Neutral Citation Number: [2024] EWHC 1709 (KB)

Case No: KB-2023-001311

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2024

Before :

HHJ RICHARD PARKES KC
Sitting as a Judge of the High Court

- -

Between :

(1) JOSEPH PACINI **(2) CARSTEN GEYER**	**Claimants**
- and -	
DOW JONES & **COMPANY INCORPORATED**	**Defendant**

Hugh Tomlinson KC (instructed by **Withers LLP**) for the **Claimants**
Catrin Evans KC and Ben Gallop (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing date: 12 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 3 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE RICHARD PARKES KC

THE CLAIMANTS AND THEIR BACKGROUND

1. The Claimants, Joseph Pacini and Carsten Geyer, are investment bankers.

2. According to the Amended Particulars of Claim ('APOC'), the Claimants were formerly senior executives of the XIO group of companies, which is said to have been a global alternative investments business with offices in London, Hong Kong and Shanghai. The Claimants were two of the four founding partners of XIO, and worked in the XIO businesses between 2014 and 2020. Mr Pacini was Chief Executive Officer and Mr Geyer was Head of Europe.

3. XIO's European business was based in London, where its UK arm was XIO (UK) LLP ('XIO UK'). XIO UK is said to have employed most of XIO's senior investment executives.

4. According to Mr Pacini's evidence (as opposed to the account in the APOC) Mr Pacini seems not to have been an employee or director of XIO UK. He says that he was a Partner (whatever that signifies in the context of a limited company) and the CEO of XIO Partners HK Ltd ('XIO HK'), and he was held out as a 'Partner of the XIO Group at large' which, he says in his evidence, was 'the name used to refer to the various XIO related entities'. According to his evidence, XIO Group was a global alternative investment firm headquartered in London, which had operations in various jurisdictions including the UK, the Cayman Islands and Hong Kong. He was, it appears, 'publicly known' as the CEO of XIO Group. He does not say whether he actually held that post, or whether he was simply held out as holding it. He left XIO Group in February 2020 and (with Mr Geyer and others) set up SGT Capital LLC ('SGT')

5. Mr Geyer's evidence is that he was initially a consultant to XIO Group, and went on to be employed by XIO UK as Head of Europe, and to be 'held out' as a Partner of XIO Group, although not a partner in a legal sense. He left the employment of XIO Group in January 2019 but remained as a 'senior adviser' through a 'separate advisory entity' until February 2020, when he and Mr Pacini and others set up SGT.

6. In short, it appears that the two Claimants were two of the four founding partners of XIO Group and held very senior positions in XIO Group. XIO Group appears to have been the entity that controlled the other XIO operations, in which they also held positions (Mr Pacini in XIO HK and Mr Geyer in XIO UK).

7. According to Mr Pacini's evidence, when XIO UK was set up as the UK arm of XIO Group, the sole director and shareholder was Athene Li. His evidence is ambiguous as to whether she was the sole director and shareholder of XIO Group or of XIO UK. He says that he and Mr Geyer left XIO Group in February 2020 after they had been involved in a dispute with Ms Li.

8. He also says that XIO UK entered a Creditors' Voluntary Liquidation in February 2021, and has since been wound up. The Claimants do not say what happened to XIO Group, or what happened to its other operations. Mr Pacini says only that he has not kept up with the corporate affairs of XIO UK or the XIO Group generally, and does

not know the status of each of the XIO Group entities, but assumes that they have been wound down.

9. Both Claimants are now resident in Switzerland and work in the field of private equity. Since 2020, they have been the joint managing directors of SGT.

THE CLAIM

10. By Claim Form issued on 16 March 2023, the Claimants complain of two articles written by Simon Clark and published by the Defendant ('Dow Jones'), which owns and publishes the Wall Street Journal ('WSJ') worldwide on its website at WSJ.com. One article was published on Dow Jones' website on 16 March 2017 ('the First Article') and the second on 31 January 2018 ('the Second Article'). Both Articles continue to be accessible online to WSJ.com subscribers.

11. The Claimants sue in data protection. They allege breach of the General Data Protection Regulation, as maintained by the European Union (Withdrawal) Act 2018 (the UK General Data Protection Regulation, or "UK GDPR") and of the Data Protection Act ("DPA") 2018, and claim compensation in accordance with UK GDPR Art 82 and/or DPA 2018 s168, a declaration that the personal data processed are inaccurate, and a compliance order under DPA 2018 s167, requiring erasure of the data and the taking of the steps prescribed by Arts 17(2) and 19 UK GDPR.

THE APPLICATION

12. Dow Jones apply by notice dated 22 August 2023 for an order striking out the claim pursuant to CPR 3.4(2)(b).

13. Certain concessions have been made by the Claimants, as a result of which the scope of the application is now narrowed. It is now advanced only on the basis set out at ground 1 of the application, namely that the claim is purely tactical and an abuse of process, (a) because it is in reality a statute-barred defamation complaint dressed up as a claim in data protection, and brought in data protection to avoid the rules which apply to defamation claims, and (b) in the sense identified by the Court of Appeal in the case of *Jameel v Dow Jones & Company Inc* [2005] QB 946.

THE ARTICLES COMPLAINED OF

14. The First Article, first published on 16 March 2017, reads as follows:

> DID XIE ZHIKUN'S NEARLY $1 BILLION GO MISSING? A PRIVATE-EQUITY MYSTERY
>
> *Chinese investor says he backed XIO Group big-time; it says he didn't, and now he has filed suit*
>
> When Chinese billionaire Xie Zhikun toured Europe in the summer of 2015, his hosts took him to the Aston Martin factory in the English Midlands, to the women's tennis final at Wimbledon and to dinner at London's Connaught Hotel, where he was presented with a portrait of himself painted in tea, according to people who helped organize the visit.

Mr Xie and his chaperones on the trip, executives at London private-equity firm XIO Group, stopped in on companies the firm was buying, according to current and former employees of XIO and an agenda of the trip reviewed by The Wall Street Journal, as well as visiting investment prospects like the sports-car maker they code-named "Project Bond" after its most famous client, the fictional British spy James Bond.

Now, that seemingly friendly relationship is in tatters. The billionaire says it was his money—nearly $1 billion—that seeded XIO and allowed it to buy its first two companies. But XIO wasn't returning his phone calls, he says. In court papers filed in the Cayman Islands, where companies at the center of the dispute are incorporated, Mr Xie is accusing XIO executives of a conspiracy to defraud him out of his cash. XIO says it doesn't have Mr Xie's money and never did. An XIO spokesman didn't respond to questions about whether any entity affiliated with Mr Xie has been an investor and XIO has denied his allegations.

Mr Xie is one of the rising number of wealthy Chinese making overseas investments even as Beijing imposes tighter capital controls. He is spreading across the world billions of dollars of the fortune he made in forestry and finance, according to company filings and people familiar with the matter. XIO, founded in Hong Kong in 2014, has a brief history in private equity but made a splash last year when it bought California-based automotive-research firm J.D. Power for $1.1 billion.

'Xie Zhikun is not an investor with XIO and never has been' —XIO Chief Executive Joseph Pacini

In legal filings and documents reviewed by the Journal, Mr Xie says he invested a substantial sum in XIO in 2014—and he wants it back. XIO Chief Executive Joseph Pacini said in an email that "Xie Zhikun is not an investor with XIO and never has been," and denied his allegations. He declined to discuss the European tour. He said other investors—not Mr Xie—provided $3.2 billion to the firm in 2014.

Mr Xie, 56, couldn't be reached for comment. A Beijing-based spokesman for his company, Zhongzhi Enterprise Group, declined to comment. A spokeswoman for Mr Xie's legal representatives in the Cayman Islands at law firm Maples and Calder declined to comment.

The tussle erupted in December. A representative of Mr Xie sent two letters, which the Journal has reviewed, to XIO's office in the Shard skyscraper in London. One letter says that in 2014 Mr Xie provided 5.8 billion yuan— $940 million at the time—to help set up XIO and to fund the acquisitions of two medium-size companies. The letter demands answers about what happened to what it described as Mr Xie's "very significant" investment following six months of "unanswered requests for information and documents." The second letter asks further questions about what happened to Mr Xie's money.

Apparently unsatisfied, Mr. Xie in February sued in a Cayman Islands court, accusing XIO Chairwoman Athene Li and CEO Mr Pacini of receiving "secret profits" from the alleged fraud. Ms Li declined to comment.

Mr Xie, an imposing figure well over 6 feet tall, is known in China for his wealth and philanthropic support for the arts and sciences. His pop-star wife, Mao Amin, regularly sings at shows and on state television, but Mr Xie keeps a lower profile. In 1995 he founded Beijing-based Zhongzhi, whose website states that it has 1 trillion yuan ($145 billion) of assets. Mr Xie's investments range widely and include electric vehicles and trusts that lend money, according to company filings.

Along with J.D. Power, XIO owns German and Israeli assets, according to its website. XIO brought in U.S. investment firm BlackRock Inc. to invest alongside it for the J.D. Power deal, according to people familiar with the transaction. BlackRock declined to comment. In December, XIO said it agreed to buy Meitav Dash, a publicly traded Israeli fund company that manages about $33 billion.

XIO was founded in Hong Kong in 2014 by Ms Li, a Chinese executive, Mr Pacini, an American former BlackRock executive, and two other partners. Ms Li is based in China and Mr. Pacini in London.

Mr Pacini moved to Asia in 2007 with J.P. Morgan Chase & Co. and joined BlackRock there in 2012 before setting up his own firm with Ms Li. He said working at J.P. Morgan and BlackRock brought him into contact with the chairmen of big Asian companies eager to invest in new places. "These organizations are massively flush with cash," Mr Pacini said in an interview in September. "They are very hungry for stable investments."

Mr Xie says in a court filing in the Cayman Islands that in April 2014 he entrusted Ms Li and Mr Pacini to handle his investments in XIO and Dorsey Ventures Ltd., a Cayman corporation.

According to another filing from Mr Xie in the same court, Ms Li is the legal owner of Dorsey, and he and Ms Li have a "share entrustment agreement" that specifies that he is the actual owner. Such agreements are commonly used by wealthy people who want to put money into shell companies without being identified in corporate records. The filing demands that Dorsey make no transfer of shares or payment of dividends without "the order of Xie Zhikun." The letters Mr Xie sent to XIO in December also mention Dorsey, saying Ms Li was supposed to manage its daily operations as well as "deal with the investments of XIO."

XIO made its first acquisitions in 2015 when it paid more than $300 million, according to people familiar with the deal, for Compo Expert, a German fertilizer company, and $510 million for Lumenis, an Israeli medical-laser company.

That summer, XIO chaperoned Mr Xie on the tour of Europe and Israel by private jet, according to people familiar with the visit. The trip's agenda refers to Mr Xie as an "LP," which is private-equity parlance for an investor in a fund. XIO staff also accompanied Mr Xie on shopping trips to stores including Harrods in London, where he spent thousands of dollars, the people say.

During the visit, Mr Xie was described as "Chairman of XIO Fund Advisory Board" in an email reviewed by the Journal that XIO co-founder Carsten Geyer sent to arrange a meeting with a banker. Mr Geyer declined to comment.

15. The Second Article, published on 31 January 2018, reads as follows:

HOW J.D. POWER WAS ACQUIRED BY A CHINESE COMPANY SHROUDED IN MYSTERY

Hong Kong's XIO Group, which acquired the U.S. auto-rating firm in 2016, is now embroiled in a dispute about the source of XIO's funding

A plan for the sale of the car-rating business J.D. Power was a month old when the seller, New York-based information giant S&P Global Inc., grew uneasy. It wasn't quite sure to whom it had agreed to sell the company.

"I wanted to raise a point with you that is causing our team here some concern," S&P Global executive Jason Gibson wrote on May 19, 2016, to the purchaser, a firm called XIO Group that had been set up in Hong Kong and was planning to do the deal through an offshore private-equity fund. Mr Gibson emailed that he hadn't received information he expected about who owned XIO and where it was getting the money for the purchase.

The sale went through. XIO acquired J.D. Power four months later for $1.1 billion. The deal left a U.S. company famed for enhancing transparency—shining a light on the automotive and other industries—owned by a private company that was soon embroiled in a largely hidden dispute in China over its funding. Most XIO employees knew little about where its funding came from. Some advisers to XIO received differing accounts.

The J.D. Power deal was completed amid a wave of overseas acquisitions by cash-rich, privately owned Chinese companies. Some of them have unclear ownership structures that bankers and lawyers say can be a source of confusion. XIO provided full details of its investors to everyone involved in the U.S. regulatory approval process for J.D. Power, a spokesman for XIO said.

Purchases of foreign assets by Chinese companies exploded in 2016 to a record $217 billion. Though China's government has sought to rein these in, the buying continues, at a slower pace.

XIO was among the new buyers Western bankers and lawyers started hearing about. A year after it was founded in Hong Kong, XIO opened its headquarters office in London's Shard skyscraper in 2015. A Shanghai-based fund company called Shanghai Li Hong Investment Center invested hundreds of millions of dollars from mainland China in one of XIO's acquisitions, according to a public document at China's Ministry of Commerce. XIO controls Shanghai Li Hong, the XIO spokesman said.

XIO quickly developed the capacity to do billion-dollar deals. Yet its executives and a billionaire Chinese tycoon are fighting over its assets in lawsuits in two jurisdictions, with details hidden from public view.

"Beneficial ownership of companies is difficult to understand in China," said Bruno Raschle, vice chairman of Zurich-based private-equity firm Schroder Adveq. "You never know who is really behind a company—an individual or the government—or sometimes the government using individuals or making use of individuals."

Chinese acquirers around which ownership questions have swirled include the conglomerate HNA Group Co. The Swiss Takeover Board found in November that when HNA bought a Swiss airline-catering firm called Gategroup in 2016, HNA failed to disclose that two of its owners held their stakes on behalf of HNA's co-founders. HNA said it respected the Swiss board's authority.

"Many companies in China mistakenly believe that extreme secrecy is a form of discretion," said Abel Halpern, a former partner of U.S. private-equity firm TPG who is setting up a business to advise Chinese companies investing outside China. "Such activity can put a black mark on Chinese capital as an asset class," Mr. Halpern said. "If people believe Chinese capital is tainted by deliberately opaque structures, then such capital is viewed with suspicion and mistrust."

In China, tracing ownership of companies can be complicated by a practice called guanxi, the cultivation of relationships and unwritten favors. This can come into play when wealthy Chinese purchase international assets as a way to move money overseas without their government's knowledge, said lawyers and bankers familiar with the practice.

Because of the risk that acquisitive companies with unclear ownership could be conduits for money laundering and tax evasion, the U.K. in 2016 published an open register of companies' beneficial ownership. European Union countries agreed in December to create public registries listing such information. Three bills in the U.S. Congress would require companies to disclose their beneficial owners.

Nine of 10 senior executives said it was important to know the ultimate owner of companies they do business with, in a 2016 survey of 2,800 executives in 62 countries by EY (formerly Ernst & Young). "If legitimate companies like J.D. Power are being bought up or interacting with anonymous companies, it opens the door to increased liabilities about which we have no idea," said Gary Kalman, executive director of the Financial Accountability & Corporate Transparency Coalition, a Washington-based nonprofit that campaigns against corruption. Goldman Sachs Group Inc. won't advise XIO because of concerns about how it is funding deals, according to a person familiar with Goldman's decision-making.

The spokesman for XIO said it works with "the most reputable global investment banks" and hasn't asked Goldman to advise on an acquisition. It is common practice for private-equity firms not to publicly disclose their investors, the spokesman said. "Honoring nondisclosure agreements and client confidentiality is a basic tenet in following international standards accepted by leading global alternative investment firms," he said. Addressing criticisms made of anonymous companies, the XIO spokesman added: "Private equity funds have made an incontestable contribution to the global economy."

When XIO sought to buy J.D. Power in early 2016, it had competition from better-known companies. XIO faced pressure to convince owner S&P Global that XIO was a credible bidder for the auto-research company, according to people involved in the acquisition process.

XIO Chairwoman Athene Li and Chief Executive Joseph Pacini enlisted Thomas Borer, a well-connected former Swiss diplomat. To vouch for XIO to S&P Global, Mr. Borer introduced XIO to John Negroponte, who had worked for S&P Global when it was called McGraw-Hill and later was U.S. director of national intelligence under President George W. Bush. Mr Borer, Mr Negroponte and S&P Global declined to comment.

In April 2016 S&P Global announced it had agreed to sell J.D. Power to XIO, "a global alternative investments firm." XIO would make the purchase using a fund based in the Cayman Islands, which doesn't require firms to publicly disclose their investors. It was during the following month that S&P Global's Mr. Gibson asked XIO for its ownership and funding details as the seller prepared to seek U.S. government approval for the deal, according to emails reviewed by The Wall Street Journal.

An XIO executive responded that Mr. Gibson should have received the information from XIO's legal adviser, Skadden, Arps, Slate, Meagher & Flom LLP. Mr. Gibson wrote back that he had received an email from Skadden, but "the part they did not share are the missing financials and ownership pieces." "We will not hold up the filing on this matter, but as it's a joint filing we would expect to be able to review," he wrote. That email was forwarded within XIO to its general counsel. She emailed colleagues she was "not sure why MG has not shared these with the team but will chase up now." MG is Michael Gisser, then head of Skadden's Asian operations and an adviser to the XIO founders. Mr. Gisser said he is retired from Skadden and declined to comment, as did Skadden.

XIO wouldn't comment on the correspondence. "In the context of the acquisition of J.D. Power, all of the parties (including law firms, advisers and government agencies) who were part of the U.S. regulatory approval process were provided full details of XIO Group's diversified institutional investor base," the XIO spokesman said.

A spokesman for S&P Global wouldn't discuss Mr. Gibson's email. S&P Global is "comfortable that the level of due diligence that we performed in connection with our sale of J.D. Power to XIO Group was appropriate," said spokesman David Guarino.

In June 2016, as XIO was working on getting U.S. government approval for the deal, its general counsel resigned. She left in part because she didn't believe she had sufficient information about XIO's investors to do her job properly, according to former employees, some of whom were employed at XIO at the time. XIO's spokesman said the general counsel left to pursue a master's degree in business administration and continued to support XIO. The former counsel now works at a U.S. private equity firm. An XIO executive working on the J.D. Power deal departed not long after. The two were among at least 14 investment professionals who have left XIO since the firm started in 2014, according to the professionals and to websites

including LinkedIn. The spokesman for XIO called its staff turnover "lower than average."

Within XIO, only its four founding partners know who the investors are, and no other current or former employees have any knowledge about them, the spokesman said. He said XIO is "legally bound by Cayman confidentiality law" not to disclose its investors without their permission. He added this is normal for private-equity funds based on the Caribbean island, where "many private equity vehicles are domiciled."

Nine of the former XIO employees who left said they were skeptical that XIO had a fund containing money from many separate institutions, which is what they said they were led to believe when they joined. The former employees, at least three of whom worked on the J.D. Power deal, said XIO was more secretive about its investors than other firms where they have worked.

XIO staff appeared on one occasion to give differing accounts of who funds its deals. When a Moody's Investors Service credit officer met with XIO staff after the deal announcement to discuss debt ratings for J.D. Power, he was told XIO's investors were Chinese, according to the Moody's officer, Edmond DeForest. A Deloitte accountant got a different response weeks later when he referred to XIO's "China resident investors" in an email to XIO that was reviewed by the Journal. "There may be a misconception. The investors into the XIO fund are not primarily Chinese," XIO partner Carsten Geyer replied. The Deloitte accountant, Anthony Passalaqua, declined to comment.

As the summer of 2016 progressed, XIO contacted financial firms to ask if they would also invest in J.D. Power. On Aug. 8, XIO's Mr Pacini emailed British pension fund Hermes Investment Management about a "co-Investment opportunity with J.D. Power," saying investors could make as much as 2.9 times their money through a resale within three years. Hermes was interested but decided not to invest, in part because it couldn't get comfortable with the lack of information it received about XIO, a person familiar with the talks said.

BlackRock Inc., the world's largest asset manager and a former employer of XIO CEO Mr Pacini, did invest with XIO, people familiar with the acquisition said. So did Beijing-based China Life Insurance Group, according to an investment manager at the insurer.

The deal for J.D. Power gained approval by the Committee on Foreign Investment in the United States. XIO said the agency's review finished in 30 days. The committee declined to comment.

XIO completed the acquisition on Sept. 7, 2016, but mystery over its funding didn't end.

A New York investment banker who had advised XIO on the acquisition met later that year with a Chinese businesswoman named Carol Xie, who shocked the banker by saying her father's investment group had bought J.D. Power—a notion the banker hadn't heard before— according to a person familiar with the meeting. Her father is Xie Zhikun, a prominent Beijing tycoon.

Within months, Mr Xie was in full warfare with XIO. As the Journal reported in March 2017, Mr Xie insisted he had given the firm almost $1 billion to do deals. XIO said he had not, and demanded he stop telling people he was affiliated with the firm.

In a message reviewed by the Journal, XIO's Ms Li wrote to her lawyers saying Mr Xie had repeatedly tried "illegally" to sell a company XIO owned. The company was Lumenis Ltd, a medical-equipment maker XIO bought in 2015. Mr Xie has asserted that his money funded the acquisition.

A representative of Mr Xie wrote to XIO on Dec. 30, 2016, demanding an explanation of how XIO's investments were performing and how the J.D. Power deal was funded. "We have never received the level of information which we should have," said the letter, which the Journal reviewed. "This is a very unsatisfactory situation and not one that we can allow to continue."

In February 2017, Mr. Xie sued in a Cayman Islands court, accusing XIO's Ms Li and Mr Pacini of agreeing to take his money and then receiving "secret profits" in an alleged fraud. He also sued Ms Li in Hong Kong. A spokesman for Mr Xie declined to comment, as did a lawyer for Ms Xie.

At a meeting in 2017, which was not attended by Mr Xie, Ms Li likened Mr. Xie's contention that he had entrusted money to XIO to a man unexpectedly claiming paternity of a child, said a person who was present.

XIO has said it raised a $3.2 billion investment fund in 2014 with a diversified group of investors it didn't name that included fund managers and insurance companies, including some from Asia. XIO says Mr Xie isn't one of its investors and never was.

After buying J.D. Power, XIO hired new executives for the California-based company and expanded its operations with the purchase of National Appraisal Guides Inc., a U.S. publisher of vehicle pricing data. XIO is "tremendously proud of the success of J.D. Power and its premier position of 'voice of the consumer,' " the XIO spokesman said.

In July, XIO had J.D. Power borrow $180 million more, in part to fund the acquisition. This made J.D. Power's debt "very high," Moody's said. In July it downgraded J.D. Power's credit deeper into non-investment-grade territory, to B3 from B2. Another purpose of the borrowing was to enable J.D. Power to pay dividends of about $100 million, according to Moody's. XIO declined to name the investors who would receive these dividends.

PRE-ACTION CORRESPONDENCE

16. The pre-action correspondence repays study. It began before the first article was even published, in response to the enquiries being made by the WSJ journalist, Simon Clark.

17. First, there were several letters to Dow Jones from Harbottle & Lewis, solicitors for XIO UK (and later for XIO Group), generally marked 'Strictly Private and Confidential' and/or 'Not for Publication or Dissemination'. It appears from Mr Pacini's evidence that although he was not a director of XIO UK, he was the one who 'liaised' with Harbottles, which I presume means that he gave them instructions on behalf of XIO UK. It is clear from a letter from Harbottle & Lewis dated 23 January 2018 that Mr Pacini was closely involved in dealing with the inquiries of Simon Clark, the WSJ journalist. Mr Pacini says in his evidence that he was concerned that Mr Clark was being deliberately misled by Xie Zhikun, the Chinese billionaire whose alleged investment activity was the main focus of the Articles.

18. On 27 October 2016, Harbottles wrote to Dow Jones to express the concern of their client, said to be XIO UK, about approaches made to their client and its (un-named) CEO by Mr Clark, concerning Xie Zhikun and an email purportedly sent by one of their client's partners in 2015. Dow Jones responded on 27 October to explain that the email in question was sent in June 2015 by 'XIO partner Carsten Geyer to a banker in which Mr Geyer referred to Xie Zhikun as "Chairman of XIO Fund Advisory Board Xie Zhikan"', and that Mr Clark's enquiries concerned whether Mr Xie was in fact involved with XIO in the manner described.

19. On 2 November 2016 Harbottles informed Dow Jones that they were defamation lawyers acting for XIO UK. Their concern appeared to be with the possibility of publication by Dow Jones of any allegation to the effect that there was a relationship between XIO UK or its affiliates and Xie Zhikun or that he was a current or former investor, which would have been 'seriously defamatory' of XIO UK and 'its individual Partners' (an expression repeated in later correspondence).

20. It is perhaps surprising, given that the allegations which concerned the solicitors were thought likely to be seriously defamatory of individual partners, that the identities of the partners likely to be defamed were not disclosed. This is a recurrent feature of the correspondence. But that the solicitors' concern was for the Claimants (among others) is clear from the letter before action (1 February 2023) and from these proceedings, which identify the Claimants as the subjects of clearly defamatory allegations.

21. The same concern about the prospect of publication of material defamatory of XIO UK and 'individual Partners' was expressed in letters of 14 November 2016 and 13 March 2017. In the 13 March letter, the solicitors warned that it would be 'seriously defamatory of our Client and its individual Partners' to allege that XIO was a 'front' for Mr Xie Zhikun, or that he owned or was an investor in any XIO Group entity. The publication of such allegations would, it was said, cause irreversible damage to the solicitors' client (XIO UK), and would cause substantial financial loss running into hundreds of millions of pounds. The solicitors also warned that processing by Simon Clark or the WSJ of personal data of their clients' officers must comply with the DPA 1998. There was a further letter of 16 March 2017 which mooted a possible claim for breach of confidence.

22. There appears to have been no complaint from Harbottle & Lewis when (on 16 March 2017) the First Article was finally published, despite the fact that the Article had plainly given currency to Mr Xie's allegation that he was a substantial investor in XIO, the very allegation which the solicitors had warned would have been 'seriously defamatory' of XIO and 'its individual Partners'. Worse, according to the meanings

now pleaded on the Claimants' behalf in the APOC, the First Article alleged that there were reasonable grounds to suspect that both Mr Pacini and Mr Geyer were party to a conspiracy to defraud Xie Zhikun of nearly $1 billion, and that Mr Pacini had received 'secret profits' as a result. In Withers' letter before action dated 1 February 2023, the meanings of the relevant personal data were stated to be that there were reasonable grounds to suspect that the Claimants 'were guilty of and/or conspired in and/or were involved in fraud, dishonesty or deceit by stealing and/or misappropriating funds provided by Mr Xie without his authorisation or consent', and that 'Mr Pacini received "secret profits" as a result of the above'. Those allegations, whichever meanings are preferred, were unarguably defamatory of the Claimants.

23. However, Harbottle & Lewis did not write again until 29 September 2017, over 6 months later. All that they had to say was that their client (apparently now XIO Group, not XIO UK) 'objected' to the First Article. That appears to have been the full extent of their complaint on behalf of XIO or, one must presume, XIO's partners. They also said that they were concerned about the possible publication of a further allegation, relating to the solvency of XIO Group, which was said to be defamatory of it.

24. There was further correspondence in October 2017. On 3 October Harbottle & Lewis expressed concern on behalf of XIO Group about the possible publication of allegedly false material and also of material which, if published, would have amounted to a breach of confidence. In that letter, an immediate undertaking not to publish such material was required, failing which an application might be made for injunctive relief. Dow Jones replied that they would continue to provide Harbottles' client with a reasonable opportunity to comment on any items pertaining to it in advance of publication. But no undertaking was given and no application was made.

25. A further Harbottles letter of 12 October 2017 emphasised a concern about confidential information. More relevantly to these proceedings, the solicitors referred to the First Article and to comments made about it to Dow Jones by XIO's PR representative, saying only that they did not propose to set out the detail of their client's objections to the Article, but that, as the PR man had said, the allegations were 'disputed and factually inaccurate', and the reporter had drawn 'misconceived conclusions'.

26. When it became apparent that Dow Jones were about to publish a further story about XIO Group, there was further lengthy correspondence from Harbottle & Lewis on 23, 24, 25, 26, 29 and 31 January 2018. The solicitors' concern, which was repeated time after time at great length, was about the feared publication by Dow Jones of material defamatory of XIO Group and its Partners. For example, on 23 January, the solicitors warned at inordinate length that any allegations suggesting grounds to suspect involvement, even obliquely, with wrongdoing or impropriety would be 'extremely damaging' and would cause 'irreparable harm' to XIO Group and to its Partners individually, and that the serious harm test set by s1, Defamation Act ('DA') 2013 would be met. Proceedings in defamation were threatened in the strongest terms. On 24 January, concerns were expressed that the further article expected to be published might suggest that there was something wrong with the honesty, probity or integrity of XIO Group, which would inevitably 'resonate in allegations made against the honesty, probity and integrity of our client's individual Partners'.

27. The Second Article was published on 31 January 2018. According to the meanings attributed to the relevant personal data at APOC para 11, the meanings of the allegations were that there were 'reasonable grounds to suspect that (the Claimants) had deliberately failed to provide proper disclosure of the true identity of investors in JD Power to the vendor and the US authorities and had concealed the fact that XIO was an investment vehicle for Xie Zhikun', and that 'Mr Geyer falsely informed a Deloitte accountant that the investors into the XIO entity purchasing JD Power were not primarily Chinese'. On the face of it, those allegations, if their meanings are correctly pleaded, were plainly defamatory of the Claimants. In Withers' letter before action of 1 February 2023, the personal data were said to be that the Claimants 'did not disclose the true investors in JD Power to the US authorities (and to those with special knowledge of the CFIUS process this would represent serious wrongdoing) and/or were deliberately secretive and/or misleading as to their identities; and (the Claimants') secretive or misleading conduct was so unusual as to cause S&P Global Inc (the seller of JD Power) to be concerned as to the identities of the purchasers'. The effect of the two Articles was further summarised by Withers in their 1 February 2023 letter as meaning that the Claimants were guilty of and/or conspired in and/or were involved in fraud, dishonesty or deceit by stealing and/or misappropriating funds, and that they did not disclose the true investors in JD Power to the US authorities and/or were deliberately secretive and/or misleading as to their identities. In those meanings also, the allegations would plainly also have been seriously defamatory of the Claimants.

28. After the Second Article was published, Harbottle & Lewis wrote on 31 January 2018 on behalf of XIO Group complaining only of the headline of the Article, which described XIO Group as a Chinese company, and on 1 February, complaining (in defamation) of two tweets by a journalist. The letter was headed 'Strictly Private and Confidential' and 'Not for Publication or Dissemination'. Removal of the tweets and undertakings not to repeat the allegations were demanded.

29. It appears from the bundle of exhibited correspondence that there was then a silence that lasted almost 6 months. The next letter that appears in the bundle is from Withers, who on 27 July 2020 wrote on behalf of the Claimants and their firm SGT complaining not of the First or Second Article but of statements alleged to have been made by the WSJ journalist Simon Clark to the managing directors of two German companies, relating inter alia to XIO's relationship with Xie Zhikun and the conduct of both Claimants when at XIO. The letter (headed 'Strictly Private and Confidential' and 'Not for Publication or Dissemination') complained that the statements were defamatory of Withers' clients, SGT and the present Claimants, and (somewhat faintly) that the journalist was guilty of harassment. Apologies and undertakings were demanded, but not given.

30. Notwithstanding the various threats and demands made in this lengthy correspondence, no proceedings were ever issued against Dow Jones by any XIO entity or by SGT. No proceedings at all were issued until the present litigation was commenced by the Claimants in respect of the two Articles in 2023, and even then not in defamation.

31. On 20 October 2022, 5½ years after the publication of the First Article and 4¾ years after the Second, SGT's General Counsel wrote to Dow Jones from the Cayman Islands to demand that the Articles be taken down. The letter (headed 'Confidential')

was the first directed at the Articles proper (I discount the 31 January 2018 complaint about the headline of the Second Article). It stated that the Articles had caused and continued to cause damage to the reputations of the Claimants and of SGT. This was because the Articles came up in online searches, and continued to dog the former principals of XIO, now the principals of SGT. Both Articles were said to be false and misleading, to have created an impression of a 'sordid story of wrongdoing'.

32. As far as the First Article was concerned, the somewhat opaque complaint was that it gave a false or misleading impression of wrongdoing by XIO and/or its principals, in that there had been no findings of any wrongdoing by them, and no findings that any money went missing at their hands; and that WSJ and Simon Clark had failed to fact-check the claims and instead had relied on false allegations made by an undisclosed and possibly malicious source.

33. In the case of the Second Article, the complaint was even less coherent, but appeared to be that Mr Clark and WSJ had sought to construct an impression of wrongdoing out of something commonplace in private equity (namely, the non-disclosure of the identities of investors in private equity funds), and had failed to give weight to the review process required by the Committee on Foreign Investment in the United States ('CFIUS') when a foreign entity sought to acquire a US business such as JD Power.

34. The October 2022 complaint was rejected by Dow Jones.

35. On 1 February 2023, after a further interval of over three months (and 2½ years since their last letter of 27 July 2020 on behalf of the Claimants and SGT), Withers wrote again on behalf of the Claimants (but this time not on behalf of SGT). The Claimants were described as former Partners of XIO Group (and as CEO and Head of Europe of XIO respectively).

36. The 1 February 2023 letter was said to be a Pre-Action Letter of Claim written in accordance with the Pre-Action Protocol of Media and Communication Claims. The solicitors made this assertion: 'This is not a privacy and/or defamation claim aimed at attempting to silence criticism but a data protection claim to remove our client's (sic) inaccurate personal data'. Ms Evans KC makes the point, in connection with that assertion, that for the first time in the lengthy course of the correspondence described above, whether on behalf of XIO Group and its partners or SGT or the Claimants, this letter did not carry the labels 'Private', or 'Confidential', or 'Not for Publication'.

37. In the 1 February 2023 letter, it was said that the Claimants' personal reputations within private equity were 'significantly' damaged by the publication of the Articles, causing substantial losses including a loss of potential business, and that this harm was continuing. Moreover, the Articles continued to cause the Claimants 'considerable harm and distress'. But the complaint was expressed not in defamation but in terms of breach of the UK GDPR, that breach consisting in the continued publication of information in the two Articles which was out of date, inaccurate and damaging to the Claimants' reputations. I shall not repeat the meanings put on the inaccurate personal data, which are recorded at [22] and [27] above.

THE ISSUE OF PROCEEDINGS

38. Proceedings were issued on 16 March 2023, exactly 6 years after the original publication of the First Article, and were served by letter dated 10 July 2023, less than a week before the validity of the claim form expired.

39. The Particulars of Claim complain of the publication of the two Articles, each of which is said to contain personal data (including personal data relating to allegations of criminal offences: 'the Personal Data') of which the Claimants, either individually or together, are the data subjects.

40. The Personal Data are pleaded at paragraphs 11 to 14 of the Amended Particulars of Claim in terms strongly reminiscent of the pleading of meaning in a defamation case. The pleading reads as follows:

'(11) The First Article contains personal data and Criminal Offences Data of which Mr Pacini is the data subject as follows:

That there were reasonable grounds to suspect that Mr Pacini was party to a conspiracy to defraud Xie Zhikun of nearly $1billion, and had received 'secret profits' as a result;

(12) The First Article contains personal data and Criminal Offences Data of which Mr Geyer is the data subject as follows:

That there were reasonable grounds to suspect that Mr Geyer was party to a conspiracy to defraud Xie Zhikun of nearly $1billion;

(13) The Second Article contains personal data of which each of the Claimants is the data subject as follows:

That there were reasonable grounds to suspect that each Claimant had deliberately failed to provide proper disclosure of the true identity of investors in JD Power to the vendor and the US authorities and had concealed the fact that XIO was an investment vehicle for Xie Zhikun;

(14) The Second Article contains personal data of which Mr Geyer is the data subject as follows:

That Mr Geyer falsely informed a Deloitte accountant that the investors into the XIO entity purchasing JD power were not primarily Chinese.'

41. The Personal Data are said at paragraph 16 of the Amended Particulars of Claim to be incorrect or misleading, in the following respects:

'(1) The Claimants were not party to any conspiracy to defraud Xie Zhikun and Mr Pacini did not make any "secret profit" from any such conspiracy;

(2) There were no reasonable grounds to suspect that the Claimants were party to any conspiracy to defraud Xie Zhikun or that Mr Pacini had made any secret profit;

(3) The allegations of wrongdoing made against the Claimants by Xie Zhikun were made in various legal proceedings – all of which were, by a settlement deed dated 4 August 2020, discontinued. There was no admission or finding of liability for

conspiracy to defraud on the part of the Claimants;

(4) The Claimants had not failed to provide proper disclosure of the true identity of investors in J D Power to the vendor or to the US Authorities;

(5) The Claimants had made full disclosure to the Committee on Foreign Investment in the United States, including providing a list of all XIO's partners and investors and potential investors;

(6) XIO was not an investment vehicle for Xie Zhikun;

(7) The investors into the XIO entity which was purchasing J D Power were not from mainland China were not affiliated with the Chinese government and they were not introduced by or affiliated with Xie Zhikun.'

42. The Particulars of Claim were amended on 17 November 2023. Before amendment, they alleged at paragraph 19 that Dow Jones had failed to process the personal data lawfully or fairly. By amendment, the allegation of unlawful processing, and the supporting Particulars, which alleged that both the Articles were defamatory of the Claimants, were deleted. The Particulars of Breach of the UK GDPR now read, as amended, as follows:

'(1) In breach of Article 5(1)(a), the Defendant has failed to process the Personal Data ~~lawfully or~~ fairly. In this respect the Claimants will rely in particular on the following facts and matters:

(a) The First Article refers to allegations of a serious nature and includes Criminal Offences Data.
(b) The First Article relates to allegations which never resulted in a criminal charge or arrest.
(c) The Second Article makes serious and damaging allegations of impropriety against the Claimants including, in particular of suspected failure to provide proper disclosure to the Committee on Foreign Investment in the United States.
~~(d) The Articles are both defamatory of each of the Claimants.~~

(2) In breach of Article 5(1)(d), the Defendant failed to ensure that the Personal Data was accurate or to erase or rectify inaccuracies in the Personal Data without delay after becoming aware of them. Paragraph 16 above is repeated. The true factual position has been known to the Defendant since (at the latest) its receipt of the PAP Letter.

(3) In breach of Article 5(1)(d), the Personal Data was kept in a form which permitted identification of the Claimants for longer than was necessary for the purposes for which the Personal Data was processed. Insofar as the First Article was reporting on legal proceedings brought by Xie Zhikun in the Grand Court of the Cayman Islands (Cause No FSD 25 of 2017), it was no longer necessary to process the Personal Data in the First Article after
those proceedings were discontinued on 27 November 2020.

(4) In breach of Article 10, the Defendant published the Criminal Offences Data in the Article without justification under any of the conditions in Parts 1 to 3 of Schedule 1 to the DPA 2018.

(5) In breach of Article 17, the Defendant has failed to give effect to the Claimants' exercise of their rights of erasure (by way of the PAP Letter) by removing the Articles from WSJ.com. The Claimants rely on the following:

(a) Even if (contrary to the Claimants' primary case) the Defendant's initial decisions to publish each of the Articles was justified, their continued publication is no longer justified once the Defendant had received the PAP Letter.

(b) Further and in the alternative, by the PAP Letter, the Claimants objected to the processing of the Personal Data in the Articles. There were no overriding legitimate grounds for continuing the processing.

(6) In breach of Article 21 the Defendant has failed to give effect to the Claimants' exercise of their right to object to the processing involved in the publication of the Articles as set out in the PAP Letter. There are no compelling legitimate grounds for the continuing publication of the Articles.

(7) If and insofar as the Defendant contends that the processing of the Claimants' personal data in the Articles is for "special purpose of journalism" set out in paragraph 26 of Schedule 2 to the DPA 2018, and without prejudice to the burden of proof (which lies on the Defendant) the Defendant is not entitled to rely on any exemption from the listed UK GDPR provisions in that it is not reasonable for the Defendant to believe that:

(a) Application of the listed UK GDPR provisions would be incompatible with the purposes of journalism;

(b) The continuing processing of the Personal Data by publication is in the public interest. In particular, it is not reasonable to believe that the continuing processing of inaccurate and/or out of date personal data is in the public interest.

If and insofar as the Defendant had such reasonable beliefs when (it) published each of the Articles, it could no longer hold such beliefs once it became clear that the Personal Data was (sic) inaccurate and out of date.'

43. Under the heading of Remedies, the Amended Particulars of Claim now read as follows. It is important to note that there remains a claim for damage to reputation.

'(20) By reason of the Defendant's wrongful processing of the Personal Data as pleaded above, the Claimants have suffered damage to their reputations, and have been caused anxiety, humiliation and distress for which the Defendant is liable to pay compensation to the Claimant'.

(21) In support of their claims for compensation under s168 of the DPA 2018 the Claimants will rely on the following:

(1) ~~The loss of control of and autonomy over the Personal Data occasioned by the continuing publication of the Articles.~~

(2) the fact that the Defendant has continued to publish and maintain the Articles despite being put on notice of the Claimants' objections in the PAP Letter.

(3) The fact that the Articles have been repeatedly mentioned by prospective investors in XIO and SGT as requiring further due diligence and therefore being an obstacle to investment. This has caused additional work and distress for the Claimants.'

44. The prayer seeks compensation pursuant to Art 82 of the GDPR/UK GDPR and/or s168 of the DPA 2018, a declaration that the Personal Data are inaccurate, and a compliance order pursuant to s167 DPA 2018, requiring (a) the erasure of the Personal Data and any similar data, and (b) that the Defendant takes the steps set out in Art 17(2) and Art 19 of the GDPR/UK GDPR (i.e. notification to controllers processing the data, and notification to publishees of the personal data of any rectification or erasure ordered).

45. The amendments to the Particulars of Claim followed a letter from Dow Jones' solicitors dated 25 July 2023 in which it was argued that the claim was purely tactical and amounted to an abuse of process. That was said to be because (1) the history of the complaint and the Particulars of Claim themselves demonstrated that the claim was in reality a statute-barred claim in defamation disguised as a data protection claim, and because (2) the history of the complaint and the natural and ordinary interpretation of the two Articles showed that in truth it was a 'corporate' claim about the effect of the Articles on the reputation of entities within the XIO Group and SGT, rather than a genuine complaint by the Claimants as individuals. It was contended that in any event the pleading was defective, in particular because it complained that the Articles were defamatory, without setting out the facts and matters required to make good a claim in libel.

46. In response to that letter, and after service of the Application, the Claimants by letter dated 12 September 2023 agreed to make the amendments to paragraphs 19(1) and 20(1) of the Particulars of Claim which are recorded above.

47. In the light of the amendments to the Particulars of Claim, paragraphs 2 and 3 of the Grounds of Application (which, broadly, sought to strike out the passages objected to in the letter) are no longer pursued.

EVIDENCE

48. There are three witness statements before the Court, one by Mr David Barker, a partner in Pinsent Masons, the Defendant's solicitors, and one each by the Claimants, Mr Pacini and Mr Geyer.

Mr Barker

49. It is material to refer to Mr Barker's evidence of the number of times that the Articles were viewed. It appears that the First Article received a total of 4,617 views in the United Kingdom (not just England and Wales) since first publication, of which 63 were in 2022 and 41 in 2023; and that the Second Article received 2,612 views in the UK since first publication, of which 44 were in 2022 and 34 in 2023. He invites the inference that a substantial number of the recent page views would have been made by persons involved in the litigation.

Mr Pacini

50. Mr Pacini, the First Claimant, who (with Mr Geyer) is co-managing partner of SGT, explains in his witness statement why he has brought these proceedings. The proceedings against him in the Cayman Islands and Hong Kong which were described in the Articles had been withdrawn, as had all allegations of wrongdoing; and Xie Zhikun had died. So the Articles were outdated, but continued to be influential and available online, where they could be found by a search against his name. They linked him to allegations of defrauding a Chinese businessman. He was increasingly concerned about their continuing publication, which were now causing him and Mr Geyer serious difficulties in raising funds from institutional investors. The Articles were always the first conversation that he was forced to have with potential investors. For instance, despite his having worked in the past for JPMorgan and BlackRock, which had been among his biggest investors at XIO Group, both refused to let him affiliate with them, or to invest in SGT, because of their concern about the Articles. Similarly, other investors had declined to come in with SGT because they had said that they could not be associated with him, and SGT had in addition come under increased scrutiny from Government bodies. It was towards the end of the pandemic in 2021, when he and Mr Geyer started trying to raise funds again, that the Articles were being repeatedly brought up and were affecting their business, and Mr Pacini realised that he had to take action to bring this damaging situation to an end.

51. It should be noted that despite having been at the centre of the attempts by XIO to prevent Mr Clark and WSJ from publishing the two Articles, Mr Pacini gives no explanation for not having taken action sooner. He explains how the position has changed with the death of Xie Zhikun and the withdrawal of legal proceedings, and that he is bringing the claim to exercise his rights under the UK GDPR, but there is no explanation at all as to why the factors which concern him now – the damage to his reputation and the distress which he has suffered – did not cause him to issue proceedings in defamation when the Articles were published.

52. Mr Geyer's witness statement is to similar effect. He states that when he and Mr Pacini started fundraising for SGT in 2021, during the Covid pandemic, potential investors almost always raised the Articles, and wanted detailed explanations about the allegations. Despite explanation, their business was 'almost always' turned down. Even the most substantial investors, who had made substantial returns from working with him and Mr Pacini, said that they could not justify working with them again. He makes the point that investors are usually investing the funds of others (pension funds, for instance) and they have to justify placing their clients' money with SGT. SGT's business model depends on trust, which is undermined by the continued presence of the Articles and the lack of any statements correcting them. In Mr Geyer's case, he is particularly concerned by allegations in the Articles that he says meant he had lied to an accountant at Deloittes and to the US Government. He fears that the Articles have effectively destroyed his ability to work in the industry other than for himself. That being so, he wants such inaccurate processing of his personal data to stop.

53. Mr Geyer is as reticent in his account as Mr Pacini. He does not explain why he was not sufficiently concerned by the Articles to take action sooner, whether in data protection or defamation.

54. Nor does either Claimant say why, given their concerns, they should have waited to sue until the very limit of the limitation period applicable to a data protection claim in respect of the original publication of the First Article. However, they both insist that they are not bringing proceedings for 'tactical' or improper reasons, but in order to put a stop to the difficulties which out of date and inaccurate allegations continue to do to their business activities.

THE ISSUES

55. The application is founded on the proposition that the claim is 'purely tactical' and an abuse of process. The central issue, according to the Grounds of Application, is whether the Claimants are making use of a technically viable cause of action in data protection, where the claim is in reality a statute-barred defamation complaint disguised as a claim for data protection and brought under a false flag to avoid the rules that apply to defamation claims.

56. Wrapped up in that issue, but perhaps better considered separately, is the closely related question of whether a claim for damage to reputation can be made in data protection proceedings.

57. There is also an alternative, or possibly cumulative, issue, namely whether the claim is an abuse in the sense explained in *Jameel v Dow Jones* [2005] QB 946.

58. Ms Evans contends that the nub of the claim is damage to reputation; Mr Tomlinson disputes that but accepts, as he must, that the claim includes a claim for harm to reputation. That, he contends, is entirely proper, and an essential element of a claim which seeks erasure of data under GDPR Art.17 in accordance with the 'right to be forgotten' . Ms Evans' response is that damages for harm to reputation cannot be recovered in a data protection claim.

THE POWER TO STRIKE OUT FOR ABUSE OF PROCESS

59. The starting point is CPR 3.4(2), by which 'the court may strike out a statement of case if it appears to the court - .... (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the fair disposal of the proceedings'.

60. The scope and flexibility of that power are not in dispute. The power is unconfined by narrow rules (*Tinkler v Ferguson* [2021] 4 WLR 27 at [35]), and can be used to strike down proceedings as an abuse of process -

> "where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct. Indeed, the power exists precisely to prevent the court's process being abused through the lawful and literal application of the rules, and most likely would not be needed or engaged where a party was acting unlawfully or in breach of procedural rules, where established rules of law or procedural sanctions would usually suffice to protect the court process" (*JSC VTB Bank v Skurikhin* [2020] EWCA Civ 1337; [2021] 1 WLR 434 at [51], per Phillips LJ).

61. Where a claim discloses no real or substantial tort, or is pointless or wasteful, it will be susceptible to striking out on *Jameel* grounds. A claim may be small in value or extent but of great importance to the claimant (eg a damaging publication to a single individual: *Haji-Joannou v Dixon* [2009] EWHC 178 (QB)), and in such cases, the court should only find that continued litigation would be abusive where there is no way to adjudicate it proportionately (*Sullivan v Bristol Film Studios Ltd* [2012] EWCA Civ 570 at [29]).

62. However, the jurisdiction to strike out a claim for abuse is exceptional:

> 'Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial' (Broxton v McClelland [1995] EMLR 485, 498, per Simon Brown LJ).

63. In *Hannon v News Group Newspapers Ltd* [2014] EWHC 1580 (Ch); [2015] EMLR 1 at [17], where the abuse was said to consist in bringing actions in confidence and misuse of private information when they should have been brought in defamation, Mann J described the application to strike out as a "high hurdle to surmount. If the claims remain at the level of the arguable, and not plainly improper, then the application will fail". He also observed that if a point is fact sensitive and requires the attention of a full trial, the application will fail on that point, and that serious points of law are often (although not always) more appropriately dealt with at a trial and not in interim applications.

CHOICE OF CAUSE OF ACTION

64. As Diplock LJ stated in *Letang v Cooper* [1965] 1 Q.B. 232, "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".

65. In principle, on the facts of the case, a claimant may have more than one cause of action against the defendant. He may choose which cause or causes of action he wishes to deploy. Generally he will choose all those available, but he need not do so; indeed, he might be well advised to be selective, if a defendant has an arguable defence to one cause of action, but not to another. That may happen where, for instance, one cause of action is statute barred and another is not.

66. In *Joyce v Sengupta* [1993] 1 WLR 337, causes of action were available in libel and malicious falsehood, but the plaintiff chose the latter because legal aid was then available for claims in malicious falsehood, but not for claims in libel. That choice was attacked as an abuse by the defendants, which contended (among other arguments) that the plaintiff had deprived them of the "legitimate juridical advantage" of trial by jury. Nicholls V-C said

> 'When more than one cause of action is available to him, a plaintiff may choose which he will pursue. Usually he pursues all available causes of action, but he is not obliged to do so. He may pursue one to the exclusion of another, even though a

defence available in one cause of action is not available in another. Indeed, the availability of a defence in one cause of action but not another may be the very reason why a plaintiff eschews the one and prefers the other. Limitation is an example of such a defence. I have never heard it suggested before that a plaintiff is not entitled to proceed in this way, and take full advantage of the various remedies English law provides for the wrong of which he complains. I have never heard it suggested that he must pursue the most appropriate remedy, and if he does not do so he is at risk of having his proceedings struck out as a misuse of the court's procedures. In my view those suggestions are as unfounded as they are novel' (at pp342-3).

67. Ms Evans KC blithely dismissed *Joyce v Sengupta* as "out of date" and as having been overtaken by the Court of Appeal's warning in *Jameel v Dow Jones* [2005] QB 946 at [54] that it is no longer the court's role to provide a level playing field and to referee whatever game the parties choose to play on it. I reject that submission. Firstly, the proposition that a claimant may rely on any cause of action that arises from a given set of facts is very well established, and was recently re-stated by Warby J in *NT1 v Google* [2019] QB 344 at [61]:

"As a general rule, it is legitimate for a claimant to rely on any cause of action that arises or may arise from a given set of facts. That is not ordinarily considered to be an abuse just because one or more other causes of action might arise or be pursued instead of, or in addition to, the claim that is relied on".

Secondly, the *Jameel* dictum, often quoted though it is, surely amounts to no more than a colourful re-statement of the principle that the court will not allow its resources to be taken up with applications or litigation that amount to an abuse of process, which would hardly have been a startling proposition to the court in *Joyce v Sengupta*.

IS THE CLAIM IN REALITY A CLAIM IN DEFAMATION, DRESSED UP AS A CLAIM IN DATA PROTECTION?

68. The issue here is not so much whether the claimant has, in principle, the right to choose his cause of action; but rather whether that right should be circumscribed to prevent the use of a cause of action to sidestep established defences and thereby to secure from a disadvantaged defendant a remedy which would not have been available if a more appropriate cause of action were employed, and to maintain coherence in the law.

69. For Dow Jones, Ms Evans KC takes as her starting point the contention that the nub of the Claimants' claim is the protection of reputation, and moreover the reputation of the companies involved – XIO and SGT - rather than that of the Claimants themselves.

70. She relies on the pre-action correspondence as a whole. In particular, she refers to the correspondence from Harbottle and Lewis before the publication of the First Article, which warned Dow Jones against publishing allegations to the effect that Xie Zhikun had a relationship with or was an investor in XIO companies, allegations which, the solicitors warned, would be defamatory of XIO and its individual 'partners', who were not named but appear to have included the present Claimants, and on further

letters sent by Harbottle and Lewis threatening defamation proceedings on behalf of XIO before publication of the Second Article. She refers also to the letter sent by Withers on 27 July 2020 on behalf of both Claimants and SGT, which threatened defamation proceedings in respect of statements allegedly made by a Dow Jones journalist about the Claimants' conduct while at XIO and about XIO's relationship with Xie Zhikun, and to the 20 October 2022 letter from SGT's General Counsel directed at the Articles proper, which complained that the articles had caused and continued to cause damage to the reputations of the Claimants and of SGT. Finally, she draws attention to the pre-action protocol (PAP) letter of 1 February 2023, which complained of continuing harm to the Claimants' reputations, and alleged that they had suffered significant financial loss as a result of the Articles. I note that no actual financial loss is now complained of, possibly because it would have been SGT's loss rather than the Claimants'.

71. Ms Evans points also to the APOC, which she contends has (or had, as originally pleaded) the central premise that the Articles were defamatory of the Claimants, and retains the averment at paragraph 20 that by reason of the Defendant's wrongful processing of their Personal Data, the Claimants have suffered damage to their reputations. So there is a continuing claim for damage to reputation. That is, of course, accepted by Mr Tomlinson.

72. Additionally, she relies on the repeated references in the Claimants' evidence to the importance of trust and the damage to the Claimants and their business that the Articles have done to that trust, which she not unreasonably categorises as a complaint of damage to the Claimants' reputation.

73. In short, she contends that the nub of the Claimants' complaint has always been, and is now, their reputations and in particular the reputations of the corporate bodies behind them, and that the use of a cause of action in data protection is purely a tactical – and impermissible - device to get round the difficulties which a claim in defamation would face.

74. Those difficulties would certainly be substantial. Ms Evans cites the one year limitation period in defamation (s4A, Limitation Act 1980, and s8 Defamation Act ('DA') 2013); the need to show serious harm (s1, DA 2013); the restrictions imposed by s9 DA 2013 on so-called 'libel tourism', which she contends would have prevented a defamation claim from being brought in this jurisdiction; and the arguable availability of a number of defences to a claim in defamation (in particular s15 DA 1996 reporting privilege). The inference is invited that a claim in data protection has been 'retrofitted' to avoid those obstacles, when in truth the essential complaint, the 'nub' of the complaint, remains one of damage to reputation.

75. On the other hand, by proceeding in data protection the Claimants have taken on the burden of proving the falsity of the allegations, as the plaintiff did in *Joyce v Sengupta*. Mr Tomlinson contends that they have also taken on the burden of proving that the "journalistic exemption" (DPA 2018 Sched 2 para 26, following GDPR Art 85(2)) does not apply. They may have chosen to take it on, but the burden is not on them. If he was arguing that it is, he gave no authority for that proposition, which as far as I am aware is incorrect. Indeed, his own pleading (APOC para 19(7)) asserts that Dow Jones is not entitled to rely on the exemption, "without prejudice to the burden of proof, which lies on the Defendant". In other words, the Claimants have

chosen to plead a positive case for non-reliance, but that does not mean that it is for them to prove that Dow Jones is not entitled to rely on the exemption.

WHAT IS THE "NUB" OF A COMPLAINT?

76. The notion of the 'nub' of a complaint is an elusive one. It is often found in the authorities as a criterion for deciding what right the claim is truly designed to protect. It was employed by Buxton LJ in *McKennitt v Ash* [2008] QB 73, a case on misuse of private information and breach of confidence. In argument before the Court of Appeal, it was suggested that there could be no confidence in allegations which were untrue. In response to that point, Buxton LJ (at [80] held that provided that the matter complained of was by its nature such as to attract the law of confidence (as it was in that case) the defendant could not deny the claimant the protection of Art 8 ECHR by showing that the matter was untrue. If, however (as was not the case there), 'a claim in breach of confidence was brought where the nub of the case was a complaint of the falsity of the allegations, and that was done to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process' (at [79]).

77. This ground has mostly been trodden in the context of interim injunctions, because of the rule in *Bonnard v Perryman* [1891] 2 Ch 269 ("the defamation rule"), which - when an interim injunction is sought in a defamation claim - gives an absolute priority to what we now know as Art.10 rights. Hence if the defendant says he will plead any of the statutory or common law defences in defamation, an interim injunction will not be granted to restrain publication of defamatory words "unless, exceptionally, the court is satisfied that the defence is bound to fail" (per Lord Sumption JSC, *Khuja v Times Newspapers Ltd* [2019] AC 161 at [19]).

78. Naturally, claimants have tried to circumvent the rule by finding another cause of action that fits the facts of the case: see eg *Woodward v Hutchins* [1977] 1 WLR 760, where the plaintiffs (who sued in defamation, breach of contract and breach of confidence), were refused an injunction in confidence, partly because the libel claim (to which the defendants intended to plead justification) was closely interwoven with the cause of action in confidence. So also in *Terry (formerly LNS) v Persons Unknown* [2010] EMLR 16 at [95], where Tugendhat J concluded on the evidence that the nub of the claimant's complaint, although brought in privacy and confidence, was the protection of his reputation rather than his private life:

'This claim is essentially a business matter for LNS.... My present view is that the real basis for the concern of LNS is likely to be the impact of any adverse publicity upon the business of earning sponsorship and similar income'.

On that basis and others, he refused an interim injunction.

79. By contrast, in *Gulf Oil (Great Britain) Ltd v Page* [1987] Ch. 327, the claim was brought not in defamation but in conspiracy to injure, but although the publication (by banner trailed from an aeroplane) was plainly defamatory, there was no possible defamation claim because the words published were admitted to be true. The court was nonetheless satisfied that there was a serious question on combination and intention to injure to be tried, and an injunction was granted. However, Parker LJ (at p334) had "no doubt that the court would scrutinise with the greatest care any case

where a cause of action in conspiracy was joined to a cause of action in defamation and would require to be satisfied that such joinder was not merely an attempt to circumvent the rule in defamation".

80. In *Hannon v News Group Newspapers Ltd* [2015] EMLR 1, the defendants applied to strike out claims brought in confidence and privacy, on the basis that they were in reality claims for damage to reputation, and should have been brought in defamation: the claimants should not be allowed to sidestep the protections provided by defamation law by framing what was in essence a claim for damage to reputation in a different cause of action. Mann J found that although there was a heavy reputational element to the claims, that did not describe the essence of the claims: there were other claims as well (in privacy and confidence), which were not *de minimis.* The judge was unable to find that the "nub" or reality of the claims was based on damage to reputation only. Moreover, the case of *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489 (where it was held that any action claiming damages for injury to reputation had to be brought in defamation) did not decide the point against a claimant sufficiently clearly to justify a striking out, largely because it was not clear that the principle stated in *Lonrho* should be applied in the developing area of the tort of privacy. The judge was unable to conclude, at least on an interlocutory application, that a claim based on damage to reputation could only be bought in defamation and not on the basis of confidence or privacy.

81. Similarly, in *ERY v Associated Newspapers Ltd* [2017] EMLR 9 Nicol J found that protection of reputation was not the nub of a claim brought in privacy and confidence, so that the defamation rule did not apply to prevent the grant of an interim injunction; and in *Dixon v North Bristol NHS Trust* [2022] EWHC 3127 (KB), where an interim injunction was sought to prevent a proposed disclosure which would (so it was said) have been a breach of contract, a breach of confidence and/or a misuse of private information, and a breach of the claimant's data protection rights under the UK GDPR and the DPA 2018, Nicklin J re-asserted the warning that the defamation rule could not be avoided by framing a claim in alternative causes of action, and that the court would scrutinise the claim to determine whether the "nub" of the claim was the protection of reputation. (at [62]). In the event, the claimant failed to meet the threshold requirement of s12(3), Human Rights Act 1998, so the judge did not have to consider whether the "nub" of the claim was defence of the claimant's reputation.

82. There are many such authorities which consider the question of whether the claimant has raised a convincing alternative cause of action, or whether the cause of action adopted is in truth no more than an attempt to circumvent the rule in *Bonnard v Perryman*. They are cases that relate to the limits of available remedies rather than to the substance of the wrong, which concerns the extent to which (as Mann J put it in *Hannon v News Group Newspapers* at [35]) 'a particular set of facts is the sole preserve of the one tort rather than the other as a matter of law'.

83. *NT1 v Google LLC* [2019] QB 344 was a decision after trial, not on an interim application, where Google tried to characterise two claims brought in privacy and data protection (arising out of spent criminal convictions) as in substance claims for damage to reputation, intended to outflank the rules which apply to defamation claims. There was in fact no claim in that case for damages for harm to reputation. Warby J accepted (at [63-64]) that the protection of reputation was a significant and substantial part of the claim, but not that it was the first claimant's only objective, i.e.

the "nub" of the claim. He found that the pleading and the evidence in support of the case relied on factors which went beyond mere reputation and crossed over into unrelated areas of private life, and that the first claimant was not seeking to exploit data protection law or the tort of misuse of private information to get round the obstacles that defamation law would put in his way: on the contrary, he was relying on the case law pronounced by the CJEU in *Google Spain SL v Agencia Espanola de Protection de Datos* [2014] QB 2022.

84. This is not a case where the court has to consider the availability of an interim remedy; nor is it a case where the court has heard oral evidence and full argument at trial. What is said by Dow Jones is that the claim is an abuse because it should have been brought in defamation, so that the Claimants should not be permitted to pursue their claim at all, even though, as is accepted, it is technically viable. That is a high hurdle. If the claim is arguable, and not plainly improper, the application must fail.

85. It seems to me that Warby J's focus in *NT1 v Google* on the 'objective' of the claimant is a helpful approach to consideration of the 'nub' of the claim. As I have said, it is accepted by Mr Tomlinson, and rightly so, that there is a reputational element to this claim. But the evidence of both Claimants is that their purpose in bringing these proceedings is to obtain the correction of the Articles in the light of a substantial change in circumstances since their original publication, namely the withdrawal of the allegations made against him in litigation in the Cayman Islands and Hong Kong. Mr Pacini admits that he had underestimated the longevity and influence of the Articles. Both he and Mr Geyer state that since the end of the Covid pandemic in late 2021, when they were attempting to raise funds for SGT, the Articles began to be brought up repeatedly by potential investors and used as a reason for not entrusting their funds to the Claimants' vehicle, SGT. They therefore issued proceedings in order to put an end to the continued processing by Dow Jones in the Articles of what they say are inaccurate personal data.

86. I have great sympathy with Ms Evans' contention that the pre-action correspondence over many years, with its repeated empty threats of proceedings in defamation made by solicitors on behalf of XIO Group and the Claimants, is strongly suggestive of a long-standing concern on the Claimants' part with damage to their reputations. Plainly that is so. She says that while I cannot go behind the Claimants' evidence I can consider whether it is plausible, which she maintains it is not, given its lack of explanation for not suing earlier and its general lack of transparency. I accept that the Claimants have not given an adequate explanation for their failure to take action in defamation at the time of initial publication. It is remarkable that they have not done so. These are matters which might well form the basis of fertile cross-examination at the trial of this action. But despite my misgivings, I cannot ignore the Claimants' evidence.

87. Mr Tomlinson insists, I think correctly, that I cannot on this application go behind the Claimants' evidence about their reasons for bringing these proceedings; and in any event, a claimant's motivation in bringing a claim where there is a good cause of action is, except in exceptional circumstances, irrelevant, a proposition for which he cites *Broxton v McClelland* [1995] EMLR 485, 497. The former submission I accept, but I do not think that *Broxton* is helpful. The issue there was whether the institution of proceedings out of feelings of personal antagonism or animosity could constitute an abuse of process. The court held that the fact that a party who asserted a legal right

was activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent was nothing to the point. Abuse of the kind alleged in this case was far from the court's mind; nor are the Claimants alleged to have been activated by such feelings. I prefer to do as Warby J did in *NT1 v Google*, and consider the 'objective' of the claimant, which has been clearly stated by the Claimants in their evidence and which cannot, it seems to me, be dismissed by the court on a summary application such as this, even in circumstances in which the Claimants have been so sparing in their explanations for many years of inaction.

88. Mr Tomlinson relies on the Claimants' 'rights of erasure' under s167 DPA 2018 and Art.17 UK GDPR. He maintains that the Articles deal with historic matters where the true facts are now clear and at variance with what was originally reported. In the seven years since the original publication of the First Article, and the six years since that of the Second, the public interest considerations relating to the processing of the Claimants' personal data have changed very substantially, and despite the Claimants' requests, Dow Jones has done nothing to amend, de-index or remove the Articles, or to make the true position clear.

89. He refers to the recent decision of the European Court of Human Rights in *Hurbain v Belgium* (2023) 77 EHRR 34, concerning the 'right to be forgotten', in which the court found no violation of Art.10 in an order to anonymise a newspaper website article about a doctor whose conviction for causing death by driving was spent. The court referred to the 'right to be forgotten' as having been specially enacted under Art.17 GDPR to take account of the decision of the CJEU in *Google Spain v AEPD* (C131-12, [2014] QB 1022). Mr Tomlinson's point is simply that this claim gives rise to serious and substantial issues, and that, as I understood him to say, no English court has yet been asked to carry out the exercise of balancing the Art.8 rights of claimants who wish to have inaccurate personal data corrected in accordance with Art.17 GDPR by the amendment of online newspaper material, and the Art.10 rights of defendants who wish to maintain online newspaper archives.

90. In my judgment, it is impossible on this application for the court to ignore the Claimants' evidence about the purpose of the litigation, which, if that evidence is correct, involves their wish to exercise the rights of erasure made available to them by s167 DPA 2018 and Art.17 UK GDPR, in the light of the problems which they say they have faced since 2021 in attempting to drum up investment funds for their vehicle SGT to manage. I cannot see how they can be summarily denied access to the court to make that case, employing a cause of action which is legitimately open to them (although not to SGT), simply because in the past they have repeatedly threatened to claim in defamation, or because the claim is heavily based (as it is) on considerations of harm to reputation, or because, had they brought the claim in defamation, it would have faced very difficult obstacles. Indeed, if their evidence is correct, the problems which drove them to litigation only became critical at a point long after the limitation period for a defamation claim would have expired (one year from first publication: s4A, Limitation Act 1980, and s8, DA 2013). Nor am I persuaded that the Claimants can be said to be using data protection law to make a claim which in reality is the claim of SGT. The cause of action is one which they, as natural persons, have been provided with by Parliament, by dint of the DPA 2018 and the UK GDPR, which in my judgment (in accordance with the principles stated in *Letang v Cooper* and *Joyce v Sengupta*) they should not be prevented from taking to

trial. That conclusion does not, I think, prevent Dow Jones from continuing to maintain at trial that this litigation is an abuse of process, as the defendant did in *NT1 v Google*. It is impossible to say how the evidence in the case will appear to the court after disclosure and cross-examination.

91. In short, although I cannot pretend that I have found the decision straightforward, largely because of the Claimants' own reticence in evidence, the claim seems to me to be arguable, and not plainly improper. Moreover, Dow Jones' argument for abuse seems to me to be fact sensitive and to require a full trial.

DAMAGES FOR HARM TO REPUTATION

92. There is a closely related question which I feel may be better considered separately, and that is whether (even if the claim is properly constituted in data protection, or cannot be said to be improperly so constituted) damages for harm to reputation can arguably be recovered other than through a claim in defamation.

93. In 1993, the Court of Appeal held that any action claiming damages for injury to reputation had to be brought in defamation, so that the plaintiff could not sidestep the defences available to defamation claims: *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489. In that case the plaintiff's claim was founded on an alleged conspiracy to damage his reputation.

94. There is no doubt that the protection of reputation is part of the function of the law of privacy as well of the law of defamation: *Khuja v Times Newspapers Ltd* [2019] AC 161. At [21], Lord Sumption stated:

"The protection of reputation is the primary function of the law of defamation. But although the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available even when the matters published are true."

He added at [34] that a party was entitled to invoke the right of privacy to protect his reputation. But he did not say (because it was not in issue: the appeal was from refusal of an interim injunction) that a party could recover compensation for reputational harm (as opposed to distress) in a privacy claim.

95. In *Richard v BBC* [2019] Ch 169, Mann J allowed recovery of compensation for harm to reputation in a claim brought in misuse of private information. He distinguished *Lonrho v Fayed*, as he had in *Hannon*, on the basis that it was not sufficiently clear that the principle expounded by the Court of Appeal should be applied in the developing area of the tort of privacy (at [337]). After considering *Khuja*, the judge said this at [345]:

'It is therefore quite plain that the protection of reputation is part of the function of the law of privacy as well the function of the law of defamation. That is entirely rational. As is obvious to anyone acquainted with the ways of the world, reputational harm can arise from matters of fact which are true but within the scope of a privacy right. In *Khuja v Times Newspapers Ltd* [2019] AC 161 the effect of knowledge of police investigations which did not give rise to a charge, in terms of damage to reputation, was acknowledged. It is not difficult to think of others – for example, knowledge of

certain medical conditions. If the protection of reputation is part of the function of privacy law then that must be reflected in the right of the court to give damages which relate to loss of reputation. That loss of reputation has an impact on the feelings of the wronged individual (which can be reflected in damages), and will inevitably come in to that extent in any event. The facts of the present case are a very good example of that, in my opinion. Mr Millar submitted that the facts of the present case "vividly" demonstrate why damage to reputation must be excluded from a claim in privacy, because the facts (that Sir Cliff was being investigated for historic sexual abuse involving a minor) were true and the freedom of the press to report those true facts should not be undermined by the award of damages for misuse of private information. I think the exact opposite is the case. The facts of this case (on the footing that the public interest in reporting does not outweigh Sir Cliff's privacy rights) vividly demonstrate why damages should be available for an invasion of privacy resulting (inter alia) in damage to reputation.'

96. It appears that Mann J was proceeding on the basis that damages for harm to reputation could be awarded in a privacy claim even where the facts were true. Indeed, the basis of the BBC's argument seems to have been that the press should not be inhibited from reporting true facts by the award of damages for harm to reputation. That was a curious way of approaching the issue, because the words published in *Richard* were true only in the most literal sense: that is to say, there was an investigation into allegations against the claimant. That would never have been an answer to a defamation claim. Had the claim been in defamation, the pleaded meaning might have been, for example, that there were reasonable grounds for suspicion that the claimant had committed a serious offence. But there was no suggestion from counsel for the BBC that the material published could have been defended as true in that sense. Nonetheless, Mann J does seem to have been accepting that damages for harm to reputation could be awarded even if the information was true. As he said, reputational harm can arise from matters of fact which are true but within the scope of a privacy right. An obvious example would have been the disclosures which were the basis of the claim in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); [2008] EMLR 2. That said, the aspect of defamation damages which seeks to provide vindication for a claimant who has been falsely defamed, would plainly not be recoverable in a case where the information was true.

97. Nicklin J was confronted with a similar problem in *ZXC v Bloomberg LP* [2019] EWHC 970 (QB); [2019] E.M.L.R. 20, where he followed *Richard* in so far as he found a reasonable expectation of privacy in a report of a criminal investigation, and the claim for misuse of private information succeeded. However, the claimant's stance had been that it was immaterial whether the information was true or false. The defendant argued that the court could not award damages for harm to reputation in a case of misuse of private information. The judge considered with great care the function of damages for harm to reputation, and his views are (as so often) worth setting out in full:

[149] In my judgment there is some force in Mr Millar QC's (counsel for the defendant's) submissions, and care must be taken when assessing damages in misuse of private information cases.

i) There is no dispute that reputation is an aspect of the art.8 right. The difficulty arises because English law accommodates the art.8 right in different ways; the torts of defamation and misuse of private information (together with data protection laws) being the principal private law remedies. These causes of action cannot be neatly divided into their own compartments; they overlap. A particular publication may give rise to a claim for defamation, or misuse of private information, or both.
ii) Damages awarded in defamation claims serve three purposes: (a) compensation for the damage to reputation; (b) vindication of the falsity of the defamatory allegation; and (c) compensation for the distress, hurt and humiliation which the defamatory publication has caused (the so called 'solatium'): *John v MGN Ltd* [1997] Q.B. 586, 607-608 per Sir Thomas Bingham MR.
iii) The truth or falsity of the information that forms the basis of a complaint of misuse of private information is generally irrelevant: *McKennitt v Ash* [2008] Q.B. 73 [86]. It may become an issue if it is raised by a defendant on the issue of public interest defence/art.10.
iv) It is a fundamental principle in the law of defamation that damages and vindication of reputation should not be awarded on a false basis: i.e. where the defamatory allegation can be proved to be substantially or partially true: e.g. *Mackenzie v Business Magazine (UK) Ltd* unreported 18 January 1996 CA; *McPhilemy v Times Newspapers Ltd* [1999] 3 All E.R. 775, 789c-d; *Burstein v Times Newspapers Ltd* [2001] W.L.R. 579 [47], [60]. This principle is important in balancing the art.8 and art.10 rights. Looked at through this prism, the imposition of an award of damages for damage to reputation is an interference with the art.10 right which cannot be said to be necessary to protect the art.8 rights of another if the defamatory allegation is true.

[150] It seems to me to follow from these principles that:

i) damages awards in misuse of private information claims cannot ordinarily include elements for compensation for damage to reputation and/or vindication of reputation (elements (a) and (b) from *John*);
ii) to award damages for these elements whilst at the same time holding that the truth or falsity of the information is irrelevant is wrong in principle; insofar as any damages award were to be increased to reflect these aspects, the additional element is an unjustifiable interference with the art.10 right of the defendant;
iii) if a claimant wishes to seek an award of damages that reflect elements (a) and (b), then a defendant would have to be permitted to defend as true any underlying defamatory allegations that fall within the claim for misuse of private information (or advance any other defence that would have been available had the claim been brought in defamation: cf. *Rudd v Bridle & Another* [2019] EWHC 893 (QB) [60(5)] per Warby J); and
iv) the element of solatium is an element common to damages awards in both defamation and misuse of private information. In support of his/her claim for damages in a misuse of private information claim, it is at least arguable a claimant is entitled to rely upon the element of distress and upset caused by his/her belief that the allegations are false and have damaged his/her reputation. The basis for this is that, true or false, it was a misuse of private information for the relevant information to have been published.

> [151] The tort of misuse of private information "focuses upon the protection of human autonomy and dignity — the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people": *Campbell v MGN Ltd* [2004] 2 A.C. 457 [51]. Of course, "esteem" is often bound up with aspects of reputation. It might be better to use the phrase "damage to the standing of the claimant" rather than "reputation" when referring to this element of privacy damages. But whatever it is called, in a misuse of private information claim a person cannot be awarded any element of compensation for harm to/vindication of reputation caused by the publication of defamatory statements if the defendant is not given the opportunity to defend the statements as true. That would be to award at least some element of damages on a false basis and be contrary to the principles that I have set out above.
>
> [152] In this case, the Claimant made an express concession that the truth or falsity of the underlying information in the LoR [Letter of Request] is not a relevant issue. In my judgment, the consequence of that is, whilst he can legitimately rely upon the distress and embarrassment that he has felt as a result of the publication of the Information, he cannot be awarded any element of purely reputational damages.

98. Nicklin J's decision was upheld by the Court of Appeal ([2021] QB 28) and the Supreme Court ([2022] AC 1158), although his approach to the question of the recoverability of damages for harm to reputation was not directly in issue.

99. Warby J had to consider the issue of damages for injury to reputation in the privacy case of *Sicri v Associated Newspapers Ltd* [2021] 4 WLR 9, in which the identity of the claimant as a person briefly and, as it turned out, wrongly, detained in connection with the 2017 Manchester Arena bombing, was published by the defendant. After considering the authorities, the judge concluded at [154] that neither *Richard* nor any other authority enabled a claimant to recover in a privacy claim damages for injury to reputation caused by the publication of information that is defamatory but substantially true. In *Richard*, as I have mentioned, the information was true only in a very literal sense (although the judge seems in fact to have been compensating for the publication of true information). In *ZXC*, the ratio was not that damages could not be recovered for damage to reputation in a claim for misuse of private information, but that they could not be recovered unless the defendant was allowed to defend the published statement as being true (or to raise any other relevant defamation defence). As Warby J said in *Sicri* at [154], the common law has prohibited such recovery for centuries in defamation claims, and that prohibition was put on a statutory basis by s2, DA 2013. He went on:

> 'I see no principled justification for allowing any such claim to be maintained in the newly discovered tort of misuse of private information. The facts that the information is private, and that its publication represents a misuse of the information, do not appear to me to be relevant, or sufficient, reasons for doing so. Nor does the fact that the rationale for protecting the information is the reputational harm that disclosure might cause'.

100. There was no necessity for interfering with freedom of speech by offering a remedy for reputational harm by means of the emergent tort of misuse of private information, when another, mature, tort was available for the purpose. In the judge's opinion,

"there would ... be merit in a general rule that a claimant who seeks to clear his name of a defamatory imputation arising from a wrongful disclosure of private information, and to recover damages for reputational harm, should be required to bring a claim in defamation" (at [158]).

101. Warby J concluded at [161] that a claimant in misuse of private information was not to be awarded damages for injury to reputation, without regard to the defences that would or might have been available had the claim been brought in defamation. The facts of *Sicri* illustrated why that was so: the claim would have been time-barred had it been brought in defamation, and the claimant would have had to persuade the court that it was just and equitable to make an order that would negate the single publication rule in s8 DA 2013:

'To allow the same loss to be claimed by reliance on a different tort would remove any such obstacles, and so far from being necessary in a democratic society would seem to be inconsistent with the manifest intention of Parliament" [162].

102. The judge would therefore have held (but for the fact that he did not need to, deciding the case on a narrower basis) that damages for injury to reputation are not available in a claim for misuse of private information, and that a claimant who wished to recover such damages must sue in defamation 'or one of the other torts in which it is established that reputational harm is compensatable' [163]. The narrower basis on which the issue of recoverability of damages for harm to reputation was decided in *Sicri* was that it would not be just to award compensation for harm to reputation, because that could only have been done by reaching conclusions on meaning, defamatory tendency and defamatory impact, which the pleadings and arguments did not equip the judge to do (see [164-166]).

103. How far do these principles translate to claims in data protection? The overall purpose of data protection law, as the same judge said in *Aven v Orbis* [2020] EWHC 1812 (QB) at [30] by reference to the Data Protection Directive (95/46/EC), the precursor of the GDPR, is to give practical effect to the fundamental right of individual privacy guaranteed by Article 8 of the European Convention on Human Rights. That is a purpose closely analogous to that of the tort of misuse of private information. There is no obvious reason of principle, and none was suggested to me in argument, why the courts should take a different approach to the recovery of damages for reputational harm in a case brought in data protection from that which is taken in cases of misuse of private information.

104. *Aven v Orbis* was a claim brought in data protection alone, where the claimants sought a number of remedies, including damages under s13 DPA 98 (the precursor of s168(1) DPA 2018, which states in terms that "non-material damage" under Art 82 GDPR includes distress). Publication, to use a defamation term, was very limited indeed. It was a case where the information published was seriously defamatory at common law, and where much of the defamatory information was proved to be false. In those circumstances, it was conceded by the defendant's counsel that damages could include damages for harm to reputation. So the point was not argued. But the response of the judge (again Warby J) to the concession was: "In a case such as this, where the inaccurate information is seriously defamatory, that seems right" [196].

However, he warned that the issue might deserve closer attention in different circumstances. To a degree it received that attention in *Sicri*. It is noteworthy that in *Aven* the judge was content to adopt approaches familiar in the defamation context to deal with issues of meaning [24ff], fact or opinion [150-151] and assessment of damages [197], because any other approach would lead to incoherence in the law: see [197].

105. The position appears to be that damages for injury to reputation may be recoverable via a cause of action other than defamation even if the allegations are true (on one view of *Richard*) or as long as the defendant is enabled to run all the defences which would have been available had the claim been brought in defamation (*ZXC v Bloomberg*, *Sicri, Rudd v Bridle* [2019] EWHC 893 (QB)), or possibly not at all, on the footing there is no necessity for interfering with defendants' Art.10 rights by offering a remedy for reputational harm by means of emergent torts, when another, mature, tort is available for the purpose (*Sicri*).

106. It is important to note that, even though there was no appeal against Nicklin J's award of damages in *ZXC v Bloomberg*, or any challenge to the principles which he applied in assessing damages, so that the Supreme Court did not have that issue before it, Lords Hamblen and Stephens (with whom the other members of the court agreed) delivered this warning shot ([2022] AC 1158 at [79]:

'The applicable principles as to damages formulated in this case and in *Sicri v Associated Newspapers Ltd* [2021] 4 WLR 9 may merit consideration in a case in which the issues arise for determination. We have reservations about the extent to which quantification of damages for the tort of misuse of private information should be affected by the approach adopted in cases of defamation, but it is not appropriate to address this in this judgment.'

107. In this case, the Claimants bear the burden of proving that the published information (their personal data) is inaccurate, so there is no question of damages being sought for publication or processing of information which is true. Moreover, although I have not heard argument on the point, it is plainly arguable that the published information is seriously defamatory of the Claimants. However, it is impossible to avoid the conclusion that the state of the law on the recoverability of damages for injury to reputation in non-defamation claims is uncertain and in flux, even where the processed or published information is said to be false and defamatory, and that it would be wrong to stigmatise a claim for damages for reputational harm caused by the processing of inaccurate data in a data protection claim as an abuse of process. This is a difficult and unsettled issue which is unsuitable for determination on a summary application and probably requires the attention of an appellate court.

JAMEEL ABUSE

108. Dow Jones put their application on the alternative basis that the claim is an abuse of process in the sense found by the Court of Appeal in *Jameel v Dow Jones & Co Inc*

[2005] QB 946. In *Jameel* a foreign claimant brought defamation proceedings in England against the publisher of a US newspaper in respect of an article on an internet site hosted in the USA. The evidence was that the article had only been accessed by five subscribers in England. The court found that the proceedings were not serving the legitimate purpose of protecting the claimant's reputation, the publication within the jurisdiction was minimal and did not amount to a real and substantial tort, the damage to the claimant's reputation was insignificant and the facts did not justify the grant of an injunction prohibiting further publication; and that, in those circumstances, it was disproportionate and an abuse of process for the claimant to proceed with his claim.

109. *Jameel* was plainly an extreme case. The minimal English publication in England was being used to found jurisdiction to litigate what was in truth a foreign dispute between persons with no connection to this country. The claim would now fall foul of s1 and s9, DA 2013.

110. As Nicklin J explained the process in *Alsaifi v Trinity Mirror* [2019] EMLR 1,

'[38] It is not appropriate to carry out a detailed assessment of the merits of the claim. Unless obvious that it has very little prospect of success, the claim should be taken at face value ...
[44] At the heart of any assessment of whether a claim is *Jameel* abusive is an assessment of two things: (1) what is the value of what is legitimately sought to be obtained by the proceedings; and (2) what is the likely cost of achieving it?
[45] But it is clear from *Sullivan* (*Sullivan v Bristol Film Studios Ltd* [2012] E.M.L.R. 27) that this cannot be a mechanical assessment. The Court cannot strike out a claim for £50 debt simply because, assessed against the costs of the claim, it is not 'worth' pursuing. Inherent in the value of any legitimate claim is the right to have a legal wrong redressed. The value of vindicating legal rights—as part of the rule of law—goes beyond the worth of the claim. The fair resolution of legal disputes benefits not only the individual litigants but society as a whole.'

111. Unsurprisingly, the concept of *Jameel* abuse holds good in data protection claims, just as in defamation: see *Vidal-Hall v Google Inc* [2016] QB 1003 at [134]-[136], and *Harlow Higinbotham v Teekhungam* [2018] EWHC 1880 (QB) at [45].

112. Ms Evans KC submits that this is not a claim where the Claimants can hope to achieve tangible or significant benefit from the litigation. She relies in particular on the following points:
(a) what she describes as the 'nugatory reputational impact' on the Claimants, demonstrated by their own evidence and their failure to sue much earlier;
(b) the 'very low' levels of publication within the jurisdiction;
(c) the fact that the relief sought under s167 DPA 2018 is limited to processing in this jurisdiction, so that any order could not have extra-territorial effect, and the Articles would continue to be available in other jurisdictions, thus rendering futile the relief which is sought;
(d) the fact that the substance of the allegations complained of by the Claimants (APOC paras 11-14) is a matter of public record, as shown by (eg) the rehearsal of the allegations in *Boettcher v XIO UK, Geyer, Pacini and others* [2023] EWHC 801 (Comm);

(e) the likely high cost of the litigation, which will at least need to determine the truth of the Articles as well as Dow Jones' reliance on the journalism exemption, which in practical terms amounts to a substantial defamation action which even effective case management is unlikely to be able to constrain within reasonable bounds;
(f) The delay in bringing the proceedings, which is not consistent with a genuine desire to obtain the relief sought.

113. I do not think that levels of publication of the Articles can be said to be *de minimis*, as they were in *Jameel*. Page views of the First Article in the UK were only 63 in 2022 and 41 in 2023, and of the Second Article 44 in 2022 and 34 in 2023, but before 2022 they were 4513 and 2534 respectively. It would not take many page views by people in the investment management world for the problems to arise which the Claimants have described in their evidence. I note that in *Aven v Orbis*, by contrast, the scope of publication was tiny.

114. It seems to me that, for present purposes, the answers to Ms Evans' points (a) and (f) are also to be found in the Claimants' evidence, thin though it is. Their claim is founded on the difficulties which they say they have experienced since the period after the Covid pandemic in raising funds for their investment business. After 2021, when the problems arose, their delay has not been substantial. The General Counsel of SGT first wrote to Dow Jones requesting removal of the Articles on 20 October 2022, and Withers became involved in early 2023. Given the evidence as to the starting point of the problems which the Claimants say they have endured (evidence which of course may well require further investigation at trial), it is not possible, in my judgment, to characterise the delays in bringing and serving proceedings as pointing to abusive behaviour.

115. Nor do I regard the availability of public judgments which rehearse the same or similar allegations as a factor which renders this claim pointless. The Claimants' wish, on their evidence, is to obtain a judicial determination of what they say is the falsity of the processing of their personal data. That would be of real value to them notwithstanding the ventilation of the same allegations, without any consideration of their truth, in other publicly accessible litigation.

116. As to Ms Evans' point that a declaration or erasure order in these proceedings could not have extra-territorial effect, because the relief sought under s167 DPA 2018 is limited to processing in this jurisdiction, Mr Tomlinson KC responds that the relief sought bites on the processor of the data, Dow Jones, which, he says is 'here', by which I take it that he means it has not challenged the jurisdiction, so that the court can make any order it wishes against Dow Jones, including an order with extra-territorial effect. Ms Evans complains that the Claimants must plead processing in the different jurisdictions relied on, because different issues may arise in different jurisdictions. Mr Tomlinson does not accept that, but the point is not one for this application; nor was the question of extra-territorial effect argued more than superficially, so I shall say no more about it. It seems to me that whether or not the court is able to make an order under s167 which has extra-territorial effect may be of little significance, if the Claimants are able to secure a reasoned judgment of the High Court of England and Wales which demonstrates the falsity of the allegations. That, as Mr Tomlinson KC suggested, is likely to be sufficient for the Claimants' purposes, as Warby J decided that it would be in *Aven v Orbis* (at [192]).

117. In my judgment, accepting as I am bound to for the purposes of this application the correctness of the Claimants' evidence as to what they seek to achieve by these proceedings, it cannot be said that the claim has little prospect of success; what is sought by the proceedings has real value for the Claimants; and although it may well be right, as Ms Evans suggests, that the costs of taking this case to trial will be substantial, that is not a reason for preventing it from being tried. I do not think it can be said that the costs of the proceedings are likely to be disproportionate to the relief which the Claimants seek. In any event, they should be capable of control by diligent exercise of the court's case management powers.

118. It would therefore be wrong to strike out the claim summarily on *Jameel* grounds.

TRIAL OF PRELIMINARY ISSUE

119. There is an alternative application by the Defendant for an order listing a trial of the following preliminary issues:

(a) The meaning of any personal data of which the Claimants are the data subjects;

(b) Whether that meaning was defamatory of the Claimants (presumably at common law);

(c) Whether any such data were criminal offence data within the meaning of Art.10 GDPR.

120. The directions proposed at (a) and (c) appear to me to be eminently sensible. In *NT1 v Google* at [83], Warby J proceeded on the basis that he should identify the meaning of the private information using the same approach as would be usual in defamation (and see *Aven v Orbis* at [29]). As Mr Tomlinson says, once the meaning(s) of the data are established, the ambit of the dispute as to falsity should become clear.

121. The importance of direction (c) arises from the Claimants' case (APOC para 8) that some of the processed data are criminal offence data within GDPR Art.10, with the consequence that the processing of such data would only be lawful if it meets one or more of the conditions in DPA 2018 Sched.1 Parts 1, 2 or 3 (see DPA 2018 s10(5)). That is a point which could usefully be determined as a preliminary issue.

122. As for the proposed direction (b), I am not sure of its value, and am unclear as to whether it is pressed. However, it will not take long to argue and the parties agree to its inclusion.

123. Subject to my uncertainty over direction (b), I therefore make the order sought under paragraphs 4 and 5 of the Defendant's Grounds of Application.

CONCLUSION

124. For the reasons which I have tried to give, albeit at excessive length, I dismiss the Defendant's application to strike out the claim as an abuse of process, but I will give directions for the trial of a preliminary issue, as sketched out above.

125. I would be grateful if the parties would attempt to agree a draft order which incorporates the necessary directions. If there any matters (eg costs) which cannot be

agreed, I will of course consider submissions (ideally in writing) in accordance with a timetable convenient to the parties and the Court.