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

No. HQ18M00961

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31st July 2019

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Queen's Bench Division)

B E T W E E N :

WARRICK FENTIMAN

Claimant

- and -

RICHARD MARSH

Defendant

Mr Jeremy Reed (instructed by Kingsley Napley LLP) appeared on behalf of the Claimant.

The Defendant did not appear and was not represented.

Hearing date: 22 July 2019

J U D G M E N T

RICHARD SPEARMAN Q.C.:

Introduction

1. This is the trial of a claim for libel, brought by Warrick ("Rick") Fentiman in respect of 4 publications which are said to be defamatory of him. Mr Fentiman was represented at

the trial, as he has been throughout these proceedings, by Jeremy Reed. I am grateful to Mr Reed for the balanced and sensible way in which he presented his client's claim. This included ensuring that I had in mind those parts of the Defence of the Defendant, Richard Marsh, which remained in existence – a large part of Mr Marsh's Defence having been struck out by Order of HH Judge Parkes QC (sitting as a Judge of the High Court) dated 21 June 2019 – and which provided the only indication of Mr Marsh's stance in answer to the claim, because Mr Marsh did not appear and was not represented at the trial.

2. It appears from an exchange of emails between Mr Marsh and Mr Fentiman's solicitors that Mr Marsh was notified on 19 July 2019 of the time and venue of the trial. The trial began at 2pm on 22 July 2019, and, in the absence of Mr Marsh – and, thus, of any rival evidence, submissions or cross-examination of Mr Fentiman's witnesses – concluded that same afternoon. In an email dated 17 July 2019, Mr Marsh stated: "Please apologise to the Judge on my behalf for my absence, and explain that I am no longer resident in the UK, and have no funds whatever to finance a flight to the UK to attend court".

3. Although 4 publications were sued on, it appeared to me that the claim faced potential difficulties in respect of one of them because (a) that publication made no reference to Mr Fentiman by name and (b) no reference innuendo had been pleaded in the Particulars of Claim in respect of that publication and (c) if, in order to plead the case correctly, it was necessary for Mr Fentiman to seek permission to amend the Particulars of Claim, an application for permission to amend would need to surmount the hurdles which stand in the way of applications which are made so late in the day, to say nothing of having to be made without notice to Mr Marsh in the circumstances of the present case. Ironically, Mr Marsh's non-appearance may well have operated to his advantage in this context. If Mr Marsh had been present and represented, his advisers might not have questioned the form of the pleaded case, and, even if they had done so, the argument that an amendment would cause prejudice to him might have been hard to sustain. Having considered these issues overnight, Mr Reed informed me that Mr Fentiman had come to the conclusion that an application for permission to amend was probably required, but had decided not to make any such application. It was explained that this was on the basis that the other 3 publications sued on covered very similar ground to the 4th publication, with the result that the exclusion of the 4th publication would be unlikely to have any, or any material, impact upon the quantum of damages.

4. As a result of Mr Reed's successful application before HH Judge Parkes QC to strike out parts of the Defence and for summary judgment in respect of various aspects of the claim, and as the judge stated in *Fentiman v Marsh* [2019] EWHC 1563 (QB) at [61], the issues for trial have been narrowed, in respect of each of the (now 3) publications complained of, to (1) meaning, (2) whether the publication caused serious harm (see section 1(1) of the Defamation Act 2013: "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the

claimant"), and (3) if Mr Fentiman succeeds on those issues, the measure of damages. In addition, I am fortunate to be able to rely on HH Judge Parkes QC's exposition of the background and aspects of the claim, which I state below substantially in his words.

Background

5. Mr Fentiman is the Chief Executive Officer of Specialist Hygiene Solutions Limited ("SHS"), which trades under the name "Hygiene Solutions". Among its products are a system known as "Deprox" which carries out "surface bio-decontamination" for healthcare and commercial purposes, and an automated UV light disinfection system known as "Ultra-V". Both systems are supplied to NHS hospitals.

6. Mr Marsh has a history of making serious allegations against SHS and its directors. He did not attend the hearing of Mr Fentiman's application before HH Judge Parkes QC, who was informed (in similar fashion to what occurred in advance of the trial before me) that Mr Marsh had sent an email to Mr Fentiman's solicitors saying he was no longer resident in the United Kingdom and would not be able to attend the hearing.

7. The brief history behind the allegations on which Mr Fentiman now sues is as follows.

8. SHS issued proceedings against Mr Marsh on 25 August 2015 in respect of allegations of defamation and breach of contract and confidence. Those proceedings were compromised by a consent order in Tomlin form on terms which included an undertaking by Mr Marsh not to publish any further information (whether public or private, true or false, defamatory, disparaging or otherwise) of or concerning SHS, its employees, directors, servants or agents, or its Deprox product. That undertaking was in remarkably wide terms, but Mr Marsh was advised by solicitors Birketts LLP.

9. In spite of that undertaking, between about 2016 and 2018 Mr Marsh published a large number of allegations on websites with the domain names deproxfraud.info, ultra-vfraud.info and deprox-fraud.blogspot.co.uk, on YouTube, via Dropbox and Twitter, and on Facebook, by email, and by letter to delegates at a conference on Infection Prevention Control. In broad terms, the published statements alleged that SHS's products, including Deprox, were ineffective and/or dangerous, and made a number of allegations of dishonesty and criminality against Mr Fentiman and other directors.

10. Those allegations were alleged to be in breach of Mr Marsh's undertaking to the court. By notice dated 13 March 2018, SHS applied to commit Mr Marsh to prison for contempt of court. In the course of the hearing of the application, Mr Marsh pleaded guilty to contempt in respect of 17 specimen counts, as they were described. At the same time, he admitted that all the other publications complained of in the committal application had been published by him in breach of his undertaking to the court. Mr Marsh also apologised for his breaches of the undertaking. Mr Marsh was sentenced on

30 April 2019 to be committed to HM Prison Pentonville for 8 months, suspended for 2 years provided that the undertaking was not breached during that period.

The allegations which are now complained of in the present claim

11. As set out above, Mr Fentiman relies on 3 further statements as being defamatory of him. Each of them relates to a cyber-attack on Mr Marsh's various internet platforms, which Mr Marsh alleges had previously taken place. Mr Fentiman does not know whether any such attack did, in fact, take place. Accordingly, he is in no position to deny that it did. Even if it did, however, Mr Fentiman's case is that he (and, for that matter, as far as he knows, SHS) had nothing whatsoever to do with it. Mr Marsh's defences of truth and to the effect that there was a public interest in publishing allegations to the contrary effect have gone due to the Order of HH Judge Parkes QC.

12. In the Particulars of Claim, the deproxfraud.info blogsite is termed "the First Blogsite" and the ultra-vfraud.info blogsite is termed "the Second Blogsite". The 3 publications complained of are termed "the First Post", "the Second Post", and "the Third Post".

13. The First Post was made on the Second Blogsite on 2 October 2017. Mr Fentiman complains of the following words:

> Hack backfires!
>
> The illegal and cowardly cyberattack on whistleblower site deproxfraud.info and on the personal Facebook and LinkedIn pages of Richard Marsh have only served to draw the attention of the NHS, Public Health England and the Health and Safety Executive to the grubby and unethical activities of Rick Fentiman and his minions at Hygiene Solutions Ltd.

14. The pleaded meaning of the First Post is that Mr Fentiman was responsible for carrying out an illegal cyber-attack on the First Blogsite and on Mr Marsh's Facebook and LinkedIn pages.

15. The Second Post was made on 3 October 2017 on Twitter and Linkedln. Mr Fentiman complains of the following words:

> Deproxfraud.info is back! The site was fully restored this morning, following last week's hacker attack by Hygiene Solutions Ltd.

16. These words were accompanied by a photograph of Mr Fentiman, which is pleaded to have been altered by Mr Marsh "to give the impression that [Mr Fentiman] is the evil emperor from the Star Wars movies".

17. The basis of this allegation is that the photograph depicts Mr Fentiman wearing a hood and with bright red "bulls-eyes" for eyes. Further, the word "HACKER"

appears prominently in large font and in red type across his upper forehead. For readers unfamiliar with the Star Wars movies, I consider that the photograph nevertheless suggests a demonic element to the "HACKER" who is pictured.

18. The pleaded meaning of the Second Post is that Mr Fentiman is a hacker, who carried out an unlawful hack and cyber-attack on Mr Marsh the previous week, the effect of which in part had been to take down the First Blogsite.

19. The Third Post was made on 13 October 2017 on the First Blogsite. Mr Fentiman complains of the following words:

> Legal action taken re cyber-attack
>
> Legal action is being taken against the directors of Hygiene Solutions Ltd in connection with flagrant breaches of the Computer Misuse Act 1990. See:
> https://www.legislation.gov.uk/ukpga/1990/18/crossheading/compute

20. The pleaded meaning of the Third Post is that criminal charges were being brought against the directors of SHS, including Mr Fentiman, for carrying out a cyber-attack on Mr Marsh.

Mr Marsh's pleaded Defence

21. With regard to the First Blogsite, Mr Marsh pleads (so far as material) that (a) this site has a built in analyser that counts the number of times that it is accessed each day and (b) between 1 October 2017 and 15 March 2018 (the day after the claim form in these proceedings was issued) this site received approximately 7,200 visits.

22. This information is relevant to the Third Post, which was posted on the First Blogsite. However, it says nothing about the number of times that the Third Post was accessed (save that, if it is right, the Third Post cannot have been accessed on more occasions than the First Blogsite was accessed, namely 7,200 times in the period pleaded). Nor does it state the number of people who accessed the First Blogsite (because it may be, and indeed it is probably likely, that at least some people accessed it on more than one occasion). Further, the Third Post was not removed until some months after 15 March 2018. This information therefore only covers some of the period for which the Third Post was available to be accessed.

23. However, Mr Marsh also pleads that the First Blogsite records the number of visits to each specific post, and that the exact number of visits to the Third Post amounted to 188 in total. This figure is unverified by any documents. However, it is based on the following profile of visits: 101 in October 2017; 8 in November 2017; 0 in December 2017; 66 in January 2018; 7 in February 2018; 6 in March 2018; 0 in April 2018.

24. The "spike" of 66 visits in January 2018 coincides with the date of the 4th publication (on Facebook), which Mr Fentiman is no longer pursuing. This provides some grounds (which are necessarily limited and imperfect) for thinking that these alleged figures may be right. If they are dependable, they suggest that the Third Post was accessed on relatively few occasions during the period which Mr Marsh has chosen to identify, and may not have been accessed at all thereafter.

25. With regard to the First Post, Mr Marsh pleads that this was on the Second Blogsite, which was much smaller than the First Blogsite and attracted fewer viewers. He suggests that on a "generous estimate" the First Post may have attracted approximately half the number of views as the Third Post attracted, that is to say about 100 views.

26. With regard to the publication of the Second Post on LinkedIn, Mr Marsh pleads that there are no statistics available as the Second Post was merely a link to external content, but that statistics are available for another publication containing negative content concerning Hygiene Solutions that he published on 11 October 2017 (8 days after the Second Post was published), and that this was clicked on a total of 184 times between that date and April 2018. He pleads that there are "no grounds to claim that the Second Post would have attracted significantly more than this level of engagement on LinkedIn". He also pleads – supported by what he says are relevant screen shots – that the Second Post "received no likes, no comments and no shares" and that "This indicates a very low level of interest and engagement".

27. As to the publication of the Second Post on Twitter, Mr Marsh pleads that he has 108 Twitter followers, that Twitter keeps a record of all engagements with posts, and that the Second Post received 46 engagements, comprising: 20 link clicks, 14 detail expands, 6 profile clicks, 3 re-tweets, 2 media engagements, and 1 like.

28. With regard to the photograph contained in the Second Post, Mr Marsh pleads that there is no basis for the claim that this has been altered "to give the impression that [Mr Fentiman] is the evil emperor from the Star Wars movies". He pleads: "The image depicts [Mr Fentiman] wearing a hood. A hood is a very common article of clothing and has no obvious negative connotations – it is often associated with monastic orders – see below [followed by a cartoon featuring monks]."

29. With regard to the meanings pleaded in the Particulars of Claim, Mr Marsh's case is that (1) the pleaded meaning of the First Post is "substantially true" (i.e. that Mr Fentiman probably was responsible for carrying out an illegal cyber-attack on the First Blogsite and on Mr Marsh's Facebook and LinkedIn pages), (2) the pleaded meaning of the Second Post is also "substantially true" (i.e. that Mr Fentiman is a hacker), and (3) the Third Post did not mean that "criminal charges were being brought" but instead the words "legal action is being taken" meant (as was in fact true) that Mr Marsh "had discussed the hacking issue with lawyers, and researched the relevant case law extensively preparatory to bringing a criminal charge".

30. The Defence contains a quantity of material which Mr Reed relied upon in aggravation of damages. This material includes claims (a) that the reason why Mr Fentiman has not sued Mr Marsh in respect of numerous other very serious allegations contained in other posts is that those allegations are substantially true and (b) that Mr Fentiman "is a liar … has no hesitation in committing a crime if he thinks that he can get away with it … is motivated by greed and financial gain without any regard for the effects of his actions on individuals or society at large … is dishonest … would not hesitate to take illegal actions to destroy the websites that were damning him and his business – because he has no social conscience or moral compass … [and] is the only possible party that meets all these conditions [i.e. the conditions which it is said that the hacker of Mr Marsh's sites must have met]".

The evidence of the witnesses

31. In his witness statement dated 21 November 2018, Mr Fentiman states:

> "… I will not attempt to quantify the harm caused by any particular post in this witness statement. I do believe that the posts about which I complain in this claim were harmful to my reputation.
>
> I suspect that Mr Marsh has no money (which is what he has said), and so what I really seek in this action is vindication by virtue of the action succeeding and by virtue of the size of the damage award – albeit in the expectation that I will never recover any of my legal costs, let alone any damages awarded. This might be considered as some measure of the upset that these particular allegations have caused me. I believe that the allegations that I complain of in this claim are allegations of a nature which are seriously harmful to my reputation. I also believe that unless I take action, Mr Marsh's conduct is likely to continue.
>
> Furthermore, I find it aggravating that the Defendant is using his defence of this claim as a platform for repeating the multiple other outrageous allegations that he has made against me and SHS.
>
> … The seriously defamatory allegations about which I complain have no truth in them whatsoever, and I hope that the court will vindicate my reputation."

32. In his witness statement dated 3 July 2019, Tautvydas Karitonas, the Head of Product Development at SHS, states:

> **"…** As I have been at SHS since 2014, I know what it was like to work for the business before and after the Defendant's allegations. I also worked with the Defendant at SHS and was very upset about the allegations he made against SHS's products after he had left. However, as my role at SHS is to ensure the product efficacy and to develop the products, I was able to reassure myself that these allegations about SHS's products were not factually correct. We had evidence that the allegations were not true. However, I did not have any evidence that the Claimant did not hack the Defendant's systems.
>
> Prior to the hacking allegations being published, there was a lot happening at SHS due to the Defendant's other allegations and it was a difficult

environment to work in. However, from working with the Claimant, I understood him to always be truthful and do the right thing. I saw the Claimant as a role model, as somebody I looked up to and learned from.

When the hacking allegations were published, the focus shifted as the allegations were now directed at the Claimant as an individual and his conduct, and not at SHS's products or matters relating to SHS's products. I was worried that the Claimant had cracked under the pressure in trying to deal with the product allegations in the proper and lawful manner, as he had been doing. I had seen first-hand the immense pressure that the Claimant had been under. SHS was his business and he assumed all of the responsibility for it. The Claimant had spent a good deal of time trying to deal with the Defendant's product allegations, yet they remained online. I believed that it was possible that the Claimant had taken an easy way out to bring the Defendant's blogsites down and hacked the Defendant's systems. I think it is only natural that this crossed my mind given the allegations. I was confused. I thought I knew the Claimant and his character, and I respected him, but having seen the hacking allegations I was no longer sure about him.

Before the cyber-attack, the Defendant posted on a routine basis and it seemed nothing would stop his posts. I thought maybe the Claimant had decided to take matters into his own hands, being fed up with having the false allegations out there on the internet, and dealt with this problem by choosing to hack the Defendant's systems in a desperate attempt to support SHS. This was a stressful time.

I did not speak to anybody about the hacking allegations about the Claimant. I decided it would be inappropriate, given my role, and because, as much as I have come to know the Claimant by working for SHS, he is my manager and the owner of SHS. However, I do recall the Claimant bringing up the allegations generally and explaining it was more of the Defendant's "nonsense" and other team members making clear the hacking allegations were crazy, absurd and just another attack but on a personal level.

The hacking allegations did have a professional impact on me. I have always been ambitious and career driven and I was worried about my professional reputation. If I decided to leave SHS, I was worried what opportunities there would be out there for me and I was concerned that my CV would be tainted by the allegations … I did not want to miss out on the opportunity to work somewhere because I had been tainted by working for SHS.

… SHS operates in a small, closed and niche industry. The allegations, including the hacking allegations, would likely be known to the industry and to SHS's competitors. I would be extremely surprised if SHS's competitors were not aware of all of the allegations, and if they were not following them. I was worried that the allegations would have a longer term impact on SHS and the Claimant, and me professionally, due to circulation within this closed industry."

33. The evidence of Eleanor Barnes, a Client Support Executive Assistant at SHS, was to the like effect. In her witness statement dated 4 July 2019 she said:

"In late September 2017, I became aware that the Defendant's blog was no

longer online. A couple of weeks later I became aware that the blog was back online, and I saw that the Defendant made posts claiming that he was the victim of a cyber-attack and that the Claimant was the perpetrator of that attack.

I have been shown what I am told have been referred to as the First Post, the Second Post, and the Third Post, in this claim. I recall seeing the First Post and the Second Post, but I do not recall seeing the Third Post. I particularly remember the Second Post as it contained a photograph of the Claimant's face.

The First and Second Posts made me feel a little bit unnerved and uneasy. The allegations were scary.

… The hacking allegations were different to the other allegations levied at SHS as they concerned the Claimant's character and integrity, not just the products which the employees had faith in.

I took the hacking allegations seriously and wondered whether the Claimant had carried out the cyber-attack. The Defendant had been busy posting continuously about SHS for the preceding year and the allegations of hacking made me question why he would have chosen to stop now. I wondered what the Claimant had to hide as he had always said he would go down the professional and legal route to deal with the Defendant's allegations. So as a result of the allegation of hacking that the Defendant had made against the Claimant, I thought that perhaps the other allegations might be true after all. The allegation that the Claimant had carried out the cyber-attack made sense to me, as I knew that the Defendant's blog which made the allegations against the Claimant and SHS had disappeared from the internet, and I thought the only possibilities were that the Defendant had taken it down himself, or that the Claimant for SHS had taken it down. I could not think why the Defendant would have taken it down himself, and when the Defendant accused the Claimant and SHS that seemed to make sense to me.

In the office, the Claimant would often speak to me and I did wonder whether he had hacked the Defendant's accounts because he was trying to cover up serious faults within SHS's products. Whilst I don't think that I behaved differently towards the Claimant following the hacking allegations, I did feel differently towards him and tried to keep him at arms-length. I was worried that the allegations were true, or might be true. I was careful what I said around him, and I listened carefully to the Claimant for anything he said which might confirm that the hacking allegations were true.

… The Defendant's blog and the Defendant's hacking allegations were discussed amongst the other employees of SHS, both at work and at social events. I know this because I heard it. The employees I spoke to, and heard speaking, knew that the Defendant's posts had been removed and the blame pointed at the Claimant …

I know these posts alleging hacking made me question whether the allegations levied by the Defendant about SHS's products were in fact true.

… By the time of the hacking allegations in October 2017, I had been working at SHS for about two and a half years and I had a good working relationship

with the Claimant. Despite this, the hacking allegations made me feel uneasy and I was unsure whether I wanted to continue working for SHS. By this point, I thought I knew the Claimant, but was always questioning whether I really did – which was not a nice feeling …"

34. Finally, very similar evidence was given by Tom Lister, Head of Sales at SHS in a witness statement dated 5 July 2019. This included the following:

"**Impact of the Hacking Allegations on Myself**

12. As explained above, I had confidence in SHS's products and, accordingly, could simply dismiss these allegations but the hacking allegations were different as they concerned the Claimant's ethics as an individual. I did seriously question whether the hacking allegations were true and the Claimant had done something unethical to remove the other allegations that the Defendant had put on the internet.

13. It was credible, as far as I was concerned, that the Claimant could have carried out the cyber-attack - he had a motive given the amount of pressure he had been under, and given his commitment to removing the allegations. To add to this, I later became aware that the Defendant claimed to have evidence that the cyber-attack was carried out in Kings Lynn, which is where SHS and the Claimant is based. To my mind, this strengthened the Defendant's position.

14. I was particularly concerned about these allegations because hacking is serious and if somebody is found guilty of hacking in this way (i.e. as a corporate cover-up) then it could have hit the headlines. I knew that if these allegations were true, it could be the end of SHS. I believed a lot of people would have seen these hacking allegations, either by reading them themselves or having heard them passed on by word of mouth, and I needed to think seriously about my own career.

15. Shortly after the hacking allegations were made by the Defendant, I was in a room with the Claimant and his brother, Mark Fentiman. We discussed the allegations and the Claimant, and Mark, assured me that these allegations were also false. I had no way of proving whether that was correct, but I decided to stand by the Claimant and the company.

Impact of the Hacking Allegations on others in SHS

16. I am part of the management team and other employees at SHS knew that I was standing by the Claimant. I do not recall any specific conversations with other employees about the hacking allegations but I did pick up on murmuring throughout the business after the hacking allegations had been made by the Defendant. I remember feeling that the dynamics of the team had changed and there was an ill-ease within the workplace.

17. SHS is an SME and not a listed company. The Claimant is the figurehead and CEO of the business and, therefore, without him the future of the business was seriously questionable as far as I was concerned. I was worried about my job – I would be out of work if SHS did not survive. The hacking allegations, therefore, placed a lot of strain on the Claimant, and

on SHS's management team (including me).

Impact of the Hacking Allegations on the PBCC Community

18. The Claimant was well respected within the PBCC [i.e. Plymouth Brethren Christian Chrurch] community. Trust (including personal credibility and integrity) is a major currency within the PBCC, and that trust can be quickly eroded.

19. The allegations, both concerning SHS and the hacking, spread throughout the local congregation, of which the Claimant and I are both part of. I know that some of the PBCC community understood the pressure the Claimant was under because of the various allegations that the Defendant had been making about SHS, and I believe that some of them are likely to have thought (as I did, initially at least) that the twig had finally snapped. By this, I mean that they are likely to have thought that the Claimant had taken down the Defendant's website having tried and failed to get the allegations on the website taken down by other lawful means.

Impact of the Hacking Allegations on Clients, Potential Clients and Industry Contacts

20. Through my role of Head of Sales at SHS, I was aware that our clients, potential clients and contacts within the industry ("Contacts") were aware of both the allegations levied at SHS and the hacking allegations. For example, the Sales Manager of our main competitor, Bioquell Plc, contacted me to discuss the allegations. In addition, I knew that many people were watching the Defendant's every move and some would even "like" the Defendant's posts. I recall, prior to any meetings with clients and prospects, having to prepare to be questioned about the allegations by SHS's Contacts as the majority would mention them.

21. Our Contacts were, for the most part, able to understand and disregard the allegations which the Defendant levied at SHS and its products. For example, we had senior figures in the industry that critically analysed the allegations and discredited them. In addition, for those who were unable to understand the allegations, the SHS team were able to respond defending the product with technical and scientific arguments as we had faith in the product.

22. The hacking allegations were different – I (and the SHS team) had no way of disproving the hacking allegations – unlike the allegations about the SHS product which I could answer with scientific testing and technical explanations. I could not rebut the hacking allegations with technical and scientific arguments like I could the other allegations, and it came down to the Claimant's word against the Defendant's word.

23. I know that the Defendant's allegations were also spread by word of mouth. For example, I attended an appointment where I met the Head of Sterile Services for Brighton and Sussex Hospital who had heard the allegations and explained that they had been brought up at the region's Decontamination Committee Meeting. I was told that SHS could not be trusted so the Trust could not do business with SHS. The same happened in

> Sheffield, the Sheffield Trust became very cagey. I do not think these were isolated incidents."

35. In his oral evidence, Mr Lister confirmed that the reference in paragraph 20 of his witness statement to allegations which the Sales Manager of Bioquell Plc had contacted him to discuss were "product" allegations, not the hacking allegations. He also confirmed that paragraph 21 of his witness statement related to "product" allegations. With regard to paragraph 22, Mr Lister stated: "I've got no specific recollection of people asking me directly about the hacking allegations". However, he also made clear that, as people were interested in the allegations that Mr Marsh was making, he would invite me to conclude that people outside SHS would have seen the hacking allegations as well as the "product" allegations. With regard to paragraph 23, Mr Lister confirmed that he had no specific knowledge that the hacking allegations were spread by word of mouth, but that he had come across instances where people had not actually looked at Mr Marsh's posts but had heard about what was in them, and raised them with him.

36. In short, Mr Lister's evidence, which I regard as being of most assistance in determining the probable extent of both the direct and indirect ("grapevine") dissemination of the hacking allegations complained of in these proceedings, is stronger with regard to the "product" allegations than with regard to the hacking allegations.

37. At the same time, in my judgment, this (and other) evidence, which I accept, provides a sound basis for drawing inferences that both direct and indirect dissemination was extensive, highly damaging, and, in all likelihood, permeating and lurking underground.

Issue 1: Meaning

Legal principles

38. In *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB), in which both sides were represented by very experienced specialist defamation practitioners, Nicklin J stated at [10]-[12]:

> "There has been no dispute as to the legal principles. They are well-established and very familiar.
>
> The Court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways: *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 173D–E, *per* Lord Diplock.
>
> The following key principles can be distilled from the authorities: see e.g. *Slim v Daily Telegraph Ltd* 175F; *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 70; *Gillick v Brook Advisory Centres* [2002] EWCA Civ 1263

[7]; *Charman v Orion Publishing Co Ltd* [2005] EWHC 2187 (QB) [8]-[13]; *Jeynes v News Magazines Ltd & Anor* [2008] EWCA Civ 130 [14]; *Doyle v Smith* [2018] EWHC 2935 [54]-[56]; *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB) [66]; *Simpson v MGN Ltd* [2016] EMLR 26 [15]; *Bukovsky v Crown Prosecution Service* [2017] EWCA 1529 [2018] 1 WLR 18; *Brown v Bower* [2017] 4 WLR 197 [10]-[16] and *Sube v News Group Newspapers Ltd* [2018] EWHC 1234 (QB) [20]:

(i) The governing principle is reasonableness.

(ii) The intention of the publisher is irrelevant.

(iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.

(iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

(v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.

(vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.

(vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

(viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).

(ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.

(x) No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.

(xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts

which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

(xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

(xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning).

As to the *Chase* levels of meaning, see *Brown v Bower* [17]:

> They come from the decision of Brooke LJ in *Chase v News Group Newspapers Ltd* [2003] EMLR 11 [45] in which he identified three types of defamatory allegation: broadly, (1) the claimant is guilty of the act; (2) reasonable grounds to suspect that the claimant is guilty of the act; and (3) grounds to investigate whether the claimant has committed the act. In the lexicon of defamation, these have come to be known as the *Chase* levels. Reflecting the almost infinite capacity for subtle differences in meaning, they are not a straitjacket forcing the court to select one of these prescribed levels of meaning, but they are a helpful shorthand. In *Charman v Orion Publishing Group Ltd*, for example, Gray J found a meaning of "*cogent grounds to suspect*" [58]."

39. Mr Reed also referred me to *Stocker v Stocker* [2019] 2 WLR 1033, in which the Supreme Court gave guidance as to the correct approach towards ascertaining the meaning of posts and Tweets on social media. Lord Kerr JSC said at [41]-[45]:

> "[41] The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read.
>
> [42] In *Monroe v Hopkins* [2017] 4 WLR 68, Warby J at para 35 said this about tweets posted on Twitter:
>
> > "The most significant lessons to be drawn from the authorities as applied to a case of this kind seem to be the rather obvious ones, that this is a conversational medium; so it would be wrong to engage in elaborate analysis of a 140 character tweet; that an impressionistic approach is much more fitting and appropriate to the medium; but that this impressionistic approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read that tweet. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter."
>
> [43] I agree with that, particularly the observation that it is wrong to engage in elaborate analysis of a tweet; it is likewise unwise to parse a

Facebook posting for its theoretically or logically deducible meaning. The imperative is to ascertain how a typical (ie an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on.

[44] That essential message was repeated in *Monir v Wood* [2018] EWHC (QB) 3525 where at para 90, Nicklin J said, "Twitter is a fast moving medium. People will tend to scroll through messages relatively quickly." Facebook is similar. People scroll through it quickly. They do not pause and reflect. They do not ponder on what meaning the statement might possibly bear. Their reaction to the post is impressionistic and fleeting. Some observations made by Nicklin J are telling. Again, at para 90 he said:

> "It is very important when assessing the meaning of a Tweet not to be over-analytical. … Largely, the meaning that an ordinary reasonable reader will receive from a Tweet is likely to be more impressionistic than, say, from a newspaper article which, simply in terms of the amount of time that it takes to read, allows for at least some element of reflection and consideration. The essential message that is being conveyed by a Tweet is likely to be absorbed quickly by the reader."

[45] And Nicklin J made an equally important point at para 92 where he said (about arguments made by the defendant as to meaning), "… these points only emerge as a result of close analysis, or someone pointing them out. An ordinary reasonable reader will not have someone by his/her side making points like this."

40. The question in that case was what meaning the words "He tried to strangle me" would convey to the "ordinary reason reader" of a Facebook post. In the present case, the words complained of have clearer characteristics of being straightforward statements of fact, and I consider there is less room for concerns about parsing and elaborate analysis.

Application to the publications complained of

41. The effect of Mr Marsh's Defence is to admit that the First Post meant that Mr Fentiman was responsible for carrying out an illegal cyber-attack on the First Blogsite and on Mr Marsh's Facebook and LinkedIn pages. I agree that it bears that meaning.

42. The effect of Mr Marsh's Defence is to admit that the Second Post meant that Mr Fentiman is a hacker. I agree with Mr Fentiman that it also means that Mr Fentiman had carried out an unlawful hack-attack the previous week (although this of itself does not make the meaning any more or less defamatory). As to Mr Fentiman's contention that the Second Post also meant that "the effect of [that hack and cyber-attack] in part had been to take down the First Blogsite", I see no reason why, applying the legal principles summarised above, the Second Post should be regarded as meaning any

more than "the effect of Mr Fentiman's hack-attack had been to prevent access to the First Blogsite". In my judgment, that is the meaning that the Second Post bears.

43. As to the Third Post, in addition to the words complained of, this included the line: "CYBER-ATTACK, DEPROX, HYGIENE SOLUTIONS LTD, RICK FENTIMAN, UCLH". Further, under the heading "Computer Misuse Offences", the Third Post set out the text of some statutory provisions. The Third Post also included a cartoon (which features twice) of a man on horseback (depicted in the style of a Texas Ranger) leading away a number of criminals (roped together, and each wearing black and white horizontally striped garments). Although not forming part of the words complained of, I consider that these contents form an important part of the context. In my opinion, the Third Post meant that criminal charges were being brought against the directors of SHS, including Mr Fentiman, for carrying out a cyber-attack on Mr Marsh. As not all persons who are arrested face criminal charges, and as "An unvarnished allegation that a person has been arrested for a criminal offence will ordinarily convey the imputation that he has conducted himself in such a way as to give reasonable grounds for suspecting him of that offence" (see *Doyle v Smith* [2019] EMLR 15, Warby J at [115]), the meaning of the Third Post is more serious than a *Chase* level 2 meaning. It is saying, in effect: "there are very strong grounds to suspect that Mr Fentiman is guilty of Computer Misuse Act 1990 offences".

Issue 2: Did the words complained of cause serious harm to Mr Fentiman's reputation?

Legal principles

44. I considered the applicable legal principles in *Yavuz v Tesco Stores Ltd & Anor* [2019] EWHC 1971 (QB) at [54]-[58]. Mr Reed accepted that I stated the law correctly in those passages, although he submitted (and I agree) that the facts of that case were very different from those of the present case. In that case, if the alleged slander had been published, it would have been published to no more than a handful of individuals, none of whom knew the claimant, and some of whom would probably not have believed it. In those circumstances, I concluded that the claimant had not established that, assuming that it was spoken, the slander complained had caused "serious harm "to her reputation.

45. The meaning and effect of section 1 of the Defamation Act 2013 ("section 1") were considered by the Supreme Court in *Lachaux v Independent Print Ltd* [2019] 3 WLR 18, in which Lord Sumption JSC, giving the judgment of the Court, said at [14], [16]:

> "… section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it "has caused or is likely to cause" harm which is "serious". The reference to a situation where the statement "has caused" serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It

> depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated …
>
> … Suppose that the words amount to a grave allegation against the claimant, but they are published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed. The law's traditional answer is that these matters may mitigate damages but do not affect the defamatory character of the words. Yet it is plain that section 1 was intended to make them part of the test of the defamatory character of the statement."

46. Accordingly, whether a statement has caused "serious harm" falls to be established "by reference to the impact which the statement is shown actually to have had". Further, that, in turn, "depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated".

47. Moreover, a statement may not be defamatory even if it amounts to "a grave allegation against the claimant" if (for example) it is "published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed".

48. At the same time, the assessment of harm of a defamatory statement in not simply "a numbers game" (see *Mardas v New York Times Co* [2009] EMLR 8, Eady J at [15]). Indeed: "Reported cases have shown that very serious harm to a reputation can be caused by the publication of a defamatory statement to one person." (*Sobrinho v Impresa Publishing SA* [2016] EMLR 12, Dingemans J at [47]).

49. Other points that arise from the *Sobrinho* case include the following:

> "46 …. [F]irst … "Serious" is an ordinary word in common usage. Section 1 requires the claimant to prove as a fact, on the balance of probabilities, that the statement complained of has caused or will probably cause serious harm to the claimant's reputation …
>
> 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 …
>
> 48. Thirdly, there are obvious difficulties in getting witnesses to say that they read the words and thought badly of the claimant, compare *Ames v The Spamhouse Project* [2015] EWHC 127 (QB) at [55]. 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 …
>
> Fifthly, 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"* …"

50. In *Doyle v Smith* [2019] EMLR 15, Warby J cited these passages with approval at [116]. Warby J went on to emphasise the importance of the point about inference, and (among other things) approved at [117] the following words of HHJ Moloney QC in *Theedom v Nourish Training (trading as CSP Recruitment)* [2016] EMLR 10:

> "Depending on the circumstances of the case, the claimant may be able to satisfy section 1 without calling any evidence, by relying on the inferences of serious harm to reputation properly to be drawn from the level of the defamatory meaning of the words and the nature and extent of their publication."

51. Although the Supreme Court stated the law differently from the Court of Appeal in *Lachaux v Independent Print Ltd* [2018] QB 594, the following passages from the judgment of Davis LJ accord with the Supreme Court's analysis of section 1:

> "72. ….serious reputational harm is capable of being proved by a process of inference from the seriousness of the defamatory meaning … there is no reason in libel cases for precluding or restricting the drawing of an inference of serious reputational harm derived from an (objective) appraisal of the seriousness of the imputation to be gathered from the words used.
>
> 73. … The seriousness of the reputational harm is … evaluated having regard to the seriousness of the imputation conveyed by the words used: coupled, where necessary or appropriate, with the context in which the words are used (for example, in a newspaper article or widely accessed blog).
>
> 79. There may, for instance, be cases where the evidence shows that no serious reputational harm has been caused or is likely for reasons unrelated to the meaning conveyed by the defamatory statement complained of. One example could, for instance, perhaps be where the defendant considers that he has irrefutable evidence that the number of publishees was very limited, that there has been no grapevine percolation and that there is firm evidence that no one thought any the less of the claimant by reason of the publication …"

52. In *Dhir v Saddler* [2017] EWHC 3155 (QB), [2018] 4 WLR 1, Nicklin J said at [55]:

> "In my judgment, the authorities demonstrate that it is the *quality* of the publishees not their *quantity* that is likely to determine the issue of serious harm in cases involving relatively small-scale publication. What matters is not the extent of publication, but to whom the words are published. A significant factor is likely to be whether the claimant is identified in the minds of the publishee(s) so that the allegation "sticks" …

(ii) A feature of the "sticking power" of a defamatory allegation that has potential relevance to the assessment of serious harm is the likelihood of percolation/repetition of the allegation beyond the original publishees ("the grapevine effect") (*Slipper v BBC* [1991] 1 QB 283, 300 *per* Bingham LJ). In *Sloutsker v Romanova* [2015] [2015] EWHC 545 (QB); [2015] 2 Costs LR 321, Warby J said at [69]:

> "… It has to be borne in mind that the assessment of whether there is a real and substantial tort is not a mere numbers game, and also that the reach of a defamatory imputation is not limited to the immediate readership. The gravity of the imputations complained of… is a relevant consideration when assessing whether the tort, if that is what it is, is real and substantial enough to justify the invocation of the English court's jurisdiction. The graver the imputation the more likely it is to spread, and to cause serious harm. It is beyond dispute that the imputations complained of are all extremely serious."

53. In the *Dhir* case, Nicklin J held that the claimant had demonstrated that publication of an allegation that the claimant "threatened to slit my throat" which imputed to the claimant the commission of the criminal offence of making a threat to kill, punishable, upon conviction, by imprisonment, and which was published orally to at least 90 people at a Church meeting had caused "serious harm" to the claimant's reputation.

54. In the *Doyle* case, Warby J held at [121]-[122] that the inference could properly be drawn of "serious harm" to the reputation of the claimant arising from the publication online of the "Third Article", which alleged that there were reasonable grounds to suspect that the claimant had committed the offences of blackmail and sending malicious and menacing communications in connection with the proposed sale to the claimant of land owned by a rugby Club and deceiving members of the Club into voting in favour of that sale, because (a) such an allegation "could hardly be described as anything other than seriously harmful to reputation", (b) the defendant's evidence "seem[ed] to show that the Third Article was viewed on 69 occasions", (c) "Publication on this scale is not trivial or insignificant", and (d) the inference was not rebutted or even significantly undermined by other evidence, or by the submissions for the defendant. During the course of discussing these last matters, Warby J observed:

> "It is commonplace for a claimant to adduce evidence that has … limits [as to the extent of publication], and the reasons are well-known: see *Sobrinho* (above). Here, the claimant's evidence in his witness statements for trial was if anything more extensive than one might expect in all the circumstances. During the trial, Mr Foster's evidence that "many members" of the Club were monitoring the Website was not challenged. In cross-examination he elaborated: "Everybody in the Club knew about it. Everyone was talking about it".
> …
>
> The victim of a libel cannot ordinarily identify all the publishees. Further, as [Counsel] points out, there is the "grapevine effect" referred to in *Sobrinho*."

Application to the facts

55. The main significant features of the 3 publications in issue are as follows:

    (1) The allegations which formed the subject of the First Post, the Second Post, and the Third Post were all grave, and had an inherent tendency to cause serious harm. In substance, the First and Second Posts alleged that Mr Fentiman was an illegal cyber-attacker and hacker, and the Third Post escalated matters by alleging that his illegal activities had become the subject of prosecution for criminal offences.

    (2) The number of people to whom each of the First Post, the Second Post, and the Third Post were published was substantial. Even on Mr Marsh's pleaded case, taking matters up to April 2018 in each case, but also discounting the possibility of a substantial number of repeat viewings by the same people, the Second Post was published to approximately 184 + 46 = 230 persons, and the Third Post was published to approximately 188 persons. Further, in accordance with Mr Marsh's pleaded case, there were, perhaps, about 100 views of the First Post. Findings of serious harm were made on lower figures in both of the *Dhir* and *Doyle* cases.

    (3) Substantial further "grapevine" dissemination is made out on the evidence (including Mr Marsh's pleaded case that the 46 engagements relating to the publication of the Second Post on Twitter resulted in 3 re-tweets). Mr Lister's evidence is particularly telling in this regard, because he explains, and I accept, that the hacking allegations (which formed the subject of all 3 Posts) spread through the PBCC community as well as the community of SHS's customers. I would have been prepared to draw an inference of substantial "grapevine" dissemination in respect of each of the Posts even in the absence of that evidence. Such percolation typically results from allegations like these on social media.

    (4) The evidence shows that, far from people not believing the allegations, they were so pernicious that even those close to Mr Fentiman who trusted and admired him were deeply troubled by them, and seriously concerned that they might be true. This was partly for one of the very reasons pleaded by Mr Marsh, namely that Mr Fentiman had a motive for wanting to shut down platforms that "were damning him and his business" (although Mr Marsh has no case that Mr Fentiman was, in fact, guilty of the wrongdoing alleged in the Posts, or any material wrongdoing).

56. For these reasons, in particular, I find that Mr Fentiman has established that the requirement of "serious harm" is satisfied in respect of each of the above 3 Posts.

Issue 3: the measure of damages

Legal principles

57. I shall follow the approach of Nicklin J in *Dhir v Saddler* [2017] EWHC 3155 (QB), [2018] 4 WLR 1 in gratefully adopting the following summary of the relevant principles by Warby J in *Barron v Vines* [2016] EWHC 1226 (QB):

"[20] The general principles were reviewed and re-stated by the Court of Appeal in *John v MGN Ltd* [1997] QB 586… Sir Thomas Bingham MR summarised the key principles at pages 607-608 in the following words:

"The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must **[1]** compensate him for the damage to his reputation; **[2]** vindicate his good name; and **[3]** take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is **[a]** the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. **[b]** The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. **[c]** A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that **[d]** compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way. Although the plaintiff has been referred to as "he" all this of course applies to women just as much as men."

[21] I have added the numbering in this passage, which identifies the three distinct functions performed by an award of damages for libel. I have added the lettering also to identify, for ease of reference, the factors listed by Sir Thomas Bingham. Some additional points may be made which are relevant in this case:

(1) The initial measure of damages is the amount that would restore the claimant to the position he would have enjoyed had he not been defamed: *Steel and Morris v United Kingdom* (2004) 41 EHRR [37], [45].

(2) The existence and scale of any harm to reputation may be established by evidence or inferred. Often, the process is one of inference, but evidence that tends to show that as a matter of fact a person was shunned, avoided, or taunted will be relevant. So may evidence that a person was treated as well or better by others after the libel than before it.

(3) The impact of a libel on a person's reputation can be affected by:

(a) Their role in society. The libel of Esther Rantzen [*Rantzen v Mirror Group Newspapers (1986) Ltd and Others* [1994] QB 670] was more damaging because she was a prominent child protection campaigner.
(b) The extent to which the publisher(s) of the defamatory imputation are authoritative and credible. The person making the allegations may be someone apparently well-placed to know the facts, or they may appear to be an unreliable source.
(c) The identities of the publishees. Publication of a libel to family, friends or work colleagues may be more harmful and hurtful than if it is circulated amongst strangers. On the other hand, those close to a claimant may have knowledge or viewpoints that make them less likely to believe what is alleged.
(d) The propensity of defamatory statements to percolate through underground channels and contaminate hidden springs, a problem made worse by the internet and social networking sites, particularly for claimants in the public eye: *C v MGN Ltd* (reported with *Cairns v Modi* at [2013] 1 WLR 1051) [27].

(4) It is often said that damages may be aggravated if the defendant acts maliciously. The harm for which compensation would be due in that event is injury to feelings.

(5) A person who has been libelled is compensated only for injury to the reputation they actually had at the time of publication. If it is shown that the person already had a bad reputation in the relevant sector of their life, that will reduce the harm, and therefore moderate any damages. But it is not permissible to seek, in mitigation of damages, to prove specific acts of misconduct by the claimant, or rumours or reports to the effect that he has done the things alleged in the libel complained of: *Scott v Sampson* (1882) QBD 491, on which I will expand a little. Attempts to achieve this may aggravate damages, in line with factor (d) in Sir Thomas Bingham's list.

(6) Factors other than bad reputation that may moderate or mitigate damages, on some of which I will also elaborate below, include the following:
(a) "*Directly relevant background context*" within the meaning of *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 and subsequent authorities. This may qualify the rules at (5) above.
(b) Publications by others to the same effect as the libel complained of if (but only if) the claimants have sued over these in another defamation claim, or if it is necessary to consider them in order to isolate the damage caused by the publication complained of.
(c) An offer of amends pursuant to the Defamation Act 1996.
(d) A reasoned judgment, though the impact of this will vary according to the facts and nature of the case.

(7) In arriving at a figure it is proper to have regard to (a) Jury awards approved by the Court of Appeal: *Rantzen* 694, *John*, 612; (b) the scale of damages awarded in personal injury actions: *John*, 615; (c) previous awards by a judge sitting without a jury: see *John* 608.

> (8) Any award needs to be no more than is justified by the legitimate aim of protecting reputation, necessary in a democratic society in pursuit of that aim, and proportionate to that need: *Rantzen*... This limit is nowadays statutory, via the Human Rights Act 1998."

Mr Fentiman's case

58. In support of Mr Fentiman's claim for damages and aggravated damages, Mr Reed placed particular reliance on the following points:

    (1) The seriousness of the allegations, going to a core aspect of Mr Fentiman's reputation (factor [a] in *John*).

    (2) The fact that Mr Marsh asserted the truth of the libels and has refused to retract or apologise, thereby increasing the need for an award of damages which vindicates Mr Fentiman's reputation (factor [c] in *John*).

    (3) The fact that Mr Marsh's assertion of the truth of the libels in his Defence continued the injury to Mr Fentiman's feelings (factor [d] in *John*).

    (4) The identity of the publishees, including in particular the publication to those of Mr Fentiman's employees, members of his PBCC congregations, and colleagues in the industry who believed the allegations.

    (5) The propensity of the allegations in question to percolate.

    (6) The tone of the Posts, including, in particular, the doctored photograph of Mr Fentiman in the Second Post with the super-imposed word "HACKER".

59. So far as concerns the level of award, Mr Reed referred to (a) *Cairns v Modi* [2013] 1 WLR 1015, in which the Court of Appeal upheld an award of £75,000 (plus a £15,000 uplift for the way in which the proceedings had been conducted on the defendant's behalf) to a claimant who was accused of match-fixing in a tweet sent to about 65 people (albeit "almost certainly" comprising a "specialist [readership], consisting of those with a particular interest in cricket" - see Lord Judge CJ at [26]), and (b) *Monroe v Hopkins* [2017] 4 WLR 68, in which Warby J awarded £24,000 to a claimant who was accused, in tweets, of condoning and approving of scrawling on war memorials and monuments. Mr Reed submitted that the allegations in the present case were "much more serious than that in *Monroe*, suggesting that the award ought to be rather higher than £24,000" and were comparable to the allegation in *Cairns*, although the extent of the publications in the present case was greater than that in *Cairns*, such that the appropriate award of damages "might well be rather closer to £75,000 than to £24,000".

Discussion

60. As Warby J said in *Doyle v Smith* [2019] EMLR 19 at [131]: "The authorities suggest that the Court should have regard to other awards made by Judges and/or approved by the Court of Appeal, in respect of comparable libels". At the same time, as Eady J said

in *Al Amoudi v Kifle* [2013] EWHC 293 (QB) at [24]: "comparable awards … are … of limited assistance only because circumstances vary so much from one case to another".

61. In the *Dhir* case, Nicklin J awarded damages in the sum of £35,000 taking into account a number of factors, including: (on the damages-enhancing side) that the seriousness of the allegation would be likely to have a serious "sticking power" in people's memories, resulting in the need to make some allowance for the "grapevine" effect, that the claimant was present when the words complained of were spoken and is likely to have been acutely embarrassed and upset in consequence, and that damages had been aggravated by the defendant's persistent plea of truth, which had been maintained all the way to and through a public trial; and (on the damages-reducing side) that the claimant had resorted to violence and threats of violence in the past, and this conduct was in the same sector of his reputation as the allegation made by the defendant.

62. In the *Doyle* case, Warby J awarded damages in the sum of £30,000 in respect of the "Second Article", which was published on a "village news" website operated single-handedly by the defendant, had 242 views, and was held to bear the following meaning:

> "There was very good reason to believe that the Claimant had been guilty of participation in an attempt to defraud members of the Club of many millions of pounds, by allowing the Club to issue what he knew to be false and deceptive documentation about a proposed land sale and then, with a view to ensuring the proposal went through, asking the Club not to correct it."

63. In the present case, I agree that all the factors identified by Mr Reed are relevant. I also consider that some of the especially aggravating features of Mr Marsh's conduct include (a) that the 3 Posts which are complained of were published against the background summarised above, and (b) particular features of Mr Marsh's Defence, such as that the reasons why Mr Fentiman is said to be the likely perpetrator of the hacking in question included that he is a "liar … [and] has no hesitation in committing crime … is dishonest … [and] has no social conscience or moral compass", and the provocative and unconvincing plea that the photograph which forms part of the Second Post was not mischievous because "wearing a hood … is often associated with monastic orders".

64. In light of their considerable overlap and close proximity in time, Mr Reed invited me to make one award in respect of all 3 Posts. In my judgment, applying the principles I have identified and taking account of all the factors mentioned, that award cannot be less than £45,000, with an additional £10,000 for aggravated damages. Anything less would fail to serve the relevant purposes, and in particular the purpose of vindication.

Injunction

65. Mr Fentiman also seeks "An injunction restraining [Mr Marsh] from publishing any words with the meanings complained of herein, or otherwise howsoever libelling [Mr Fentiman]". This raises the question of whether there is a threat or risk of repetition that requires an injunction to prevent it. In all the circumstances, including the background against which the matters complained of in the present proceedings took place, and the way in which Mr Marsh has conducted these proceedings, I consider that there are

sufficient grounds for concern that without the protection of an injunction Mr Marsh will repeat these or similar libels in future to make it appropriate to grant an injunction.

Conclusion

66. Accordingly, there will be judgment for Mr Fentiman for damages of £55,000 in respect of all 3 material Posts. I will grant an injunction to restrain repetition. I will deal with the precise terms of that injunction and with costs when this judgment is handed down.