Case No: HQ15D05233

Neutral Citation Number: [2016] EWHC 2533 (QB)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2016

**Before** :

**MR JUSTICE WARBY**

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**Between :**

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| **Michael Frederick Bode** | **Claimant** |
| **- and –** | |
| **Carole Mundell** | **Defendant** |

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**Robert Sterling** (instructed by **Carruthers Law**) for the **Claimant**
**Matthew Nicklin QC** (instructed by **Manleys**) for the **Defendant**

Hearing date: 4 October 2016

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# Judgment

**Mr Justice Warby :**

**Introduction**

1. This application gives rise to issues about the application of the rules on pleading and proof of publication in defamation, the serious harm requirement in s 1(1) of the Defamation Act 2013, and the abuse of process doctrine in *Jameel (Yousef) v Dow Jones Inc* [2005] EWCA Civ 75, [2006] QB 946 ("*Jameel*").

2. The claimant and the defendant are both senior academics in the field of astrophysics. The claimant is Professor of Astrophysics at Liverpool John Moores University ("LJMU" or "the University"). The claimant was the founding director and until September 2015 he was the director of the University's Astrophysics Research Institute ("ARI"). He continues to work at the ARI part time. The defendant worked at the ARI for some 15 years in all, for 7 of which she was Professor of Extragalactic Astronomy. For some of this period she was managed by the claimant. She is now Head of Astrophysics at the University of Bath, a position she took up in March 2015.

3. The claim relates to statements allegedly made by the defendant in the months before she took up her current post. The claimant alleges that the defendant slandered him in one or more conversations which are said to have taken place in December 2014, and that she libelled him in one or more items of written correspondence that she sent in or between December 2014 and 1 March 2015.

4. The gist of the claim is that in these communications the defendant used words which suggested that the claimant had (1) provided a dishonest reference for a colleague, (2) covered up the existence of a disciplinary process against that colleague over alleged sexual harassment, and (3) dishonestly engaged in sex discrimination against the defendant, and victimisation of her.

5. The claim was issued on 17 December 2015, just within the limitation period for the alleged slanders. The claim form and Particulars of Claim were served in February 2016. The defendant has not yet filed a Defence. She says the claim as pleaded has serious technical and procedural defects, and in any event is bound to fail or represents an abuse of process. In April 2016 the points relied on were set out in correspondence on behalf of the defendant. The claimant was invited to discontinue the claim, or to provide Amended Particulars of Claim addressing the alleged deficiencies of the claim. He did neither. The defendant now applies for orders striking out the Particulars of Claim under CPR 3.4(2) and/or for summary dismissal of the claim pursuant to CPR Part 24.

6. In support of the application the defendant's solicitor has made a short witness statement, with exhibits. In response, and in opposition to the defendant's application, the claimant has recently made a witness statement of his own, as has his solicitor. The claimant has filed statements from a further 7 individuals.

**Legal Principles**

7. CPR 3.4 (2) gives the court power to strike out a statement of case, or part of one, if it appears to the court (a) that it "discloses no reasonable grounds for bringing … the claim", or "(b) is an abuse of the court's process or is otherwise likely to obstruct the

just disposal of the proceedings; or (c) that there has been a failure to comply with a … practice direction".

8. Mr Nicklin QC for the defendant asserts that there is much in the Particulars of Claim that is irrelevant surplusage, and for that reason liable to be struck out under CPR 3.4(2)(b). More than this, he has identified deficiencies in the Particulars of Claim which he submits would justify striking out each of the claims under CPR 3.4(2)(a) and/or (c). He acknowledges, however, that the deficiencies are not necessarily irremediable, and that the court would be likely to give the claimant a chance to put things right by amendment.

9. Mr Nicklin's submissions have focused on two other aspects of the application. He contends, first, that even if it is assumed in the claimant's favour that every factual contention he makes is true and that he can put right the alleged pleading defects, still the claims will inevitably fail at a trial and should therefore be summarily dismissed under CPR 24.2. No amount of amendment can save them. Secondly, and in the alternative, he submits that the claims should be dismissed under CPR 3.4(2)(b) as representing *Jameel* abuse.

10. CPR 24.2 gives the court power to grant summary judgment in favour of a defendant, and against a claimant on a claim or issue. This is sometimes called "reverse summary judgment". The pre-requisites are that the claimant has no real prospect of succeeding on the claim or issue, and that there is no compelling reason why the case or issue should be disposed of at a trial.

11. The relevant principles are not controversial. They were distilled by Lewison J in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339 (Ch) [15]:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
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> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
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> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal*

> *Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63 …"

12. Two requirements of defamation law are central to the defendant's application. The first is that precision in the pleading and proof of publication, including the actual words used, is always essential. It is not enough to plead or prove the gist or substance of what was said. In libel this is rarely a problem. In slander, it often is. A recent example is *Umeyor v Ibe* [2016] EWHC 862 (QB), where the claimant failed to plead or prove a proper case on publication.

13. The pleading requirement is set out in CPR 53 PD 2.4, which provides that

> "In a claim for slander the precise words used and the names of the persons to whom they were spoken and when must, so far as possible, be set out in the particulars of claim if not already contained in the claim form."

This is no more than a reflection of a long-established principle, that the precise words used must be pleaded "in order that the defendant may know the certainty of the charge and be able to shape his defence": *Cook v Cox* (1814) 3 M & S 110, 113 (Lord Ellenborough), cited in Gatley on Libel & Slander 12th ed para 26.13. The words "so far as possible" in the Practice Direction have not qualified that principle: *Best v Charter Medical of England Ltd* [2001] EWCA Civ 1588, [2002] EMLR 18 [7] (Keene LJ).

14. For the same reasons, a claimant has to *prove* publication of particular words at the trial. Gatley puts it this way:

> **"32.13 Action for slander.** Where there is no admission by the defendant that he spoke the words complained of or words to like effect, the claimant must call evidence of what the defendant said and of who heard him. The actual words spoken must be proved; it is not sufficient for witnesses to state what they believe to be the substance or effect of the words, or their impression of what was said. The burden is of course on the claimant to do so."

15. The reference here is to witnesses, but of course the best evidence will be a recording. In this action, as will be seen, the claimant has no recording, nor any witnesses to the

alleged slander. His case relies on inference from documents he obtained some months after the alleged slanders.

16. These requirements are not mere technicalities. As explained by Keene LJ in the passage cited from *Best*, the actual words used are critical because everything else flows from the words: meaning, whether defamatory, defences and damages. See also *Umeyor* at [39].

17. The second key requirement is the need to prove serious harm. Section 1(1) of the 2013 Act provides that "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant." It is common ground that the serious harm requirement is not satisfied just because the defendant has published an imputation which has a seriously defamatory tendency. A claimant must establish on the balance of probabilities that the publication has in fact caused his reputation to suffer serious harm, or is likely to do so in future: *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), [2016] QB 402. In the present case we are concerned only with whether serious harm has been caused.

18. The word "serious" is to be applied in its ordinary and natural meaning. Whether reputational harm has been caused that is serious by that standard is a fact-sensitive question. It may not be apt for summary resolution; it may require a trial; but that will not invariably be so: *Ames v The Spamhaus Project Ltd* [2015] EWHC 127 (QB), [2015] 1 WLR 409 [50], [101] and *Lachaux* [66].

19. A number of further points about the approach to serious harm have been established, which were conveniently summarised by Dingemans J in *Sobrinho v Impresa Publishing SA* [2016] EWHC 66 (QB), [2016] EMLR 12 [46]-[50]. They include the following:

> "46. … It should be noted that unless serious harm to reputation can be established injury to feelings alone, however grave, is not sufficient to establish serious harm.
>
> 47. Secondly it is open to the claimant to call evidence in support of his case on serious harm and it is open to the defendant to call evidence to demonstrate that no serious harm has occurred or is likely to do so. However a court determining the issue of serious harm is, as in all cases, entitled to draw inferences based on the admitted evidence. Mass media publications of very serious defamatory allegations are likely to render the need for evidence of serious harm unnecessary. This does not mean that the issue of serious harm is a "*numbers game*". Reported cases have shown that very serious harm to a reputation can be caused by the publication of a defamatory statement to one person.
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> 48. Thirdly, there are obvious difficulties in getting witnesses to say that they read the words and thought badly of the claimant… This is because the claimant will have an understandable desire not to spread the contents of the article complained of by asking persons if they have read it and what

> they think of the claimant, and because persons who think badly of the claimant are not likely to co-operate in providing evidence.
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> …
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> 50. … as Bingham LJ stated in *Slipper v BBC* [1991] QB 283 at 300, the law would part company with the realities of life if it held that the damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity "*to percolate through underground channels and contaminate hidden springs*" through what has sometimes been called "*the grapevine effect*". However, it must also be noted that Bingham LJ continued and said: "*Usually, in fairness to a defendant, such effects must be discounted or ignored for lack of proof*", before going on to deal with further publications which had been proved to be natural, provable and perhaps even intentional results of the publication sued upon."

20. Two other requirements of the substantive law are of some relevance. First, it is a general rule of common law that slander is not actionable without proof of special damage. This is subject to some common law and statutory exceptions. Secondly, there is the double-actionability requirement: a statement published abroad is actionable here only if it is shown to be actionable by the laws of the foreign jurisdiction as well as those of England and Wales.

21. In *Jameel* the court struck out as an abuse of process a libel claim which related to an accusation that was serious (that two people were funding terrorists) but had been published to only five people. The court identified the Human Rights Act 1998, s 6, as the source of a duty to dismiss a claim which represented an unwarranted interference with the Convention right under Article 10. At [55] Lord Phillips MR said that:-

> "Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged."

22. The test has been formulated in various ways. One is whether the claim relates to a "real and substantial tort". If not, it may represent an abuse. Others, cited with approval in *Jameel* at [57] and in *Cammish v Hughes* [2012] EWCA Civ 1655 at [56], derive from the judgment of Eady J in *Schellenberg v BBC* [2000] EMLR 296. He identified the relevant questions as whether "the game was worth the candle" or whether "there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense,

and the wider public in terms of court resources." *Jameel* makes clear that in answering those questions it is necessary to consider the extent to which pursuit of the claim could yield vindication for the claimant, or is justified for the purpose of obtaining an injunction.

**Factual Background**

23. It is enough to provide the following narrative, which is drawn from the Particulars of Claim and the evidence before the court on the application, and is not in dispute.

24. In July 2014 an allegation of sexual harassment and sexual assault was made by a student against a member of the ARI staff, Dr Chris Simpson. Dr Simpson was suspended pending an investigation which began on 17 July 2014. Dr Simpson applied for the position of Chief Scientist to the South African Square Kilometre Array project ("SA SKA"). On 15 August 2014 the claimant wrote a letter of recommendation to Natasha Africa, of human resources at SA SKA. It opened by stating that "It is a pleasure to write this letter of recommendation for Dr Chris Simpson". The letter made no mention of the allegations or the investigation.

25. After the completion of the investigation, disciplinary proceedings were brought. They began in early October 2014. A hearing was fixed for 18 November 2014, but adjourned to 9 January 2015. On 4 December 2014 the claimant was asked to provide a reference for Dr Simpson. On 8 December 2014 the claimant did so. It did not mention the disciplinary proceedings. The SA SKA job was offered to and accepted by Dr Simpson. On 12 December 2014 he resigned his post at ARI. The disciplinary proceedings came to an end. On 16 December ARI staff, including the defendant, were told of Dr Simpson's resignation.

26. On 18 December 2014 the defendant sent an email to Dr Kartik Sheth, Head of Science Operations as SA SKA. On 19 December 2014 she sent an email in similar terms to Dr Tony Foley, an Associate Astronomer at the National Radio Astronomy Observatory, Charlottesville, Virginia. So far as relevant, these emails ("the December Emails") stated as follows:

> "[Dr] Simpson resigned this week from my institute having been suspended since July following an allegation of sexual harassment./ assault by his young woman PhD student. A 5-month investigation then ensued, … The investigation concluded that there was sufficient evidence to warrant a disciplinary hearing that would undoubtedly have resulted in his dismissal for gross misconduct. The hearing was scheduled for Nov 18th, but he managed to delay it – possibly with the collusion of our HR and Institute management, who have been keen to coverup their previous cover ups. The hearing date was finally due to be January 9th, but as he resigned this week, the hearing has been cancelled and with it, the disciplinary process.
>
> I believe he has been given an academic reference from the head of the department with no mention of character or conduct; it is not clear whether this was generic or for an

> advertised position but there has been mention that he is moving to South Africa….
>
> Simpson's misconduct is becoming known more widely in some circles … However, it is clear LJMU has worked hard to maintain silence such that even fellow academics within my institute do not know why he has resigned."

27. The December Emails went on to express concern that Dr Simpson would seek to damage the reputations of those who had complained against him and to harass other young women in the future. In fairness to Dr Simpson and the others concerned I should make clear that there have been no findings about any of these matters, and that this application does not involve making any findings or assumptions about their truth.

28. The claimant did not learn of the December Emails until much later, after this action was brought, when they were disclosed by the defendant. What the claimant did learn about before he launched this action is some email exchanges that took place in February 2015. These began on 1 February 2015 when Prof Renee Kraan-Kortweg (Chair of Astronomy at the University of Cape Town) wrote an email on her own behalf and on behalf of Prof Romeel Dave (Professor of Cosmology at the University of the Western Cape), to Bernie Fanaroff, Justin Jonas, and Natasha Africa, all of SA SKA. This, ("the RKK Email") contained the following words:

> "We have been informed (Romeel and myself) of a very appalling situation concerning Chris Simpson, to whom the offer as the SA SKA Chief Scientist has been made, and who has accepted. We are extremely worried about this unfortunate situation which potentially is highly damaging to South Africa's reputation.
>
> As we think you have been made aware, Chris Simpson was suspended from his current position as off July 2014 because of an investigation into allegations of 'recurring' sexual harassment/assault of young PhD students. The information was sent to us by Prof Carole Mundale ... because our friend Kartik Sheth, who had information about the case and had heard rumours that Simpson was coming to South Africa. He has asked her permission to inform us, given the damaging consequences such an appointment could have for South Africa. We have had a few email exchanges with Carole Mundell … And she provided us with a summary of the situation around Simpson, which I attach for your information below…"

(I have left in the typographical errors present in the original)

29. The summary referred to in the RKK Email ("The Defendant's Summary") was set out at the end of. It was nine paragraphs long. Paragraphs 6 to 9 read as follows:-

> "[6] I have reason to believe that on Simpson's resignation, Prof Mike Bode, as long-standing ARI Director (currently on sabbatical from Directorship until July 2015), provided an academic reference with no mention of character or conduct. It also appears that the LJMU HR department are complicit in the coverup.
>
> [7] The ARI management had knowledge of Simpson's behaviour as early as 2008 and had complaints from me and women students from 2009 onwards but it took a formal written complaint from one of Simpson's PhD students in July 2014 escalated by one of the woman staff who supported the student to force Bode to follow the official procedure through HR.
>
> [8] I was unaware of this complaint at that time but had in parallel lodged a formal complaint against Bode for sex discrimination and victimisation which I believe was triggered by me informing him in December 2013 of my knowledge of the sexual harassment of Simpson's previous student, who I was supporting at that time. I raised the issue of the sexual harassment of that student in my complaint and this led to the broadening of the investigation as it became clear there was more than one student victim involved.
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> [9] On hearing of Simpson's resignation in Dec 2014, the letter of reference from Bode and the rumour that Simpson was planning to move to South Africa, I contacted Tony Foley and Kartik Sheth with my concerns (Dec 19, 2014). Tony confirmed that Simpson was moving to South Africa … and asked my permission to pass the information on to his HR department and also to speak with Matt Jarvis, who is a close collaborator of Simpson's. I agreed."

(I have added the numbering)

30. The RKK Email contained some commentary on the situation as depicted in the Defendant's Summary. The comments mainly related to Dr Simpson. It was suggested for instance that Dr Simpson had manipulated a postponement of the disciplinary hearing, and that the "cancellation" of the disciplinary hearing after his resignation was "not conform" and "in violation of Equaly Opportunity Guidelines". Most pertinently for present purposes the RKK Email stated that "It is also disconcerting – if not unethical – that the current director of the [ARI] Prof Mike Bode, did write such a glowing reference letter for Simpson."

31. The RKK Email and the Defendant's Summary were passed on to a number of others over the following days, as the claimant later came to learn.

**Irrelevant matter**

32. The Particulars of Claim contain a great deal more by way of factual background than I have set out above. Paragraphs 1 to 3 introduce the parties. But paragraphs 4 to 33

contain a lengthy narrative, which includes a series of assertions about a grievance lodged against the claimant by the defendant, its investigation and its outcome, as well as a detailed account of the sequence of events in relation to Dr Simpson. It appears that this is intended as a platform for an affirmative case of falsity and unreasonable conduct on the part of the defendant. Mr Nicklin submits that this is all immaterial, at least at this stage of the proceedings, and has no place in the Particulars of Claim. I agree.

33. The claimant in a defamation action does not need to plead or prove falsity. The burden of proving truth lies on the defendant. Absent a plea of truth, falsity is presumed. Bad faith can be relevant to damages, or to a case of malice if that needs to be pleaded, to defeat a defence of qualified privilege or honest opinion. It is true that the plea in aggravation of damages asserts that the defendant had no reasonable grounds to assert or mention bullying or sex discrimination by the claimant in the publications complained of. But that is not where this material appears, much of it is manifestly irrelevant to that point, and material as extensive as this is not necessary for that purpose. It cannot yet be determined whether a plea of malice is relevant, and in any event the place for such a plea is in the Reply.

34. If the claim survived and these factual allegations were to remain in the pleading, the defendant would have to plead to them. There would be no advantage and much disadvantage in that, not least in terms of cost. I would therefore strike out these paragraphs in any event, on the grounds that they are unnecessary and tend to obstruct the just disposal of the claim. I would add that the pleading of the conclusions of internal investigations as evidence of the truth of the findings made would seem to offend basic rules of evidence.

**The slander claims**

35. The claim is pleaded in paragraphs 34 to 36 of the Particulars of Claim as follows:-

> "34. … on or about 19th December 2014 the Defendant spoke to Dr. Tony Foley and Dr. Kartik Sheth, respectively Head of Science Operations at SKA SA and an Associate Astronomer at the National Radio Astronomy Observatory, Charlottesville, Virginia, about the Claimant and also Dr. Simpson.
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> 35. The best particulars that the Claimant can provide of that conversation are that the substance of the words used were as follows:
>
> > [Here, paragraphs 6 to 8 of the Defendant's Summary are set out verbatim: see [29] above]
>
> 36. The said words are defamatory of the Claimant and untrue."

36. In the paragraphs that follow the defamatory meanings attributed to the words are pleaded, and serious harm to reputation is alleged, as is a threat to repeat if not restrained. A number of features may however be noted: (1) The place(s) of publication is/are not specified; (2) no foreign law is pleaded; (3) there is no allegation of special damage; (4) nor is anything pleaded that would place this case

within any of the exceptions to the common law rule that slander is actionable only on proof of special damage.

37. Point (2) could be fatal to the claim, if it appeared at trial that the publications, if any, took place where the alleged publishees are based, in South Africa and the USA. But that is not plainly and obviously or necessarily the case, and the claimant maintains that he does not know where publication took place. It might appear at a trial that it took place in this jurisdiction. In these circumstances a pleading that makes no assertion as to foreign law may be risky, but does not in my view fail to disclose a reasonable basis for a claim. It may be that the omission could in any event be put right by the conventional pleading of the "presumption" that foreign law is the same as English law.

38. Points (3) and (4) do mean that the claim as presently pleaded fails to disclose a reasonable basis for a claim. But it is obvious that the claimant could plead an arguable case that his claim falls within one of the exceptions to the common law requirement of special damage.

39. Mr Nicklin accepts that these pleading points do not provide him with a knock-out blow. He submits that the slander claim is bound to fail because the claimant has no real prospect of proving publication or serious harm to reputation. I agree, and I also agree that there is no compelling reason why the slander claim should be disposed of at a trial.

*Proof of publication*

40. I do not accept Mr Nicklin's submission that the pleading fails to specify as far as possible the precise words used, as required by CPR 53 PD 2.4. It is true that the case is pleaded by reference to the "substance" of what was said, but specific words are pleaded, and Mr Sterling is right to say that the claimant's case as to the words used is clearly and sufficiently stated. The root problem is in my view a different one: that the claimant will not be able to prove the publication of those words.

41. It is clear, and will probably be obvious from my narrative of the background, that the sole basis for the claimant's contention that the defendant spoke to Dr Foley and Dr Sheth in the terms alleged is inference from the contents of the email correspondence cited above. This is apparent from Further Information requested and provided before this hearing, and from the evidence of the claimant. All that the claimant says of potential relevance to this issue is (at paragraph 20) that he is "aware" from the defendant's emails of 18 and 19 December 2014 and the RKK Email that Drs Foley and Sheth "were initially contacted by the Professor Mundell and/or received the said email."

42. The inference that the defendant spoke to Dr Foley and Dr Sheth at all is based only on the December Emails and paragraph [9] of the Defendant's Summary. The words alleged to have been spoken are lifted word for word from paragraphs [6]-[8] of the Defendant's Summary. Mr Sterling points out that the claimant has verified the Particulars of Claim with a statement of truth, but the claimant plainly has no personal knowledge of the facts that would make that a meaningful point on this application. The pleaded case is in truth no more than speculation, and implausible speculation at that. It is contrary to the evidence filed by the defendant, which the claimant is unable

to contradict. It is fanciful to suppose that the words spoken were precisely as alleged. No court could, without more, be expected to draw that inference. There is no suggestion, nor is there any reason to believe that the claimant could improve on his evidential position in this respect between now and trial.

43. The defendant's solicitor, Ms Wheeler, states (paragraph 11) that her instructions are that "there was no conversation between (a) Professor Mundell and Dr Foley or (b) Professor Mundell and Dr Kartik Sheth on or about 19th December 2014 in the terms alleged in paragraph 34 to 36 of the Particulars of Claim." She is also instructed that the defendant did not speak to Dr Sheth at all, and whilst Dr Foley telephoned her on 19 December 2014 "the conversation was not in the terms alleged." I agree with Mr Sterling that this is less than wholly satisfactory. It is unclear why the defendant cannot deal or has not dealt with the matter herself. Nonetheless, the absence of any rebuttal evidence from the claimant is significant. Absent admissions, he bears the burden of proof. Clearly, he has no recording. Nor does he have any evidence from either of the alleged publishees. There is no suggestion that he will obtain any such evidence in future, and this far down the line it seems to me there can be no real prospect of his doing so. Even if he did get statements from Dr Foley and/or Dr Sheth, and even if both gave evidence that they spoke to the defendant about these matters in December 2014, it is unreal to suppose that they would be able to specify the words used. I cannot see any real possibility that either would give evidence supporting the pleaded case.

44. There has been debate about when the Defendant's Summary was composed and sent. Mr Sterling suggests it may have been on or shortly after 19 December 2014, close in time to the alleged slanders. The defendant has not given evidence about the timing. It does seem likely that the Defendant's Summary was provided in the course of the "few email exchanges" referred to in the RKK Email. But Mr Sterling's suggestion as to timing seems improbable, as it would mean that Profs Kraan-Kortweg and Dave waited many weeks before raising the matter in the RKK Email on 1 February. Much more likely is the inference that the Defendant's Summary was provided not very long before the RKK Email was sent. In that case the Defendant's Summary came into being a matter of weeks after the alleged slanders.

45. In any event, the suggestion that the defendant spoke and then shortly afterwards wrote the very same words is far-fetched. Still less realistic is the suggestion in what must have been two separate conversations she spoke the identical words to Dr Sheth and to Dr Foley, before then writing down those same words and sending them to others in writing in the form of the Defendant's Summary. This is not a factual case that carries any conviction at all. No reason has been suggested as to why, if I reach that conclusion, these issues should nonetheless go to trial.

46. That is a sufficient basis for concluding that summary judgment should be entered for the defendant on the claims in slander. But the absence of reason to believe serious harm to reputation could be proved at a trial is an additional reason.

*Serious harm*

47. This is not a numbers game: see above. But it remains a fact that the publication alleged is confined to one or more of Drs Sheth and Foley. There is no allegation in this respect of republication or any "grapevine effect", as Mr Sterling confirmed in his

submissions. The allegation of serious reputational harm is not supported by any details of any particular facts relied on. It is not pleaded, for instance, that the claimant has a close relationship with either of the publishees, or that their attitude to him is a matter of importance to his personal or professional life. Nor are any particular facts about their treatment of him alleged, such as (in the classic formulation) "shunning or avoiding".

48. There is no evidence from either Dr Sheth or Dr Foley about their own reaction or response to the alleged slanders. Nor is there any evidence from anyone else about those matters. I bear in mind the difficulties that are sometimes encountered in securing evidence from publishees, or about their reactions. But there is no evidence before me of any efforts made to obtain evidence of either kind. The claimant himself has made a witness statement which, apart from the passage cited above, says nothing about the alleged slanders. He makes no complaint of any impact of any such slanders.

49. The claimant's case must again rely on inference, therefore. In submissions, Mr Sterling has understandably emphasised the claimant's high standing and good reputation, which are not in dispute, and the nature and gravity of the allegations complained of. In my judgment this purely inferential case would not, in all the circumstances of this case, be enough to carry the claimant over the serious harm threshold at a trial. It could not, realistically, succeed. As Mr Nicklin submits, the court should not allow a willingness to draw inferences to shade into a presumption of serious reputational harm. That would undermine the purpose of the reform which s 1 sought to implement. It is not suggested that there might be any more or better evidence on this issue if the matter went to trial. As Mr Nicklin has pointed out, the alleged publication was a long time ago now and the claimant has had some five months since the present application was issued to obtain evidence.

*Jameel*

50. This claim would have failed an abuse of the *Jameel* variety even if I had concluded that the case on serious harm might prevail. I have no evidence of what defences would be asserted if the claim proceeded, but I would be surprised if none was put forward. The occasion of the alleged publications is at least arguably one of qualified privilege in English law. The likelihood is that this would have been pleaded. It seems likely from the contents of the Particulars of Claim that the claimant would have alleged malice. In the absence of any allegation or evidence tending to support the view that the claimant requires vindication in the eyes of the two individuals in question, the expense in terms of resources would in my judgment have been wholly disproportionate to what was at stake.

51. This was not a mass media communication. It is a case of publication to one or at most two individuals, in which the identity and location and contact details of the alleged publishees are known to the claimant. It is a matter which could well have been dealt with proportionately by means of a phone call, email, letter or other communication addressed to the two individuals concerned. Such communication might well have clarified whether there was any evidential basis for concern (a) that particular defamatory words had been spoken and published; and (b) that serious harm to reputation had been caused. Such enquiries might have established where any communication was made. If there appeared to be grounds for complaint, attempts

could have been made to put any harm right and do away with any need for litigation. Instead, the claimant seems to have launched these claims without (so far one can determine) establishing the facts or seeking to make any contact with either of the alleged publishees, with a speculative case as to publication, and no positive evidential basis for a contention that he has suffered serious harm. There is nothing to suggest that the claim would have been justified for the purposes of obtaining an injunction. This is not a case of continuing publication but of small scale publication over 18 months ago. The facts pleaded in support of the injunction claim are purely formulaic.

**The libel claim**

52. This has been the main focus of the claimant's evidence and of Mr Sterling's argument on this application. The claim is pleaded in paragraph 37 of the Particulars of Claim as follows:-

> "Further, in late 2014 or early 2015 the Defendant sent an email or emails or other correspondence to Prof Renée Kraan-Korteweg and Prof Romeel Dave, respectively Chair of Astronomy of the University of Cape Town and Prof of Cosmology at the University of the Western Cape, alternatively to Prof Kraan-Korteweg and Prof Dave and to Dr. Foley and Dr. Sheth, containing wholly or substantially the defamation as quoted at paragraph 35 above."

53. So the words complained of are, again, those set out in paragraphs [6] to [8] inclusive of the Defendant's Summary. In paragraphs 38 and 39 of the Particulars of Claim it is alleged that "the emails and communications were untrue" and the same defamatory meanings are pleaded as are complained of as slander. Paragraphs 40 and 41 plead that "the said defamations" were, and that the defendant knew or ought to have known they would be, republished. A list of 8 individual republishes is provided. Serious harm, and the need for an injunction, are pleaded in respect of the alleged libels in the same terms as they are in respect of the alleged slanders.

54. Mr Nicklin criticises this pleading on some of the grounds relied on in respect of the claim in slander. Proof of special damage is not a requirement of libel, but the rules as to the pleading of publication and the absence of a plea of foreign law are relied on. Again, these are not put forward as knock-out blows, and I can deal with them shortly.

(1) I do not consider the pleading of publication is objectionable. There is vagueness about the date or dates of publication and the precise manner in which it was done. There is a degree of equivocation about the manner of publication, and again the word "substantially" is used. But the words are specified clearly. As recognised in *Best v Charter Medical*, there are cases where a claimant does not know the full details necessary to plead and prove a case with precision, but nonetheless has a reasonable basis for pleading his case and proceeding to disclosure. In this instance, it is clear enough that the claimant has a sound basis for inferring that the particular words pleaded were published by the defendant, in writing, to those specified in the Particulars of Claim, at or about the time or times alleged. The RKK Email provides a basis for that inference. There is no denial. Admissions,

and disclosure can reasonably be expected in due course to complete the picture, filling in the gaps in the detail.

(2) My conclusions on the double-actionability point are the same as those reached in respect of the alleged slanders.

55. I would not have struck out the claim, therefore. The real issues, in respect of the libel claims, concern serious harm and *Jameel.*

*Serious harm*

56. As with the claimant's claim in slander, his pleaded case that the alleged libels caused serious harm to his reputation lacks any supporting detail. But he does have evidence, in the form of the witness statements put together in response to the summary judgment application. His problem is that these are not good enough. Mr Nicklin submits that even taken at its highest, the claimant's evidence can be summarised as follows: (1) There is no evidence from any of the publishees or republishees that the claimant's reputation was damaged either in their own eyes or in the estimation of anyone else; (2) Of those who read the allegations having been sent them, none of them believed them; (3) There is no direct evidence from any of the witnesses of any real harm, still less "serious harm". In substance, he is right about all these points.

57. The position on the evidence is this: there is no evidence from either of the two primary publishees, Profs Kraan-Korteweg and Dave; there is none from either of the possible additional publishees, Drs Foley and Sheth; there is none from any of the three SA SKA staff, Mr Fanaroff, Mr Jonas, and Ms Africa, to whom the libel is alleged to have been re-published. From these South African sources, therefore, there is silence.

58. There are three re-publishees from whom there is evidence: Professors Dunlop, Blundell and Jarvis. Prof Dunlop, based in Edinburgh, says in terms that he did not believe the allegations against the claimant whose "reputation with me is not harmed". Prof Blundell, based in Oxford, considers the claimant to be a decent and upright man and did not believe the allegations. The highest she puts it is that it crossed her mind "about there being no smoke without fire". Prof Jarvis is a Professor at Oxford and Adjunct Professor at the University of the Western Cape. He was involved in the job offer to Dr Simpson. He does not say the claimant's reputation was harmed in his eyes. He disbelieved what was said about Dr Simpson and for that reason was sceptical about what was said about the claimant. In the course of his submissions Mr Sterling has candidly accepted that the witnesses did not think any the less of the claimant.

59. The other two republishees identified in the Particulars of Claim are Prof Russ Taylor, of the University of Cape Town and the University of the Western Cape, and Dr Simpson himself. There is no evidence from either. Mr Sterling has not suggested that the claimant's reputation was harmed in the eyes of Dr Simpson. There is no evidence of that, and it is highly improbable. As will become clear, the claimant knows Prof Taylor has been in contact with him about this matter. But there is no statement from Prof Taylor. Prof Taylor is no doubt known to Prof Jarvis, yet the latter says nothing about any impact on the claimant's reputation in the eyes of Prof Taylor. Prof Jarvis's own evidence shows that one cannot *assume* that a defamatory

statement will in fact cause reputational harm, which may or may not result. Again, Mr Sterling does not rely on the case of Prof Taylor in support of the serious harm allegation.

60. Mr Sterling does rely on the impact of publication on those who did *not* know the claimant. On a strict interpretation that might exclude all the direct or primary recipients of the alleged libel; the claimant's evidence (paragraph 30) is that "all the recipients of the email knew me". But the claimant's statement goes on, "not in the personal sense but as the Head of [ARI] …" etc. As I understand it, Mr Sterling means to include as people who did not know the claimant the five staff of SA SKA whom I have listed by name above, and unidentified persons said to have been additional republishees. That is the basis on which I approach his submissions.

61. As to additional publishees, I note that the RKK Email itself was written "in confidence" and recorded that "So far we have not informed anybody else." There is a deal of evidence about rumour, but it is very vague and for the most part it suggests rumours about Dr Simpson. That is understandable, given his central role in the story. The defamatory messages in the Defendant's Summary were not all about the claimant by any means. The evidence that there were additional republishees of the offending words is generally weak, fuzzy, and vague. There is a lack of clarity when it comes to what rumours or republications were being spread, and whether they related to Dr Simpson or the claimant or both. This evidence is not capable by itself in my judgment of supporting a case of serious reputational harm. I must take account of the possibility that the evidence on republication and rumour would be elaborated and improved on by the time of a trial; but in all the circumstances, and given the length of time that has already passed I am not satisfied that this is a realistic prospect.

62. As to those who are identified by name, I have already dealt with Drs Sheth and Foley, when addressing the slander claim. That leaves Natasha Africa, the human resources officer, Mr Fanaroff, Mr Jonas, and the two authors of the RKK Email. The only evidence about Mr Fanaroff and Ms Africa comes from Prof Blundell. She says she met Mr Fanaroff and Ms Africa, and that "Their attitude was that they were baffled at what had happened." She uses the same term, "baffled", about her own reaction to "the allegations" against the claimant. She does not identify what "the allegations" are but, in context, she clearly means that she did not accept what was said. Prof Blundell says she reasoned with the "baffled" SA SKA staff, seeking to persuade them not to accept the email at face value, but her efforts "failed as the job offer was withdrawn." This hearsay by no means amounts to evidence that the SA SKA staff treated the defamatory meanings complained of by the claimant as true.

63. The best evidence before me of any reputational harm is to be found in the RKK Email itself, and in a short passage in the claimant's own witness statement. I must consider whether this evidence suggests that the claimant might prove that the alleged libel has caused his reputation to suffer serious harm in the eyes of Profs Kraan-Karteweg and Dave. I do not think it does.

64. Although the RKK Email uses the term "appalling" it does so with reference to the "situation concerning Chris Simpson", and the Defendant's Summary is described as setting out "the situation around Simpson". The RKK Email does express the view that the claimant's conduct in providing a glowing reference for Dr Simpson is "disconcerting – if not unethical". That corresponds broadly with the first two

defamatory meanings complained of by the claimant. But it says nothing about the third meaning which, as Mr Sterling submits, is separate and distinct. The Email therefore suggests that what concerned its authors, so far as the claimant is concerned, was his "glowing reference".

65. The claimant's statement asserts (paragraph 31) that this passage "shows the serious harm to my reputation". But it is, as Mr Nicklin points out, a peculiar feature of this case that the truth of this central assertion of fact is not disputed. I have seen the recommendation letter of August which can certainly be described as "glowing". The opinion that the provision of such a reference was "disconcerting - if not unethical" is evidently the authors' own assessment. It was not one expressed in the words complained of. The claimant plainly rejects that view, but that is not the point for present purposes. Nor is it relevant to decide whether the opinion is correct or reasonable. The issue is the extent to which the claimant might prove that what the defendant said caused him serious harm to reputation.

66. The claimant's statement proceeds: "I am informed by Professor Russ Taylor that Professor Kraan-Korteweg remained totally convinced by all the contents of Professor Mundell's email." This sentence is the reason I have said above that the claimant knows Prof Taylor and has discussed the matter with him. This short piece of what appears to be double hearsay is probably the high point of the claimant's evidence on serious harm. It refers only to Prof Kraan-Korteweg. It makes no mention of Prof Dave. The sentence does not identify the "email" (the Particulars of Claim and Further Information make clear that the claimant does not know the form the libel took). It does not explain what is meant by "all the contents" of the email.

67. A claimant is not lightly to be refused the chance to make a case at trial. That is why I have taken care to analyse the evidential position as it is and as it might realistically be expected to develop. Having done so, and making all due allowance for the high standard set by Part 24, I have been persuaded that I should grant summary judgment against the claimant on this libel claim.

68. In summary, I see no real prospect that if the issue was tested at a trial the claimant would succeed in establishing that the publication of the alleged libel caused any substantial let alone serious harm to his reputation. It went to two or at most four individuals in a South African institution with which he has no existing connection. It was republished to at most four others there, and a handful more in the UK. It is accepted that publication in the UK caused no harm, as the publishees did not believe what was said. The case that serious harm was caused abroad carries no real conviction. He might demonstrate some harm to his reputation in South Africa but not, in my judgment, anything that would qualify as "serious" harm. The main reason appears to be clear: that the claimant clearly has an existing and robust reputation for integrity within the world of astrophysics. There is no reason to allow the case to proceed, if as I conclude it would be bound to fail.

*Jameel*

69. For reasons similar to those given above in relation to the slander claim the libel action would have failed pursuant to *Jameel,* if it had survived the application of CPR 24 and s 1. The alleged libel is very arguably one published on an occasion of qualified privilege. The SA SKA had a legitimate interest in receiving information on

at least some of the topics which were the subject of the words complained of. I infer that the main issue at a trial would be malice. The evidence of harm shows that allowing the case to proceed to a trial would have represented a disproportionate response.

70. The observations I have made above about the approach to the slander claim apply also to the claim in libel. It seems tolerably clear that the evidence put forward in response to the present application, or most of it, was only gathered after that application was launched. There is no evidence that any efforts were made before the claim was started to establish the extent of any harm to the claimant's reputation here or in South Africa. There is no evidence that this was attempted since the action was started, until after the present application was filed. To launch a libel claim over small-scale publication without undertaking such investigations beforehand is a risky enterprise.