Neutral Citation Number: [2024] EWHC 1533 (KB)

Case No: KB-2024-000030

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2024

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

PROSPECT	**Claimant**
- and -	
ANDREW EVANS	**Defendant**

- -
- -

David Lemer (instructed by **Pattinson and Brewer Solicitors**) for the **Claimant**
The **Defendant appeared in person**

Hearing dates: 11 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

Introduction

1. Does a trade union have the right to sue in defamation? Prospect, a trade union, has brought claims in defamation and malicious falsehood against Mr Andrew Evans, a member of that trade union at the time of the publication (but now a former member). Mr Evans has applied for a declaration, pursuant to CPR 11, that the Court has no jurisdiction to hear the defamation claim as the claimant – being a trade union – has no standing to pursue a claim in defamation. He subsequently indicated that he also wishes to rely on CPR 3.4.

The relevant CPR provisions

2. Rule 11(1) of the Civil Procedure Rules provides:

> "(1) A defendant who wishes to –
>
> (a) dispute the court's jurisdiction to try the claim; or
>
> (b) argue that the court should not exercise its jurisdiction,
>
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have."

3. In this context, "*jurisdiction*" is a reference to the court's power or authority to try a claim. An application may be made under rule 11(1) on the basis that the court has no jurisdiction to try the claim or that the court should not exercise its jurisdiction to try the claim, or both in the alternative.

4. The defendant submits that the claimant has no standing to bring a defamation claim. He contends that it is appropriate to making this application under CPR 11 because in *R v Secretary of State for Social Security ex p Child Poverty Action Group* [1990] 2 QB 540 Woolf LJ stated at 556E that "*the question of locus standi goes to jurisdiction of the court*".

5. However, that was a judicial review claim. Section 31(3) of the Senior Courts Act 1981 provides that the court "*shall not*" grant leave to apply for judicial review "*unless it considers that the applicant has a sufficient interest in the matter to which the application relates*". A claimant who does not have a "*sufficient interest*" lacks standing to bring a judicial review claim, and it is well established that the parties are not entitled to confer jurisdiction by consent. This claim is not for judicial review and s.31(3) of the 1981 Act is inapplicable. In my judgment, the *Child Poverty Action Group* case is of no relevance in considering whether the court has jurisdiction in respect of this claim for defamation and malicious falsehood.

6. Mr David Lemer, Counsel for the claimant, draws attention to the fact that there is no dispute that the court has jurisdiction to determinate part of the claim, namely the claim in malicious falsehood. That being the case, he questions whether Mr Evans has pursued the correct procedural route in bringing his application under CPR 11. Nevertheless, the claimant recognises that if the court were to accept Mr Evans' contention that a

trade union cannot sue in defamation then it would be open to the court to strike out the defamation claim under CPR 3.4(2)(a). In these circumstances, the claimant has invited the court to determine the question that I posited at the outset of this judgment under whatever procedural limb the court sees fit.

7. In my judgment, whether or not a trade union is entitled to bring a claim for defamation, the court has jurisdiction to determine this defamation and malicious falsehood claim. As the claimant has correctly identified, if as a trade union it has no right to bring a defamation claim, that cause of action would fall to be struck pursuant to CPR 3.4(2)(a). The latter provision gives the court power to strike out a statement of case if it appears to the court "*that the statement of case discloses no reasonable grounds for bringing … the claim*". The proper procedural route for challenging the claimant's right to bring a claim in defamation is CPR 3.4(2)(a) rather than CPR 11.

The relevant legislative provisions

8. The concept of a trade union is defined, for the purposes of the Trade Union and Labour Relations Act (Consolidation) Act 1992 ('the 1992 Act'), as:

> "an organisation (whether temporary or permanent) –
>
> (a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or
>
> (b) which consists wholly or mainly of –
>
> (i) constituent or affiliated organisations which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or
>
> (ii) representatives of such constituent or affiliated organisations,
>
> and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations."

9. Chapter II (ss.10-23) of Part I (ss.1-121) of the 1992 Act is entitled "*Status and Property of Trade Unions*". The key provision, for the purposes of this application, is section 10, which provides so far as relevant:

> "**Quasi-corporate status of trade unions.**
>
> (1) A trade union is not a body corporate but –
>
> (a) it is capable of making contracts;

> (b) it is capable of suing and being sued in its own name, whether in proceedings relating to property or founded on contract or tort or any other cause of action; and
>
> (c) proceedings for an offence alleged to have been committed by or on its behalf may be brought against it in its own name.
>
> (2) A trade union shall not be treated as if it were a body corporate except to the extent authorised by the provisions of this Part.
>
> …" (Emphasis added.)

10. As I explain in paragraph 38 below, Mr Evans relies on section 12(2) of the 1992 Act, which provides:

> "A judgment, order or award made in proceedings of any description brought against a trade union is enforceable, by way of execution, diligence, punishment for contempt or otherwise, against any property held in trust for it to the same extent and in the same manner as if it were a body corporate." (Emphasis added.)

11. A limited restriction on the liability of trade unions in certain proceedings in tort, essentially in respect of acts relating to inducing persons to break contracts, is provided in s.20. It does not limit the liability in defamation of trade unions, and it is common ground that trade unions can *be sued* in defamation: see, for example, *Turley v Unite the Union* [2019] EWHC 3547 (QB). Section 22 provides a limitation on the amount that may be awarded against a trade union by way of damages in certain types of tort proceedings. The limit of £1 million in respect of a union such as Prospect, with more than 100,000 members, would be of no consequence if it were sued in defamation, given the level of awards.

12. Section 127 of the 1992 Act provides:

> "**Corporate or quasi-corporate status of employers' associations.**
>
> (1) An employers' association may be either a body corporate or an unincorporated association.
>
> (2) Where an employers' association is unincorporated –
>
> (a) it is capable of making contracts;
>
> (b) it is capable of suing and being sued in its own name, whether in proceedings relating to property or founded on contract or tort or any other cause of action; and
>
> (c) proceedings for an offence alleged to have been committed by it or on its behalf may be brought against it in its own name."

13. Section 12(2) applies "*to an unincorporated employers' association as in relation to a trade union*": s.129(1)(a) of the 1992 Act.

The approach to consolidation Acts

14. In *Farrell v Alexander* [1977] AC 59, the House of Lords addressed the proper approach to the construction of consolidation Acts. Lord Wilberforce observed, at 72H-73C, that the court should firmly resist the tendency, where a consolidation Act is under consideration, to:

> "automatically look back through the history of its various provisions, and the cases decided upon them … But unless the process of consolidation, which involves much labour and careful work, is to become nothing but a work of mechanical convenience, I think that this tendency should be firmly resisted; that self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that the recourse should only be had where there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve."

15. Similarly, Lord Simon observed at 82C-D:

> "…once a consolidation Act has been passed which is relevant to a factual situation before a court, the 'intention' of Parliament as to the legal consequences of that factual situation is to be collected from the consolidation Act, and not from the repealed enactments. It is the relevant provision of the consolidation Act, and not the corresponding provision of the repealed Act, which falls for interpretation. It is not legitimate to construe the provision of the consolidation Act as if it were still contained in the repealed Act – first, because Parliament has provided for the latter's abrogation; and secondly because to do so would nullify much of the purpose of passing a consolidation Act."

16. Lord Simon identified an exception "*where the purpose of a statutory word or phrase can only be grasped by examination of the social context in which it was first used*" (84A). Save in that exceptional case, the primary approaches to statutory interpretation are:

> "as appropriate for construction of a consolidation Act as for any other type of statute. It is only on failure of the primary aids to construction that the fact that the statute to be construed is a consolidation Act permits any special approach: what it does then is to provide an additional secondary canon of construction which will sometimes be of service – namely, a presumption that a consolidation Act (in so far as it merely re-enacts) does not change the law" (84D-E).

17. To the same effect, Lord Edmund-Davies observed that a consolidating Act:

> "must initially be regarded as standing on its own feet. On the decided cases, only if its wording is ambiguous and its ambit obscure is one permitted to consider its legislative ancestry" (97B-C).

18. The proper approach to consolidation Acts is accurately summarised in *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed., 2020) at §24.7:

> "(1) In the first instance a consolidation Act is to be construed in the same way as any other Act, without reference back to earlier provisions or case law.
>
> (2) If, however, real doubt arises as to the legal meaning of a consolidation Act:
>
> (a) the presumption that consolidation is not intended to change the law comes into play; and
>
> (b) in applying that presumption, recourse may be had to earlier legislation and case law.
>
> (3) The rules described above apply not only to pure consolidation but also to consolidation with amendments so far as the provisions of the consolidation Act are unaffected by those amendments.
>
> …"

The EETPU case

19. The key authority on which Mr Evans relies for the proposition that a trade union is not entitled to bring a defamation claim is *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd* [1980] 1 QB 585 ('the *EETPU case*'). In the *EETPU case* O'Connor J held that the claimant trade union was not entitled to maintain an action for defamation in its own name because such an action must be founded on possession of a personality, and s.2(1) of the Trade Union and Labour Relations Act 1974 ('the 1974 Act') had the effect of removing that personality from the claimant.

20. Given the focus on this authority in the parties' submissions, I shall address it in some detail without, at this stage, determining whether reference to it, and the earlier statutory provisions considered in it, is appropriate, applying the approach to the construction of consolidation Acts to which I have referred. That is an issue I address in the discussion section further below.

21. In the *EETPU case,* O'Connor J cited the undisputed principle that "*the action for defamation is a personal matter because it is the reputation of the person which is defamed, and unless one can attach a personality to a body, it cannot sue for defamation*" (595A-B). He observed that the law is clear that an individual, a corporate body and a partnership can sue for libel (565D-F) and then said at 565G:

> "How then can an unincorporated body ever sue for libel in its own name? The answer on the cases is, I think, now beyond

> dispute. It is that the necessary personality must be found in some statute, or alternatively, in some grant which enables one to say of an unincorporated body that it has a sufficient personality which it is entitled to protect by bringing an action in libel."

22. O'Connor J then addressed the historical position of trade unions at 596A-598C. He observed:

    i) "*The Trade Union Acts since 1871 have recognised trade unions, but they were without question unincorporated associations, and as such one would have thought that they could neither sue in their own names, nor be sued, and as such could not be defamed in their proper name.*" (596B-C)

    ii) In *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426, the House of Lords introduced what came to be called "*a quasi-corporation, or a near corporation*". Looking at the provisions of the Trade Union Act 1871, the House of Lords concluded that "*the trade union had a sufficient personality … so that it could be sued in its own name*". "*The reverse of that coin necessarily followed; if it could be sued so also it could maintain an action in its own name and … unions soon did so perfectly properly.*" (596C-E; 596H-597A)

    iii) Parliament enacted the Trade Disputes Act 1906 "*to reverse the decision of the House of Lords in the Taff Vale case*" which had enabled the plaintiffs to sue the union in tort. The 1906 Act relieved trade unions of *liability* in tort, including libel. (596E-F; 597A-B)

    iv) The 1906 Act "*left quite unaffected the decision of the House of Lords that this unincorporated body, because of the effect of the statute to which it was subject, had a quasi-corporate personality*". Trade unions brought actions in their own name, including suing "*for libel as early as 1913*". (596F-G)

    v) In *National Union of General and Municipal Workers v Gillian* [1946] KB 81, a decision which O'Connor J observed was binding on him, the Court of Appeal decided that "*the trade union could sue in its registered name for defamatory statements touching its reputation*" (596G; 597B).

    vi) Whereas the Court of Appeal in *Gillian* considered that the Trade Union Acts had created an entirely separate entity, the House of Lords in *Bonsor v Musicians' Union* [1956] AC 104 were divided. O'Connor J observed:

> "Lord Morton and Lord Porter appeared to adopt the legal entity stance. Quite clearly Lord MacDermott and Lord Somervell did not. They took the view that a trade union was a quasi-corporation; that it had not got a brand new entity, or a corporate entity, or personal entity of its own, but that it had, because of the position imposed upon the unincorporated association by the Trade Union Acts, as analysed in the *Taff Vale* case, got a quasi-corporate personality quite sufficient for it to be separate from its members, which was the point in

> the Bonsor case where it was a member who was suing the union for wrongful expulsion. That left the fifth member of the House, Lord Keith, and his speech has been much analysed in the argument before me, but I have come to the conclusion that the best one can do with his thinking is to say that he comes down more nearly on the side of Lord MacDermott and Lord Somervell than he does on that of Lord Porter and Lord Morton."

vii) Despite that divergence in the reasoning of members of the Judicial Committee, O'Connor J concluded that following *Gillian* and *Bonsor* "*it seems to me to be clear that the trade union was clothed with a quasi-personality which enabled it to sue in its own name and to be sued in its own name where actions against it were permissible, and that was the basis for a trade union being able to protect its reputation by bringing an action for libel*" (597H-598A). By the mid-1950s, if not before, it was clear that a trade union was entitled, in law, to sue for libel (598A-B).

viii) In *Bonsor* in the Court of Appeal, Denning LJ observed that "*as simple matter of fact, not law, a trade union has a personality of its own distinct from its members*": *Bonsor v Musicians' Union* [1954] Ch 479, 507. O'Connor J concluded that it remained "*as true today as it was in 1954 and indeed, one might say from 1901 onwards*" that as a matter of fact, as distinct from law, a trade union has a distinct personality (598B-C).

ix) In the Industrial Relations Act 1971 effect was given to a recommendation made by a Royal Commission, under the chairmanship of Lord Donovan, that unions should be bodies corporate. That "*statute met with determined opposition from trade unions and in due course it was repealed*" and replaced by the 1974 Act (which was in force when O'Connor J gave his judgment). (598E-F)

23. Section 2 of the 1974 Act (which has since been replaced by s.10 of the 1992 Act, set out in paragraph 9 above) was in the following terms:

> "**Status of trade unions**
>
> (1) A trade union which is not a special register body shall not be, or be treated as if it were a body corporate, but –
>
> (a) it shall be capable of making contracts;
>
> (b) all property belonging to the trade union shall be vested in trustees in trust for the union;
>
> (c) subject to section 14 below, it shall be capable of suing and being sued in its own name, whether in proceedings relating to property or founded on contract or tort or any other cause of action whatsoever;

> (d) proceedings for any offence alleged to have been committed by it or on its behalf may be brought against it in its own name; and
>
> (e) any judgment, order or award made in proceedings of any description brought against the trade union on or after the commencement of this section shall be enforceable, by way of execution, diligence, punishment for contempt or otherwise, against any property held in trust for the trade union to the like extent and in the like manner as if the union were a body corporate."

24. Section 3 of the 1974 Act (which has since been replaced by s.127 of the 1992 Act, set out in paragraph 12 above) was in the following terms:

> **Status of employers' associations.**
>
> (1) An employers' association may be either a body corporate or an unincorporated association.
>
> (2) Where an employers' association is unincorporated –
>
> (a) it shall be capable of making contracts;
>
> (b) all property belonging to the employers' association shall be vested in trustees in trust for the association;
>
> (c) subject to section 14 below, it shall be capable of suing and being sued in its own name, whether in proceedings relating to property or founded on contract or tort or any other cause of action whatsoever;
>
> (d) proceedings for any offence alleged to have been committed by it or on its behalf may be brought against it in its own name; and
>
> (e) any judgment, order or award made in proceedings of any description brought against the employers' association on or after the commencement of this section shall be enforceable, by way of execution, diligence, punishment for contempt or otherwise, against any property held in trust for the employers' association to the like extent and in the like manner as if the association were a body corporate.."

25. Subject to limited exceptions, section 14 of the 1974 Act provided that no action in tort shall lie against a trade union (other than a special register body) or against an employers' association. The immunity given by s.14 was "not as wide as that in the Act of 1906" (602B), but much wider than that given by s.20 of the 1992 Act. While the 1974 Act was in force, neither a trade union nor an employers' association could *be sued* in defamation.

26. O'Connor J held that the words "*or be treated as if it were*" in s.2(1) of the 1974 Act (599F):

> "are absolutely clear and they say that a trade union is not to be a body corporate, and it is not to be treated as if it were a body corporate. That is, it is removing from the status of a trade union that which had been accorded to it from 1901 until 1971, when the matter was changed; and there it is."

He observed that having found them to be absolutely clear, he must give effect to them "*even though the result produced may be one which strikes me as being absurd*" (599B), whilst noting that it did not follow that the result to which he was driven was "*necessarily an absurdity*" (599E),

27. O'Connor J concluded at 600A-C:

> "If the words 'or be treated as if it were' were not in section 2(1), there would be absolutely no difficulty because all those powers which are attributed and given to trade unions make it quite clear that if they are, as the section would say, not a body corporate, they had the attributes of one and they were to be treated as one, so that they could possess the necessary personalities which they could protect by the action of defamation; but the words are there, and the words say that that is exactly what is not to be done. I do not find any ambiguity in them. It was submitted by Mr Kempster that the words should be read as though the words 'as if it were' were not there, namely, that a trade union shall not be, or be treated as, a body corporate, leaving it open to treat it as a quasi-corporation. I would willingly adopt that construction if I thought it permissible, because, as I have said, the matters contained in paragraphs (a) to (e) of section 2(1) of the Act of 1974 would give a trade union all the attributes of a quasi-corporation, and there would be no difficulty."

28. He noted the difference between section 2(1) and section 3(1), with the latter permitting an employers' association to be either a body corporate or an unincorporated association. He observed that subparagraphs (a) to (e) of section 3(2), which applied to unincorporated employers' associations, were identical to the corresponding subparagraphs of section 2(1), giving them powers that a *corporate* employers' association would have in any event (600D-E). O'Connor J stated at 600E-601B:

> "… so an employers' association which is an unincorporated association enjoying those powers, in my judgment, there being no restricting words, is quite plainly a quasi-corporation and has the power and the necessary personality to protect its reputation by an action for defamation; and it is that which really creates the difficulty because, as I have said, unless I was absolutely driven to it, I would not construe the Act as removing from trade unions the personality which enables them to sue in libel while preserving it for employers' associations, but regretfully I have

> to construe the words of the Act and section 2(1), to my mind, is not ambiguous and that is exactly what it does …
>
> The fact that it can sue in tort does not mean that it can complain of the tort of libel. That is procedural. The tort of libel, as I have already demonstrated, must be founded on possession of a personality which can be libelled and section 2(1) has removed that personality from the trade unions. I find nothing in the statute to show that those words are ambiguous. There are many attributes which, but for the presence of the words 'or be treated as if it were' in section 2(1), would simply confirm that a trade union enjoyed a quasi-corporate personality and could bring an action in libel in its own name for the protection of its own reputation, and, as I have said, I am quite clear that apart from the law anybody would say that a trade union has a separate reputation and should be entitled to protect it; but there it is. Parliament has deprived the trade union of the necessary personality on which an action for defamation depends…" (Emphasis added.)

Consideration of the EETPU case in subsequent authorities and academic works

29. The eighth edition of *Gatley on Libel and Slander* ('Gatley') published in 1981, addressed the question whether trade unions can sue for libel or slander at §970 in the following terms:

> "Although the 1974 Act provides that a trade union shall not be, *or be treated as if it were*, a body corporate it also provides that subject to the protection of section 14 'it shall be capable of suing and being sued in its own name, whether in proceedings relating to property or founded on contract or tort or any other cause of action whatsoever.' Under the legislation which governed trade unions up to 1971, it was accepted that although they were not corporations they could sue for libel and it is submitted that this is still the case notwithstanding the decision to the contrary in *E.E.P.T.U.* [sic] *v The Times*." (Original emphasis.)

30. In footnote 87, the authors submitted that O'Connor J was "*in error*" in concluding that the italicised words meant that a union could not now have sufficient corporate personality to be able to bring a libel action:

> "(1) Whatever the meaning of the italicised words they cannot exclude any incident of status simply because it is one which also attaches to corporations. For instance, the inference from the fact that a trade union can sue in its own name in proceedings founded on contract is that contracts can be made in the name of the union, and this inference cannot be excluded simply because corporations can also contract in their own name. Similarly, it is submitted that to hold that a trade union can sue in libel is not to treat it as if it were a corporation.

> (2) This is not the place to analyse in detail the judgments in *Taff Vale Ry. Co. v Amalgamated Society of Railway Servants* [1901] AC 426, in which the House of Lords held, even in the absence of express provisions such as are contained in s.2(1)(a)-(e) that a trade union could be sued in tort, and *Bonsor v Musicians' Union* [1956] AC 104 in which the House of Lords held that a member could sue the union in damages for breach of contract. Although the words 'quasi-corporation' have been used in relation to a trade union the two main strands of thought are, firstly, that the legislature had created a new kind of entity or thing, separate from its members and, secondly, that a trade union did not have a new status amounting to a legal personality distinct from its membership. In neither strand is a union treated as a body corporate, though on the first approach it is treated as a *persona juridica*.
>
> (3) If the first approach is correct, and this is the one adopted in *NUGMW v Gillian*, *supra*, there is no reason why such an entity should not be able to have sufficient legal personality to sue in libel. If the second approach is correct, as the majority in *Bonsor v Musicians' Union* seem to hold, the union is a procedural device by which a fluctuating membership can sue and be sued. Although it has been held that a representative action by an unincorporated association is not possible (at least for libel…), it has long been the law that partners can sue in the firm's name for damage to the reputation of the partnership (see §963); thus, where the procedural mechanism is recognised, a number of people can protect their joint reputation by an action for libel. It is submitted that the same should be true of a trade union. It should be noted that although Lord MacDermott in *Bonsor v Musicians' Union* [1956] AC, at pp142-143 considered that Birkett J and the Court of Appeal in the NUGW case were wrong to take the view that the Trade Union Acts created a separate entity he did not think that this view was needed in order to reach the conclusion in that case. Thus, the reasoning of O'Connor J is by the way, since it is not the case that the new legislation has altered the basis on which *NUGMW v Gillian* was decided, since that did not involve treating the union as a body corporate: the question is whether the decision in *NUGMW v Gillian* is consistent with the approach of the *Bonsor* case. It is submitted that on the partnership analogy it is."

31. In *Trade union democracy, members' rights and the law*, Elias and Ewing (1987), the authors cited the *EETPU case*, without criticism, as illustrative of the point that the statutory exceptions in s.2(1) of the 1974 Act, by which trade unions are given "*many of the powers and liabilities of incorporated bodies*" are "*exhaustive of the circumstances in which trade unions may be treated as bodies corporate*" (p.14). They observed that "*since there is no express provision specifying that [trade unions] would be treated as having a separate legal personality for the purposes of torts involving*

wrongs done to a person, such as defamation, the judge denied that the union could in law have a separate personality to be protected".

32. The issue in *Derbyshire County Council v Times Newspapers Ltd* was whether a local authority was entitled to sue for libel. The Court of Appeal ([1992] QB 770) and House of Lords ([1993] AC 534) held that it would be contrary to the public interest for a local authority to have any right at common law to maintain an action for damages for defamation. In the Court of Appeal, Balcombe LJ noted that the decision in *Gillian* has been overruled by statute, citing s.2(1) of the 1974 Act and the *EETPU case* (808D). Butler-Sloss LJ observed that legislation enacted since *Gillian* "*has removed the right of a registered trade union to sue in libel*" (828F). In the House of Lords, Lord Keith (with whose opinion all members of the Judicial Committee agreed), observed that in *Gillian* "*the Court of Appeal held that a trade union could, in general, maintain an action in tort, and that an action for libel was no exception to that rule*" (545D). Lord Keith observed at 547D:

> "The trade union cases are understandable upon the view that defamatory matter may adversely affect the union's ability to keep its members or attract new ones or to maintain a convincing attitude towards employers. Likewise in the case of a charitable organisation the effect may be to discourage subscribers or otherwise impair its ability to carry on its charitable objects."

Observing that similar consideration can no doubt be advanced in connection with the position of a local authority, Lord Keith nevertheless considered that there were distinguishing features.

33. Mr Lemer placed some reliance on Lord Keith's observation, pointing out that although he did not discuss the *EETPU case*, the 1992 Act had come into force prior to the hearing and judgment of the House of Lords in *Derbyshire.* Mr Evans relies on the Court of Appeal's endorsement of O'Connor J's judgment and contends that if Lord Keith was saying that trade unions are entitled to sue for libel that was because the submissions of Counsel for the plaintiff (as summarised in the headnote) wrongly asserted that they could do so.

34. At first sight, Lord Keith appears to be suggesting that trade unions are able to sue for libel. That seems to have been Buckley J's understanding in *Goldsmith v Bhoyrul* [1998] QB 459 (in which the issue was whether a political party was entitled to sue for libel), as is apparent from his statement that it is "*established that a trade union and a charity may sue*", citing Lord Keith's judgment (462C-D). However, Lord Keith's words should be understood in light of the submission that "*at common law*" trade unions are entitled to sue for libel. The meaning of s.2(1) of the 1974 Act was irrelevant to the argument in *Derbyshire* and Lord Keith was not considering the impact of that Act, still less of the 1992 Act. In my judgment, none of the observations of the Court of Appeal or House of Lords in *Derbyshire*, or of Buckley J in *Goldsmith v Bhoyrul,* cited above, regarding the inability or entitlement of a trade union to sue for libel are binding. Nor are they persuasive either way on the principal issue before me, as on those occasions the courts were not addressing the proper interpretation of the 1974 or 1992 Acts.

35. There has been one case since *EETPU* in which a trade union has successfully pursued a claim in defamation: *Unite the Union v Freitas* [2022] EWHC 666 (QB). However, the question that has been raised by Mr Evans' application was not the subject of judicial scrutiny.

36. The current editions of the leading academic works on defamation express views to similar effect on the question whether the *EETPU case* remains good law:

    i) The current edition of *Gatley* (13th ed., 2022) does not state as directly as the 8th edition that O'Connor J's decision was "*in error*", but the authors maintain that whether the *EETPU case* represents the law "*must be regarded as doubtful*", for broadly the same reasons (i.e. by analogy with partnerships and on the basis that holding that a trade union can sue in libel is not to treat it as if it were corporation (§9-023)).

    ii) The authors of *Duncan and Neill on Defamation and other media and communications claims* (5th ed., 2020; '*Duncan and Neill*') suggest, at §10.11, that there is "*some doubt*" as to whether the position remains as stated by O'Connor J in the *EETPU* case:

> "In the first place, O'Connor J's premise is hard to reconcile with the fact that a libel action may be brought in the name of a partnership, notwithstanding that a partnership is not a legal person and that the rule permitting such actions to be brought has been described as 'a mere matter of procedure [which] does not affect the rights of parties, or create causes of action which would not otherwise exist'. Secondly, the trade union legislation now in force is in slightly different terms. In *Derbyshire County Council v Times Newspapers Ltd* the House of Lords appears to have assumed that statements which 'may adversely affect the union's ability to keep its members or to attract new ones or to maintain a convincing attitude towards employers' would be actionable at the suit of the union itself."

    In a footnote to the second point (fn.8), after citing s.10 of the 1992 Act, the authors suggest that the "*impediment identified by O'Connor J … appears to have been removed*".

    iii) The authors of *Carter-Ruck on Libel and Privacy* (6th ed., 2010; 'Carter-Ruck') state at §8.41:

> "Whether the decision in *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd* would be followed today must, it is submitted, be doubtful. First, it is not clear that the possession of corporate status, or otherwise, should determine conclusively whether a trade union has right to sue. Other entities lacking corporate status, such as firms, have a right to sue and the correct question to ask is surely whether the entity in question has a reputation that the law ought to protect. That

> the entity does not have corporate status may be a relevant factor but it is not determinative. As was noted in *Derbyshire County Council v Times Newspapers* 'defamatory matter [about a trade union] may adversely affect the union's ability to keep its members or attract new ones or to maintain a convincing attitude towards employers' and in consequence it is argued that a trade union should be entitled to protect that reputation. Secondly, notwithstanding the decision in *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd* there is dicta in several decisions which assumes or states directly that trade unions can sue in defamation. Though the point remains arguable, it is submitted that the better view today is therefore that a trade union can sue for defamation and does not fall within the *Derbyshire County Council* principle."

The "*dicta*" referred to are the statements of Lord Keith in *Derbyshire* and Buckley J in *Goldsmith v Bhoyrul,* to which I have referred, and the observations of Lord Hope in *Jameel v Wall Street Journal Europe (No 2)* [2006] UKHL 44, [2007] 1 AC 359, at [96], [100] and [101], which assume a trade union can sue for libel.

The parties' submissions

37. Mr Evans relies on the *EETPU case* for the proposition that the courts are prohibited from treating a trade union as a person who can be defamed. This was confirmed by the Court of Appeal in *Derbyshire*. The 1992 Act was a *pure* consolidation Act and so Mr Evans contends that, despite the minor amendments to the wording, the meaning of s.10(2) of the 1992 Act is the same as the meaning of s.2(1) of the 1974 Act, as determined by O'Connor J in the *EETPU case*.

38. Mr Evans submits that s.10(2) of the 1992 Act prohibits courts treating a trade union as a body corporate except as *expressly* authorised. Part I of the 1992 Act has a single express authorisation in s.12(2) (see paragraph 10 above), which was moved from s.2(1)(e) of the 1974 Act (see paragraph 23 above), during consolidation, to make the law clearer. The words "*except to the extent authorised by the provisions of this Part*" in s.10(2) are intended to refer only to s.12(2). If the exception in s.10(2) were to be construed as applying to any *implicit* authorisation in the whole of the lengthy Part I, the purpose of the prohibition on treating a trade union as if it were a body corporate would be undermined.

39. Mr Evans contends that a trade union is a group of people with the right to sue and be sued in its own name. As it is a group of people, not a natural or juridical person, a trade union cannot be libelled. It has no legal personality nor any reputation distinct from its members. He relies on *Kelly v Musicians' Union* [2020] EWCA Civ 736, in which Singh LJ (with whom Carr LJ and Floyd LJ agreed) observed that, "*A trade union's rulebook is in law a contract between all of its members from time to time*" ([36(1)], in support of the proposition that the union is merely a name for a group of people. The rights and obligations in section 10(1)(a) to (c) of the 1992 Act apply to that group under a common name. It would be unlawful, contrary to s.10(2), to treat a trade union as a body corporate or a juridical person with a reputation separate from its members.

For the proposition that a group of people cannot be libelled as a group, Mr Evans relies on *Knupffer v London Express Newspaper Ltd* [1944] AC 116.

40. Mr Evans takes issue with the suggestion that treating the legislature as if it had created a new kind of entity with legal personality would not amount to treating it as a body corporate. He contends that is precisely what it amounts to. To have a reputation it is necessary to be an individual or a body corporate. Mr Evans submits the only exception is for partnerships. That is a pragmatic exception to ensure that actions by that type of group can be dealt with in a sensible manner. Mr Evans relies on the point made by Mr Lemer that the ability of a partnership to sue in its own name has been considered to be "*a mere matter of procedure [which] does not affect the rights of parties, or create causes of action which would not otherwise exist*": *Meyer & Co v Faber (No.2)* [1923] 2 Ch 421 at 441.

41. Mr Evans' alternative submission, raised for the first time in oral argument, is that, by analogy with a local authority, applying *Derbyshire*, the court should hold that it would be contrary to the public interest for a trade union to have a right to maintain a claim for defamation. A trade union is a democratic organisation. Members must be able to hold their union or its officials to account in good faith. That would be impossible if the union is able to threaten to sue members for libel.

42. Mr Lemer submits that the court should approach the construction of the 1992 Act as it would any other statute, notwithstanding that it is a consolidating Act (with amendments). There is no call for the court to consider the previous provisions under the 1974 Act because there is no real or substantial difficulty or ambiguity in s.10 of the 1992 Act which classical methods of construction cannot resolve.

43. Section 10(1)(a)-(c) makes clear that a trade union is not a body corporate, but it has the ability to make contracts and to sue and be sued in its own name in contractual and tortious causes of action. There is nothing in those provisions to prevent a trade union being treated as a quasi-corporate body, and so there is nothing to prevent a trade union suing in defamation.

44. Section 10(2) states unambiguously that a trade union should not be treated *as if it were* a body corporate (i.e. it should not be treated as a quasi-corporate body), but that provision is subject to the words "*except to the extent authorised by the provisions of this Part*". The authorisation may be express or implied. If the only exception were that contained in s.12(2), s.10(2) would have been differently worded to state that it was subject only to s.12(2). The natural and ordinary meaning of s.10 is that whilst, in general terms, a trade union should not be given quasi-corporate status, it can be conferred such status so as to allow it, *inter alia*, to sue and be sued in its own name in tort, including in defamation.

45. If the court decides it is necessary to consider the *EETPU case* and the 1974 Act, Mr Lemer seeks to distinguish *EEPTU* and, in the alternative, contends that decision was wrong and should not be followed. The distinctions Mr Lemer draws are:

    i) the words "*as if it were a body corporate*" in s.10(2) do not form part of the provision enabling a trade union to sue in contract and tort, supporting the contention that the wording does not place a limit on that provision (unlike in s.2(1) where those words precede the conferral of the right to sue);

ii) the words "*except to the extent authorised by the provisions of this Part*" in s.10(2) explicitly limit the effect of the provision preventing trade unions having quasi-corporate status, whereas s.2(1) of the 1974 Act includes no such wording; and

iii) s.2(1)(c) of the 1974 Act was subject to s.14 which conferred on trade unions immunity from suit in relation to, inter alia, claims in defamation, whereas under the 1992 Act trade unions can be sued in defamation.

46. Even if s.10 of the 1992 Act has materially the same meaning as s.2(1) of the 1974 Act, Mr Lemer submits that the *EETPU case* should not be followed. First, it was unnecessary for trade unions to rely on quasi-corporate status to be able to sue, given the express conferral of the right to do so, both in contract and tort, by the 1974 and 1992 Acts. The provisions preventing trade unions from being treated as quasi-corporations therefore have no effect on a trade union's ability to sue in defamation. Secondly, there is no necessity for a body to have a corporate or quasi-corporate personality to sue in defamation, provided that it has the necessary character to justify pursuing such an action. This is evident from the fact that a partnership, which has no separate legal personality, and is not treated as a quasi-corporation, can sue in its own name. The courts have repeatedly recognised that trade unions possess such a character: *EETPU,* 600B; *Derbyshire,* 547D; and *Jameel*, [100]-[101]. In addition, Mr Lemer relies on the academic commentary that I have cited above.

47. As regards Mr Evans' public interest argument, Mr Lemer submits that Lord Keith in *Derbyshire* was drawing a distinction between trade unions and local authorities.

Decision

48. In my judgment, in accordance with the principles I have outlined above, the proper starting point is section 10 of the 1992 Act. Parliament having passed a consolidation Act, the inference to be drawn is that the legislature intends that Act to be construed according to its natural and ordinary meaning, without the need for reference back to the prior legislative history or previous authority addressing prior legislation unless there is an ambiguity or real doubt about its meaning.

49. I agree with the claimant that giving the language of section 10 its natural meaning reveals no ambiguity. Parliament has conferred on trade unions the right to enter into contracts in its own name (s.10(1)(a)). It is capable of suing in its own name in any cause of action (s.10(1)(b)). It can also be sued in its own name in any cause of action (subject to ss.20-22) or be prosecuted in its own name (s.10(1)(b)-(c)). Plainly, the attributes of a trade union are such that it has a separate reputation, distinct from its members. Although s.10(1) provides expressly that a trade union is not a body corporate, by that provision Parliament has given a trade union sufficient personality to be entitled to bring an action in libel to protect its reputation.

50. The question then is whether s.10(2) deprives a trade union of the right it otherwise has to bring a libel claim. In my judgment, it does not do so. It is common ground, and I agree, that the prohibition on treating a trade union "*as if it were a body corporate*" has the effect that the courts cannot treat a trade union as a quasi-corporation. But, importantly, that prohibition does not apply to the extent that Parliament has authorised the treatment of a trade union as a quasi-corporation in Part I. I reject Mr Evans'

submission that the prohibition in s.10(2) is subject only to s.12(2). The natural reading of s.10(2) encompasses any express or implied authorisation to treat a trade union as if it were a body corporate in the provisions of Part I. If the prohibition in s.10(2) was intended to be subject only to s.12(2), Parliament would have said so.

51. In my judgment, for the purpose of suing and being sued, Parliament has impliedly authorised the treatment of a trade union as a quasi-corporation. I note that the heading to section 10 indicates that the provision addresses the "*quasi-corporate status of trade unions*". Less weight can be attached to a heading than to the provision itself, as a heading serves only as a brief guide to the main content of the provision, and so may not be entirely accurate: see *Bennion*, §16.7. Nevertheless, it seems to me that the heading properly reflects that for the purposes of s.10(1) trade unions may be treated as having quasi-corporate status. Similarly, the heading to section 127 reflects the fact that an unincorporated employers' association – to which the same rights and liabilities are attributed by s.127(2) as are given to a trade union by s.10(1) – has quasi-corporate status.

52. The conclusion that a trade union is entitled to bring a claim for libel also fits with the scheme of the 1992 Act and reflects a rational judgement on the part of the legislature. It is consonant with *the fact* that a trade union has a distinct reputation, separate from its members; and it avoids the surprising imbalance to which the defendant's interpretation would lead of an employers' association being able to sue in libel, but not a trade union, and of a union being capable of being sued in libel, while having no right to bring such an action. It is therefore consistent with the interpretative presumption that Parliament is "*a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner*": *Bennion* §11.3.

53. It follows that subject to consideration of the public interest argument the claimant is entitled to bring this claim for libel. If, contrary to the view I have reached, I considered that there was any real doubt about the meaning of section 10 of the 1992 Act, I would in any event have reached the same conclusion having regard to the 1974 Act and the *EEPTU case*.

54. The change to the placement of the words "*as if it were a body corporate*" and the addition of the words "*except to the extent authorised by the provisions of this Part*", taken together with the removal of a trade union's former immunity from suit in defamation, has removed any doubt as to the meaning of the provision. But, in my view, contrary to the conclusion of O'Connor J in the *EEPTU case,* by s.2(1) of the 1974 Act Parliament did not deprive trade unions of the right to bring an action in libel, which was by then well established.

55. O'Connor J recognised that the court should not construe the legislation as depriving trade unions of that right unless "*absolutely driven*" to do so (600F), given the incongruence of depriving them of that right while preserving it for employers' associations. In my judgment, that is not a conclusion to which the court is driven on the terms of the current or earlier legislation.

56. Even if s.2 of the 1974 Act is interpreted as precluding the court from treating a trade union as a quasi-corporation other than in the circumstances identified in s.2(1)(e), it would not follow that Parliament thereby deprived trade unions of the right to bring a

libel action. It is not necessary for a body to have corporate personality to be capable of bringing such an action.

57. The authors of *Gatley*, *Duncan and Neill*, and *Carter-Ruck* rightly draw attention to the fact that a partnership, which is not in law a person separate from its members (unless it is a limited liability partnership), can sue in the firm's name for damage to the reputation of the partnership. The rule has the effect that a potentially large and fluctuating group of partners can sue in the name of the firm for defamatory words calculated to injure the firm as a body. A partnership does not need to be treated as a quasi-corporation to be capable of suing in libel.

58. So, it would not automatically follow from a prohibition on treating a trade union as a quasi-corporation that it was thereby deprived of the right to bring such a claim. Given that a trade union (like a partnership) in fact has a reputation distinct from its members, and for decades it had been recognised that it could bring libel proceedings in its own name, I am of the view that the conclusion reached in the *EEPTU case* that Parliament had deprived trade unions of the right to bring such an action was erroneous.

59. I also reject Mr Evans' alternative argument that, even if Parliament has not deprived trade unions of the right to sue for libel, the court should determine that it would be contrary to the public interest to permit a trade union to bring such a claim. Although the internal organisation of a trade union is democratic, it is not an organ of government. It does not follow from the democratic nature of a trade union that it would be contrary to the public interest to allow it to bring proceedings to protect its reputation. Mr Evans' argument is founded on *Derbyshire*, but in that case Lord Keith recognised that the common law permits trade unions to sue for libel, and in deciding that local authorities should not be permitted to do so he distinguished them from trade unions, first and foremost on the ground that a local authority is a governmental body (547D-G).

Other matters: malicious falsehood

60. In the penultimate paragraph of his skeleton argument, Mr Evans contended the claim for malicious falsehood should be struck out on the basis that the claimant, as a non-profit members' organisation, cannot show pecuniary loss. There is no application before me to strike out the malicious falsehood claim (and, having no notice of the issue, the claimant did not address it at all). That being so, I heard no argument on the question.

Conclusion

61. The answer to the question with which I opened this judgment is 'yes'. For the reasons I have given, I conclude that the claimant trade union is entitled to bring a claim for libel in its own name. The defendant's application to strike out the libel claim, or alternatively for a declaration that the court has no jurisdiction to hear it, is therefore dismissed.