honest opinion" is also advanced by the defender. Honest opinion has replaced the previous defence of "fair comment" (2021 Act, section 7). In order to establish the defence of honest opinion, the defender has to show that three conditions are met. First, the offending statement must be a statement of opinion. This can include a statement that "draws an inference of fact" (2021 Act, section 7(7)). Second, the statement must indicate, either in general or specific terms, the evidence on which it was based. In this context, "evidence" includes any fact which existed at the time the statement was published or anything the defender reasonably

believed to be a fact at the time the statement was published. Third, it must be shown that an honest person could have held the opinion conveyed by the statement (2021 Act, section 7). The defence of "honest opinion" fails if the pursuer shows that the defender did not genuinely hold the opinion conveyed by the statement (2021 Act, section 7(5)).

[57] The defender challenged the relevancy of the pursuer's averments in articles 12 to 18. In my judgment, the pursuer's averments are a relevant response to the defender's averments of "honest opinion" because they provide relevant context and shed light on whether Mr Simpson genuinely held the asserted "opinion" imputed to him. The pursuer is offering to prove that Mr Simpson could not honestly have believed the (pursuer's) averred meaning, standing (i) his direct involvement in the collective bargaining procedure and (ii) his alleged knowing threat to cause more damage to the pursuer's business. To this extent also, the defender's preliminary plea falls to be repelled.

Decision

[58] Accordingly, I sustain the defender's preliminary plea in part only, to the limited extent of deleting, of consent, the averments highlighted in yellow in the working copy of the certified closed record dated 9 January 2024. *Quoad ultra* I shall repel the defender's preliminary plea. A hearing will be assigned to determine further procedure. Expenses are reserved meantime.