IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST
[2023] EWHC 950 (KB)

No. KB-2022-003530

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 24 March 2023

Before:

MR JUSTICE NICKLIN

B E T W E E N :

STEPHANIE HAYDEN — Claimant

- and -

FAMILY EDUCATION TRUST — Defendant

THE CLAIMANT appeared In Person.

VICTORIA SIMON-SHORE (Direct Access) appeared on behalf of the Defendant.

A P P R O V E D J U D G M E N T

MR JUSTICE NICKLIN:

1 This claim concerns a tweet published by the Defendant on 10 October 2022 ("the Tweet"). The Claimant contends that the Tweet referred to her and defamed her. The Tweet was deleted within 40 minutes of being posted. On 18 October 2022, the Claimant issued a claim form seeking unlimited general damages and aggravated damages for libel.

(A) The Tweet

2 A copy of the Tweet, as it appeared on Twitter, is set out in the Appendix to this judgment. The Tweet itself records that it was liked twice and re-tweeted three times. It is common ground that, as of 10 October 2022, the Defendant's Twitter account had 2,399 followers.

(B) The Claim

3 The Claimant's Particulars of claim are dated 15 November. In paragraphs 5-8, the Claimant sets out what she says is the alleged context of the Tweet:

> "5. On 3 October 2022, Surrey Police arrested Caroline Farrow on suspicion of harassment and malicious communications following a complaint by the Claimant. Mrs Farrow was released from custody under investigation. Subsequently, Mrs Farrow took to social media and the mainstream media to complain about her arrest and to cast aspersions about the Claimant and the credibility of the Claimant.
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> 6. During the morning of 10 October 2022, a person operating the Defendant's Twitter account @FamEdTrust engaged in a series of tweets, which included Mrs Farrow (who at all material times operated the Twitter account @CF_Farrow) and Louise Moody (who at all material times operated the Twitter account @DrLouiseJMoody).
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> 7. The Claimant asserts that the context of the tweets involving Mrs Farrow, Dr Moody and the Defendant related to the arrest of Mrs Farrow and civil proceedings in which Mrs Farrow was being sued (or had been sued) by the Claimant and Dr Moody, who had herself been previously sued by the Claimant.
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> 8. As part of the exchange of tweets, the Defendant published, or caused to be published, at 8:16BST on 10 October 2022 a tweet on the Twitter account @FamEdTrust, which the Claimant asserts is defamatory of the Claimant."

4 A few minutes after the Tweet had been posted, another Twitter user, @dolphinmaria, responded to the Tweet: "*Have you ever heard of contempt of court? I suggest you delete that tweet. You cannot possibly substantiate the claims therein*". It was apparently this reply that prompted the Defendant to reconsider the Tweet and subsequently to delete it.

5 As can be seen from its terms, the Tweet did not name the Claimant. The Claimant contends that it nevertheless would have been understood to refer to her. In her Particulars of Claim she pleads the following on the issue of reference and identification:

> "15. The Defendant's Twitter post was a quote tweet of a tweet posted on the Twitter account @DrLouiseJMoody. The post included a tag to

the public Twitter account of @CF_Farrow (i.e. the account operated by Caroline Farrow).

16. Any reader of the Defendant's quote tweet would be able to hyperlink to the tweet posted on the Dr Louise Moody account merely by clicking on the tweet. At all material times, the public Twitter account of @DrLouiseJMoody prominently included images of the Claimant and referenced the Claimant's legal name of Stephanie Hayden. Further reading of the tweets posted on the @DrLouiseJMoody public twitter account would lead an objective reader of the Defendant's quote tweet to conclude that when the Defendant referred to a 'delusional transactivist' the Defendant was referencing the Claimant.

17. Further, the Claimant will rely on the entire context of the Defendant's publication and tagging of the @CF_Farrow (i.e. Mrs Farrow's) public Twitter account as further material in support of the Claimant's assertion that the Defendant's publication objectively referenced the Claimant and that it was the Defendant's intention to reference the Claimant."

6 The Claimant's case on the defamatory meaning alleged to have been borne by the Tweet is:

"18. In their natural and ordinary, alternatively, inuendo meaning the words complained of bore and were understood to bear the meaning:

(a) [the Defendant's words included as part of the quote Tweet] 'Taxpayers are funding a delusional transactivist (Stephanie Hayden) to take people to court because Stephanie Hayden is offended over social media posts. Not only is he (Stephanie Hayden) harassing decent people and their families – but hardworking decent people are paying for Stephanie Hayden's appalling obsession. How is this allowed?'

(b) [in respect of the re-publication of Dr Moody's tweet] 'Taxpayers had funded court fees approaching half a million pounds for Stephanie Hayden who is an unemployed delusional broke fantasist.'

19. In all the circumstances, the Defendant was asserting that the Claimant was abusing the court to harass decent, hardworking people and their families."

7 The Claimant contends that this meaning is defamatory of her at common law. It is appropriate here to note that, although the meaning set out puts forward an alternative innuendo meaning, no particulars of innuendo have been provided and it has not been something that has been pursued in relation to the hearing today.

8 As to serious harm to reputation, as required to be demonstrated under s.1 Defamation Act 2013, the Claimant has pleaded the following in her particulars of claim relating to serious harm:

"21. The Claimant asserts that the Defendant's publication is likely to cause serious harm to the reputation of the Claimant or, alternatively, the tweet seriously injured the Claimant in her credit and reputation.

(a) The defamatory allegations were extremely serious, went to the Claimant's probity and integrity and imputed that she was guilty of a crime, being harassment pursuant to the Protection from Harassment Act 1997.

(b) The Defendant is a registered charity, and an objective reader would conclude that the words complained of, which were published or caused to be published by the Defendant, and the imputations those words convey, are credible.

(c) At all material times, the Claimant was the complainant in active criminal proceedings involving Caroline Farrow. The Defendant, by including Mrs Farrow in the context of its publication (i.e. by posting tweets including tagging the @CF_Farrow public Twitter account) was commenting on the merits of the proceedings (civil and/or criminal) involving Mrs Farrow. The Defendant was impugning the credibility of the Claimant as a witness and the complainant in those proceedings in a manner contrary to the Contempt of Court Act 1981.

(d) The Defendant, by posting a quote tweet stating that the Claimant is 'harassing decent people and their families' has published or caused to be published defamatory words of the Claimant, the imputation of which is that the Claimant is engaged in the commission of the criminal offence of harassment. This is inherently likely to cause serious damage to the reputation of the Claimant.

(e) The Claimant is a public figure in her own right and, from time to time, acts as a commentator on television and radio. The Defendant, as a registered charity, has a certain level of credibility such that the public impugning of the Claimant's character by the Defendant is likely to cause serious harm to the reputation of the Claimant.

(f) The Claimant has a significant following on Twitter amounting to approximately 3,800 followers. The Claimant is followed by senior journalists, lawyers and politicians, including the Speaker of the House of Commons.

(g) The Claimant will rely on the extent of publication, amounting to at least 45,000 Twitter users, and potentially many more by way of re-tweets, quote tweets and replies. Further, the timing of the publication coincided with a social media and mainstream media frenzy concerning the arrest of Mrs Farrow. The tweet was published on an unlocked Twitter account, identifiable as the account of a registered charity to the world at large. The Defendant itself had 2,399 followers to whom the tweet was directly published, because it appeared in their Twitter timeline.

(h) The Claimant was opportunistically and viciously defamed by the Defendant for political purposes as a method of attacking

> a transgender woman in the public eye. The transgender debate, of which the parties are both contributors to, is a public debate attracting widespread attention and intrenched views on all sides. It is to be inferred, in all the circumstances, that the defamatory allegations against the Claimant were repeated and disseminated more widely in the course of this debate.
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> The Claimant acts as a media commentator and has provided commentary for RT, BBC and ITV. Inherently, as a result of being a regular commentator for media organisations, the Claimant has a reputation capable of being seriously damaged."

(C) Application to Dismiss the Claim

9 On 2 December 2022, the Defendant filed an acknowledgement of service indicating an intention to defend the claim. It did not file a defence. Instead, on 15 December 2022, it issued an application notice seeking to strike out the claim under CPR 3.4(2)(a) and (b), or, in the alternative, summary judgment against the Claimant ("the Dismissal Application") on the grounds that:

> "… The claim does not establish a reasonable cause of action, as the claim as pleaded in the Particulars of Claim does not set out an arguable claim that the tweet complained of, which was available for the Defendant's Twitter followers to read for no more than 40 minutes, has caused or is likely to cause the Claimant serious harm to her reputation. This is irremediable because the circumstances of publication generally are incapable of causing the Claimant serious harm to her reputation. Moreover, the Particulars of Claim do not establish a reasonable case that the Tweet complained of was understood to refer to the Claimant.
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> Further, in light of the above, and on the basis that the Claimant can expect to receive such limited benefit from the pursuit of the claim to trial, it would be disproportionate, especially when contrasted against the inevitable expense to the public purse, for the matters which are in dispute in this claim to be litigated to trial.
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> The claim therefore falls to be struck out as a *Jameel* abuse of process. In the alternative, the Defendant seeks summary judgment against the Claimant on the basis that the claim for damages resulting from serious harm caused to the reputation of the Claimant as a result of the Tweet complained of has no reasonable prospect of success…"

10 The Dismissal Application was supported by a witness statement of Lucy Marsh on behalf of the Defendant, dated 14 December 2022. Ms Marsh is the communications officer of the Defendant. She states that she was shocked to learn of Caroline Farrow's arrest in October 2022. She had read an article about the arrest which appeared in the *Daily Mail* on 5 October 2022. The article did not name the Claimant as the complainant in relation to the allegations that had led to Ms Farrow's arrest. Ms Marsh became aware that the Claimant was the complainant as a result of a supporter of the Defendant alerting her to a post of the Claimant on Twitter that identified herself as the person responsible for the complaint that had led to the arrest.

11 Subsequently, she had read a post by Louise Moody, which appeared in the Tweet in which Ms Moody had claimed that approaching half a million pounds in court fees had been incurred by the Claimant, which she had not been required to pay. In her statement, Ms Marsh says that she received regular emails from Graham Linehan and she followed Adrian Yalland and Louise Moody and was aware that the Claimant had brought multiple civil claims whilst benefitting from fee remission, which meant that she did not have to pay the fees that otherwise would have been required. Ms Marsh explained her decision to post the Tweet as follows:

> "I decided that I would add my own voice, and that of FET, to the debate. I believe that it is unjust that the Claimant is allowed to repeatedly use the fee waiver exemption to sue ordinary people, by which I mean private individuals, for having an opinion she disagrees with. I see this conduct of the Claimant in bringing these claims in direct relation to the ongoing debate about transgender activists believing that they are entitled to shut down debate. I believe this is effectively a tactic to silence her critics, by way of harassing them into submission. To be clear, I did not mean that the Claimant was guilty of the criminal offence or civil wrong of harassment.
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> At the time, I was also thinking about the contrast between the Claimant's access to public funds and my awareness of a friend who had been abandoned by her estranged husband, had been a victim of domestic abuse, was now a single mother with [several children], and was not entitled to any legal aid to defend herself in court against her husband. I felt that the Claimant was in some way benefiting from a legal loophole that allowed someone to repeatedly sue for offence and this seemed wrong when victims of domestic violence had no legal aid anymore and families were struggling."

(D) Further Evidence filed by the Parties

12 I gave directions in advance of this hearing, which included a timetable for evidence to be filed by the parties. Both parties have taken the opportunity to file such evidence. Some of this evidence travels well outside the issues that I have to resolve, which are effectively limited to whether the Claimant has a case on reference and serious harm to reputation that have a real, as opposed to fanciful, prospect of success and whether the claim is *Jameel* abusive.

13 Although I have read all of the evidence, I intend only to refer to those parts of the evidence that are relevant. There is detectable a certain amount of acrimony between the immediate parties and others. The less said by me about the peripheral dispute, the better. There is, for example, no application asking the court to determine the prospects of success of possible defences of honest opinion or truth. However much the parties may be antagonistic to each other, it is necessary to concentrate on the issues that the court has to decide.

14 The Claimant provided her evidence in response to the application in a witness statement dated 27 January 2023. On the issue of reference, the Claimant stated that during the morning of 10 October the Defendant posted several tweets which were "*abusive of [the Claimant] and intentionally smeared [her]*". The Claimant has fairly accepted today that, since she drafted her Particulars of Claim, she has discovered further evidence that she has put forward in response to the Dismissal Application. Perhaps of most significance, for the purposes of reference, is the fact that on 5 October 2020, in the context of the wider discussion about the arrest of Ms Farrow, the Defendant re-tweeted a tweet of the Claimant in which she had put out a statement concerning the arrest of Ms Farrow (albeit that Ms Farrow was not named).

There were further tweets from the Defendant on 5 and 6 October criticising the Claimant and even calling for her arrest for wasting police time.

15 If she were required to do so, I am satisfied that the Claimant would be able to provide better particulars of her pleaded case on reference. In my judgment, it is tolerably clear from the evidence that she filed what her case on reference is.

16 As to the publication of the Tweet and the extent to which it was read, the Claimant referred to the response of @dolphinmaria and stated that "*plainly the tweet … was seen and read by third parties*". The Tweet was available to be viewed on a public platform and the Claimant herself had seen and read the tweets from the Defendant's Twitter account on the morning of 10 October 2022.

17 The Claimant's first witness statement does not contain any evidence as to actual harm to her reputation or suggest a basis on which an inference could be drawn as to the likelihood of such serious harm being caused by the Tweet's publication. Equally, there is no further evidence of actual publishees of the Tweet identifying the Claimant as the person to which the Tweet was referring.

18 In accordance with the directions for evidence, the Defendant has filed a second witness statement from Ms Marsh, dated 28 February 2023, and a statement from Adrian Yalland. There is little, if anything, of relevance to the issues I must decide in either of those statements, but they have provoked a further witness statement from the Claimant, dated 6 March 2023, served outside the terms of the order I made governing evidence. As this further witness statement simply disputes what Mr Yalland has said in his witness statement, I am satisfied that there is nothing of relevance in the Claimant's second witness statement either.

(E) Legal Principles

(1) Striking Out

19 A claim can be struck out under CPR 3.4(2) if it is clear that the claim is bound to fail; for example, if the statement of case sets out no coherent statement of fact or where the pleaded facts, even if established, do not amount in law to a recognised cause of action. That task is carried out without consideration of any evidence. Even if the court were to be satisfied that the statement of case ought to be struck out, consideration should be given as to whether the defect might be cured by amendment and whether the parties should be given an opportunity to do so: ***Soriano -v- Societe D'Exploitation De L'Hebdomadaire Le Point SA & Anor*** **[2022] EWHC 1763 (QB)** [15] *per* Collins Rice J.

(2) Summary Judgment

20 The principles that the court applies when considering a summary judgment application are well established: *Easyair Ltd -v- Opal Telecom Ltd* **[2009] EWHC 339 (Ch)** [15], approved by the Court of Appeal in ***AC Ward & Son -v- Catlin (Five) Ltd & Ors*** **[2009] EWCA Civ 1098** [24].

21 A recent summary of the approach that the court should adopt can be found in the Court of Appeal's decision of ***Ashraf -v- Lester Dominic Solicitors & Ors*** **[2023] EWCA Civ 4** *per* Nugee LJ:

[39] ... The principles applicable to a summary judgment application are well established and very familiar and were not disputed before us. The relevant principles were cited by Edwin Johnson J as follows:

(1) The criterion is not probability but absence of reality: ***Three Rivers DC -v- Bank of England (No 3)*** **[2003] 2 AC 1** [158] *per* Lord Hobhouse.

(2) It is not generally open to the Court to resolve disputed questions of fact on such an application, and it should not be allowed to develop into a mini-trial. But that does not mean that the Court has to accept without analysis everything said by a party in his statements before the Court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents: ***Optaglio -v- Tethal*** **[2015] EWCA Civ 1002** [31] *per* Floyd LJ (citing ***ED&F Man Liquid Products Ltd -v- Patel*** **[2003] EWCA Civ 472** [10]).

(3) The Court must take account not only of evidence actually placed before it but evidence that can reasonably be expected to be available at trial: ***Royal Brompton NHS Trust v Hammond (No 5)*** **[2001] EWCA Civ 550** [19] per Aldous LJ.

[40] On this last point I would draw particular attention to the words "can reasonably be expected". It is well established that a respondent to a summary judgment application cannot defeat it simply by asserting that he hopes that something might turn up: see the well-known dictum of Megarry V-C in ***Lady Anne Tennant -v- Associated Newspapers Group Ltd*** **[1979] FSR 298** on RSC Ord 14 (cited by Deputy Master Lloyd) that "You do not get leave to defend by putting forward a case that is all hope and Micawberism". This is equally applicable to an application under CPR Part 24. There needs to be some reason for expecting that evidence in support of the respondent's case will, or at least reasonably might, be available at trial. This was a point which Edwin Johnson J had well in mind, and referred to in his Judgment at [120] where he said:

> "References to what might turn up in disclosure or in subsequent evidence seem to me to be of no assistance to the Estate, unless the court is given some reason for thinking that something is going to turn up, either in disclosure or in evidence, which will change the position."

I agree.

22 The Claimant referred me, in addition, to ***S -v- Gloucestershire County Council*** **[2000] FLR 825**. I do not consider that this authority adds anything to the principles I have already set out.

(3) Serious Harm to Reputation

23 To succeed with a claim in defamation a claimant must demonstrate that the publication complained of has caused or is likely to cause serious harm to the reputation of the claimant:

s.1 Defamation Act 2013). In ***Banks -v- Cadwalladr*** **[2023] EWCA Civ 219** the Court of Appeal noted the following about section 1 and what a claimant must establish. Paragraph 42 reads as follows:

> [42] Section 1 of the 2013 Act was intended to modify the common law by requiring a claimant bringing a claim for defamation to prove as a fact that the publication complained of has caused the claimant actual reputational harm that is serious (or that the publication of the statement is likely to cause such harm). The means Parliament adopted to achieve this was to modify the pre-existing common law definition of the term "defamatory". That term can no longer be applied to a statement just because the statement has the inherent qualities required by the common law. Parliament has provided that such a statement "is not defamatory unless" it also satisfies the additional statutory criterion that "its publication has caused … serious harm to the reputation of the claimant" or is likely to do so.
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> [43] The touchstone here is not the nature of the statement but the impact of "its publication". Those two words are plainly critical…

24 All depends upon the circumstances of the publication and the number of publishees. Even when the words have been published only to a limited number of people, proof of serious harm to reputation is not simply a "*numbers game*". In such cases, it is likely to be more relevant the quality of the publishees, not their quantity: see discussion in ***Dhir -v- Saddler*** **[2018] 4 WLR 1** [55].

25 Whilst a claimant may, in an appropriate case, rely upon an inferential case as to serious harm, ultimately whether section 1 is satisfied is a question of fact. Two consequences follow from that. First, as with any question of fact, it may be susceptible to determination on a summary basis under Part 24: ***Lachaux -v- Independent Print Ltd & Anr*** **[2018] QB 594** [79]. Second, because the resolution of the issue of serious harm would require a factual investigation and is almost inevitably bound up with the issue of damages (if ultimately the claimant succeeds with his or her claim), it is not an issue that is usually suitable for resolution as a preliminary issue: see discussion in ***Bindel -v- Pinknews Media Group Ltd & Anr*** **[2021] 1 WLR 5497** and ***Blake & Ors -v- Fox*** **[2022] EWHC 3542 KB** [62]).

26 As to claims of serious harm as to reputation advanced on a purely inferential basis, the Claimant must nevertheless prove facts that provide a sufficient evidential basis upon which the court can properly draw the inference that section 1 is satisfied: ***Sivananthan -v- Vasikaran*** **[2023] EMLR 7** [53] *per* Collins Rice J. Drawing inferences from evidence is to be contrasted with optimistic speculation or guesswork.

(4) Reference/Identification

27 Finally, at common law it is an essential ingredient of a claim for defamation that a claimant pleads, and later proves, that the words complained of referred to (or identified) him/her. The relevant principles are summarised in ***Dyson & Ors -v- Channel Four Television Corporation & Anr*** **[2023] EMLR 5** [18]-[26].

28 At common law, the test whether the publication referred to the Claimant is objective: whether an ordinary, reasonable reader, if necessary attributed with knowledge of extrinsic facts, would have understood the words to refer to the Claimant.

29 That objective test does not extend to the separate issue of whether the publication has caused or is likely to cause serious harm to reputation under s.1 Defamation Act 2013. If, for example, the evidence shows that the publication was only read by three people, but that none of them actually understood it to refer to the claimant, then the claimant's claim will fail, because the claimant will have failed to establish that his/her reputation was actually damaged in the eyes of the publishees.

30 Although, at common law, this would have been irrelevant to the issue of liability, the same principle had already been recognised, prior to the Defamation Act 2013, when it came to the assessment of damages: see ***Cairns -v- Modi*** **[2013] 1 WLR 1015** [47]-[49]).

(5) *Jameel* abuse of process

31 The relevant principles can be taken from ***Tinkler -v- Ferguson*** **[2020] 4 WLR 89** [46]-[49]. In summary, a court may strike out a claim as an abuse of process where it is satisfied that no real or substantial wrong has been committed and litigating the claim would yield no tangible or legitimate benefit to the claimant proportionate to the likely cost and use of the court's resources.

32 Where a Defendant that can demonstrate that a claim has no real prospect of success, or should be struck out on other grounds, will have no need of recourse to the *Jameel* jurisdiction. The claim will simply be dismissed under Part 24, or struck out under Part 3.4(2).

33 The *Jameel* jurisdiction is exercised only in relation to cases that do have a real prospect of success and cannot be struck out on conventional grounds. Seen in that context, it can be readily appreciated why the jurisdiction is regarded as exceptional and is only really suitable for litigation that is obviously pointless or wasteful.

(F) Submissions

34 On behalf of the Defendant, Ms Simon-Shore advances four broad submissions:

(a) The Claimant's pleaded case on reference does not disclose a proper basis on which the Tweet could be understood to refer to the Claimant and the claim, therefore, falls to be struck out under CPR 3.4(2).

(b) The Tweet is a single publication consisting of the Defendant's tweet and the quote tweet from Dr Moody. Paragraph 18 of the Particulars of Claim does not distil the defamatory sting about which the Claimant complains. It effectively simply repeats the words complained of. The closest that the Claimant comes to identifying the sting is in paragraph 19 of the particulars of claim and also in paragraph 21(a), which is actually a paragraph directed at the Claimant's case on serious harm to reputation. Whilst Ms Simon-Shore accepts that the Defendant has not sought the determination as a preliminary issue, the issues of natural ordinary meaning and fact and opinion, she contends that the court could make an assessment of these issues for the purposes of assessing whether the Claimant has a real prospect of showing serious harm to reputation.

(c) Whether or not the court accepts that suggestion, on the issue of serious harm to reputation Ms Simon-Shore submits that as the Claimant has failed to adduce actual evidence of any harm to her reputation caused by the publication of the Tweet, her

case on serious harm to reputation is purely inferential and that inferential case is bound to fail:

(i) The Tweet was available, at most, 40 minutes before it was deleted. Having been deleted, the Claimant has no way of establishing from Twitter analytics data how many people actually read it;

(ii) Having regard to the short period that the Tweet was available before deletion, the number of followers of the Defendant's Twitter account at the relevant time, the available evidence of actual publication (replies, likes and retweets) and the need to establish that the relevant publishee would have understood that the Tweet referred to the Claimant and the nature of the defamatory allegation complained of by the Claimant, the claim of serious reputational harm is fanciful.

(d) In the alternative, Ms Simon-Shore argues that the Claimant's claim should be struck out as *Jameel* abusive. This is based on the contention that the resources required to dispose of the claim would "*significantly outweigh the nominal benefit that the Claimant could expect to achieve following what could only have been (at best) minimal damage to her reputation*". Ms Simon-Shore questioned what the Claimant seeks to achieve in the claim, and contends that the trial of defences of truth and/or honest opinion would be both complicated and costly.

35 In response, the Claimant has submitted the following:

(a) The issues of reference and identification cannot be resolved on a summary basis or striking out, because they require ultimately an assessment of evidence. That can only be fairly carried out at a trial. Her pleaded case, which must be assumed true for the purposes of a strike out application, discloses a proper case on reference and identification.

(b) On the issue of serious harm to reputation, the Claimant accepts that she must establish as a fact that publication of the Tweet has caused her serious reputational harm (or that it was likely to cause such harm). She argues, however, that this issue can only fairly be resolved after a consideration of the evidence. The Claimant contends that, as a baseline, the Tweet was published to 2,399 followers of the Defendant's Twitter account, but that, she argues, is not the full extent of the publication. She contends that as Ms Farrow and Dr Moody were tagged in the quote tweet, this would increase the number of publishees. The Claimant contends that Dr Moody and Ms Farrow have, respectively, some 14,700 and 28,400 followers. The Claimant has noted that Ms Marsh, in her evidence, has disputed the contention that "tagging" someone into a tweet causes that tweet to appear in the timelines of the tagged Twitter account, but she argues that Ms Marsh cannot give this evidence and that this issue can only be fairly resolved by evidence, potentially expert evidence, at a trial. As to the seriousness of the allegation, the Claimant contends that the court cannot resolve today whether the Tweet does bear the meaning that she was guilty of the criminal offence of harassment. She contends she has a real prospect of demonstrating this meaning. Finally, she argues that weight would be attached by the publishees to the fact that the Tweet came from a registered charity.

(c) As to reference, the Claimant contends that, at the summary judgment stage, the question is whether the Tweet is capable of referring to her. She points to the fact, as

she contends, that @dolphinmaria did identify the Tweet as referring to her. It can hardly be contended, therefore, she argues, that the Claimant has no real prospect of showing that the Tweet referred to her. Further, the Claimant contends that her public profile, which is a point emphasised in the Defendant's evidence, means that it is not fanciful to suggest that at least some of the publishees would have understood the Tweet to refer to her.

(d) Finally, as to *Jameel*, the Claimant contends that this jurisdiction is reserved to strike out only plain and obvious cases.

(G) Decision

(1) Reference/Identification

36 For the striking out application, the issue is whether the pleaded case discloses a proper basis of reference and identification. Whatever points that can be made about the existing pleading, Ms Simon-Shore realistically accepted that if the Claimant were required to provide further or better particulars of her case on reference, she could do so. It is clear that the Claimant's case is based on extrinsic evidence: tweets that were published before the Tweet complained of, including, in particular, tweets by the Defendant that I have set out above. Although it may be a case where the Claimant might be required to provide further particulars to identify precisely the material upon which she was relying, the nature of the case emerges clearly from her evidence. I refuse the application to strike out the Claimant's case of reference and identification.

37 For similar reasons, and considering the evidence adduced by the Claimant as to the surrounding Twitter conversation, I do not consider that the Claimant's case on reference and identification is fanciful. She is, in my judgment, entitled to point to the fact, as a matter of evidence, that @dolphinmaria did appear to identify her as the subject of the Tweet. As noted in ***Dyson***, ultimately the common law test for reference/identification is objective, but on this issue evidence has been held to be admissible. It would be a matter for trial to determine whether the Court is satisfied that the notional, ordinary, reasonable reader would understand the Tweet to refer to the Claimant, having regard to all of the evidence that is produced on that issue.

(2) Serious Harm to Reputation

38 The starting point is that the Claimant's case is purely inferential. The only direct evidence of the actual impact of publication on the Claimant's reputation is the evidence of the reaction of @dolphinmaria. It appears from the text of her Tweet that she considered that the Defendant's criticism of the Claimant was unsubstantiated. As such, this evidence provides no real prospect of demonstrating serious harm to the Claimant's reputation, or likelihood thereof, at least in @dolphinmaria's eyes.

39 The court is entitled to consider the basis of the inferential case to decide whether it raises a case with a real prospect of success. In my judgment, the pleaded case does not do so. The Claimant contends that the allegations were "*extremely serious*" and "*inherently likely to cause serious damage to [her] reputation…*"

40 For the purposes of this decision, I will assume in the Claimant's favour that she has a real prospect of establishing her pleaded meaning, including that element of her meaning that contends that she was guilty of the criminal offence of harassment. The Defendant could have

sought a definitive ruling determining the natural and ordinary meaning of the Tweet as a preliminary issue. Alternatively, it could have made an application to strike out those parts of the Claimant's meaning, if it contended that those were meanings that the Tweet was incapable of bearing. It did not do so. In the absence of such applications, it is not appropriate to make any determination as to the meaning of the Tweet.

41 Nevertheless, as is clear from the authorities, the seriousness of a defamatory allegation alone cannot satisfy the requirement of serious harm under section 1. As made clear in ***Banks -v- Cadwalladr***, it is the effect of its publication upon which the court must concentrate. Whilst the status of the person making the allegation may well be a factor that affects the overall impact of an allegation, this too still requires a consideration of the evidence as to the effect of the publication.

42 I am highly doubtful as to the Claimant's contention that the Tweet was published to anything like 45,000 people. This appears to be an aggregate of the followers of the Defendant's twitter account and those who followed Dr Moody and Ms Farrow. From my general knowledge of how Twitter operates, I am sceptical that "tagging" somebody into a tweet has the effect of publishing the tweet to all the tagged person's followers; all the more so if one is quote tweeting a tweet that has tagged such people.

43 However, the short point is that the Claimant has not provided evidence that it does. On the issue of publication, the burden of proof lies on the Claimant. But, even making the evidential assumption in the Claimant's favour, the number of 45,000 is the theoretical maximum number of direct publishees. The actual evidence does not support actual publication to anything like this figure. The Tweet was liked twice and retweeted three times. That provides a maximum of five people, even assuming that there is no commonality between those who liked and those who retweeted. Of course, there may be people who simply read the Tweet and did not engage by liking or retweeting it. There is no evidence as to the number of people to whom the Tweet was published as a result of any retweeting.

44 It is essentially common ground that the Tweet was available, at best, for 40 minutes before it was deleted. Therefore, of whatever number of publishees in whose timeline the Tweet would have appeared, the actual number who would have read it would have been much smaller. A Twitter user would have to have looked at their timeline within the 40 minutes that there was available the Tweet to read before it was deleted. Of that smaller subset of people who actually read the Tweet before it was deleted, for the purposes of serious harm to reputation, the Claimant must also show that those publishees understood the Tweet to refer to her. An inferential case of serious harm to reputation, based on a grave allegation made against a named individual in a mass circulation newspaper, may well have a real prospect of success. That is because, in that case, there is a solid basis on which the court can draw the necessary inferences of fact. Here, the Claimant's inferential case is devoid of reality, even making several assumptions in her favour.

45 I cannot and do not rule out that it might be possible to prove that the Tweet was read by one or more people in the short time it was available and that that relevant person understood the Tweet to refer to the Claimant. As I have noted above, I am mindful that serious harm to reputation is not simply a numbers game, but ultimately such serious harm must be proved by evidence. In this case, the Claimant has not adduced any evidence of that publication of the Tweet that caused any harm to her reputation. As noted, the case is entirely inferential.

46 In her submissions today, the Claimant argued that she would have the opportunity to put in evidence at trial. That will not do. The scope of the facts upon which the Claimant intends to

rely in support of any claim of serious harm to reputation must be set out in the Particulars of Claim. The Claimant has rested her case, as she accepted today, on a wholly inferential case. She has actually had the opportunity, in answer to the summary judgment application, to put in any evidence in support of her claim that the publication of the Tweet has caused or is likely to cause serious harm to reputation. She has not presented any evidence to the Court on this issue. The Claimant cannot resist the Defendant's application for summary judgment by suggesting that some evidence may emerge during the litigation. There is no real prospect of anything emerging from the Defendant's disclosure on the issue of publication or serious harm that might come to the aid of the Claimant. Equally, the Claimant cannot point to a witness who, for example, although s/he has refused to assist by providing a witness statement, could nevertheless be served with a witness summons.

47 Standing back, it is fanciful to suppose that there is any likelihood that the Claimant's case on the issue of serious harm to reputation is going to improve if this case were permitted to continue. She has put forward her best inferential case and, on an assessment of the underlying facts, it is hopeless. The Claimant is not entitled to progress further with the claim in the hope that some actual evidence of serious harm to reputation may turn up.

48 In light of these conclusions, I will grant the Defendant summary judgment on the grounds that the Claimant has no real prospect of satisfying the requirements of section 1 of the Defamation Act 2013 and there is no other compelling reason why that issue should be disposed of at a trial.

49 Having dismissed the claim by granting summary judgment, the issue of whether the claim is *Jameel* abusive does not arise. Nevertheless, had I found that the Claimant did have a real prospect of success on the issue of serious harm to reputation, I would not have struck out the claim as an abuse. These proceedings are at a very early point. No defence has been served. I note the suggestion in the Defendant's submissions that defences of truth or honest opinion might have been advanced in answer to the claim and the contention that these would have been complicated and costly to resolve, but that is necessarily speculative. Striking out a claim as a *Jameel* abuse requires a careful assessment, both of the value of what the Claimant seeks by the proceedings to achieve and the likely costs of achieving it.

50 No evidence has been adduced by the Defendant on the latter point; no doubt that reflects the fact that it would be impossible at this stage to put forward any reliable estimate of the likely costs of proceedings, given that the issues have not yet crystallised. It will be a rare case where the court will conclude that a case has a real prospect of success, but yet strikes it out as an abuse of process under the *Jameel* jurisdiction after concluding that there is no way in which the proceedings can be conducted at proportionate cost to what is at stake.

LATER

51 I am not going to make a declaration that the claim was totally without merit. There is a distinction to be drawn by a litigant pursuing litigation which is ultimately unsuccessful and instances where it crosses the line into the territory of being wholly without merit. In her submissions, Ms Simon-Shore's submissions made wider submissions about the Claimant's conduct of litigation generally. The question to which I have to direct my mind is whether or not *this* claim was totally without merit. I am not satisfied that it was totally without merit. For the reasons I have identified in the judgment I have just given, I have granted summary judgment against the Claimant, but that reflects the legal merits of her claim. She has failed on the issue of serious harm to reputation. It was not a claim totally without merit.

LATER

52 I must now deal with the question of the summary assessment of costs. Ms Hayden has accepted that, having been successful, the Defendant is entitled to its costs. Two costs schedules have been filed and served by the Defendant. The first is for the costs of the Dismissal Application in the sum of £20,015.00. The second is for the costs of the action as a whole in the sum of £21,575.00. Both figures include VAT. The latter costs schedule includes the costs of the Dismissal Application. The nature of the proceedings means that the costs of the action are only marginally more than the costs of the application. That is because the Dismissal Application was the very first thing that was done in response to the claim, meaning that there are limited other costs of the action.

53 In those circumstances, it seems to me that it is right for me to assess the entirety of the costs of the action on a summary basis, because the alternative, which would be to send off for detailed assessment those parts of the costs of the action that were not costs of the application, would be wholly disproportionate to the sums involved.

54 Ms Hayden has made several discrete points on the costs that are sought by the Defendant. The first is that Ms Simon-Shore has been instructed on a direct access basis and that she is a relatively senior barrister. Ms Hayden suggests that a more junior barrister could have been instructed and that, therefore, the hourly rate would have been less.

55 I do not find any substance in that submission. The number of barristers willing to take work on a direct access basis, who would feel competent to deal with a matter like this, without having instructing solicitors, will be fairly limited. In reality, the fact that counsel has acted on a direct access basis without solicitors is likely to mean that this case has been conducted in a way that has led to an overall reduction in the costs that the Defendant has incurred. So, there is nothing in the Defendant's instruction of Ms Simon-Shore that has done anything to increase the overall costs burden. If anything, it is likely to have reduced it.

56 There are no objections to the time spent preparation. A point that I have raised, which Ms Hayden has adopted, is that, given what I have said about the second witness statement of Lucy Marsh and the witness statement of Adrian Yalland, I would disallow those costs. So that represents four hours to be removed.

57 Also, it seems to me, I ought to make some modest reduction overall for the preparation, particularly for this hearing, given that I have rejected entirely the *Jameel* basis on which the application was based, and I have rejected that part of the Dismissal Application that sought a strike out on the basis of reference.

58 Taking all of those features into account, it appears to me that the proper figure, before VAT is added, would be one of £12,500.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.