

LEGAL UPDATE

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CASE UPDATE

ENGLISH HIGH COURT SUGGESTS THAT ISSUERS' PUBLIC ANNOUNCEMENTS MAY BE PROTECTED BY QUALIFIED PRIVILEGE

Stuart Bray v Deutsche Bank AG [2008] EWHC 1263 (QB)

Executive Summary

A recent English High Court decision has suggested that defamatory statements contained in an announcement of a public listed company may be protected by qualified privilege if the statements were published in circumstances so as to comply with the disclosure requirements of a securities exchange. The decision also suggests that inaccuracy does not defeat the privilege, and that the privilege is not lost with the mere passage of time.

{Note: The question of any possible illegality in publishing false statements was not considered by the court because the issue was not pleaded.}

Relevant Background

In March 2006, Deutsche Bank AG (the "**Bank**") issued a public announcement (the "**Announcement**") reporting adjustments to its 2005 preliminary results.

A former employee (the "**Claimant**") brought a libel action against the Bank, alleging that he had been defamed in one of the statements contained in the Announcement.

The Bank refuted the Claimant's allegations. The Bank also sought summary judgment on the claim in libel, on the ground that the Announcement had been published on an occasion of qualified privilege.

Decision

The English High Court ordered summary judgment against the Claimant on the issue of qualified privilege in the action for libel.

Defence of qualified privilege at common law available

The gist of the Bank's defence of qualified privilege is that "*the regulatory framework within which the Bank operated, in particular in New York, required, in the circumstances described in the [Announcement], that the [Announcement] be published*".

The shares of the Bank were listed on the Frankfurt and New York Stock Exchanges. In New York, the Bank was subject to disclosure requirements

under the US Securities and Exchange Act 1934 and the New York Stock Exchange Listed Company Manual Rules (the “**NYSE Rules**”). It was common ground that the Bank was obliged by New York law to publicly disclose the increased legal provisions in the Announcement. The NYSE Rules also required the release of information that might reasonably be expected to materially affect the market for the Bank’s securities. The NYSE Rules further prescribed a procedure for the public release of information, which included dissemination to the public press and immediate publication to news organisations.

In light of the above, the court accepted the Bank’s submission that the Announcement was protected by qualified privilege at common law. That is, the Bank had “*a legal social or moral duty to publish [the] information and the recipients [had] a corresponding and legitimate interest in receiving it*”.

{**Note:** *The Claimant alleged that the Announcement contained inaccuracies. The Bank disagreed. The court approached the issue on the assumption that the Announcement was inaccurate. The court, in any event, held that inaccuracy does not defeat the qualified privilege asserted by the Bank. Only bad faith would defeat the privilege.*}

The privilege cannot be lost by mere passage of time

The Claimant contended that the qualified privilege asserted by the Bank had expired by the mere passage of time. There could be no privilege beyond the date when the adjustment to which the Announcement related had been made and the Bank’s final financial statements and auditor’s report prepared and published, *ie.* the last week of March 2006.

Accordingly, the Claimant submitted that the publication of the Announcement in its original unqualified form following notification of the Claimant’s complaint on 31 January 2007 was not protected by qualified privilege. This point arose because the English common law recognises that each “publication” (in the sense used in the law of libel) gives rise to a separate tort or cause of action. It was the Claimant’s case that every time a person accessed the Announcement from the electronic archives on the Bank’s websites, a “publication” occurred.

The court rejected the Claimant’s argument as “*unworkable*”. If the privilege in respect of such press publications could be lost by the mere passage of time, the consequences would be “*far reaching*”:

“... the back copies of newspapers held in libraries and websites would have to be regularly reviewed and edited. But there would no way for the holder of the information to know when or in what form the editing was required.

...

It is hard to see how the keeper of a library or database can guard against the risk of liability for defamation where there is a publication of a statement written at a time when it was protected by common law privilege (of the reciprocal duty and interest type), but where the same reciprocal duty and interest may not subsist at some subsequent date upon which the document is read by a new reader”.

The court held that the mere passage of time is not capable in law of resulting in the loss of qualified privilege at common law if the privilege existed at the time the statement was first published.

Comment

This decision gives some comfort to listed companies that the public statements they are required by law to make in relation to their affairs are protected by qualified privilege. However, while inaccuracies in the statements do not by themselves defeat the privilege, this does not mean companies can dispense with the need to check their facts. Over and above the regulatory obligations not to mislead the public, any failure to check facts before issuing statements may amount to reckless conduct, which would defeat the privilege.

Further, the case does not go so far as to say that a statement once privileged will always remain privileged. In particular, it is arguable that once it has been brought to the attention of a party that a published statement contains falsehoods or inaccuracies, it would be reckless for that party to continue republishing that statement without qualification. While the court sensibly observed that it would be unworkable to expect “*the keeper of a library or database*” to regularly review or edit the information it maintains, the same may not apply to the original publisher or parties who continue to actively publish the statement. In this regard, the court did not appear to specifically address the issue of whether the Bank could continue maintaining the Announcement on its website without qualification after its attention had been drawn to inaccuracies in the same.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors’ Profiles on our [website](#)), or:

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