Neutral Citation Number: [2019] EWHC 2717 (QB)

Case No: HJ17M03508

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2019

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

RIAD TAWFIQ AL SADIK (AKA RIAD TAWFIQ MAHMOOD AL SADEK AKA RIAD TAWFIK SADIK)	**Claimant/ Respondent**
- and –	
SUHAD SUBHI SADIK	**Defendant/ Applicant**

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- -

Richard Munden (instructed by **Gowling WLG (UK) LLP**) for the **Claimant/Respondent**
Ian Helme (instructed by **Brett Wilson LLP**) for the **Defendant/Applicant**

Hearing date: 2 April 2019

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Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. This is a claim in libel. The applications before me are brought by the Defendant/Applicant pursuant to an application notice dated 30 January 2019. She seeks an order that the Claimant/Respondent's claim be struck out pursuant to CPR r 3.4(2) and/or that she be granted summary judgment pursuant to CPR r 24.2.

2. For clarity, in this judgment I will refer to the Claimant and the Defendant. They are closely related. The Claimant is the brother of the Defendant's husband and she is the sister of the Claimant's wife.

3. The libel claim arises out of three WhatsApp messages sent by the Defendant to a group of 34 people on 18 or 19 September 2017 (the Messages). WhatsApp is a messaging service allowing users to exchange messages to each other individually, or via user-defined groups, over the internet. All of the group members were part of the Claimant's wider family. The Messages were sent following bitterly contested family property litigation between parties including the Claimant on the one part, and the Defendant and her husband and son on the other (the property litigation).

4. The property litigation concerned a house in London, the ownership of which was disputed. The Defendant and her husband had lived there for a number of years. The Claimant prevailed in this dispute when, at the conclusion of the trial, the Defendant, her husband and son discontinued their action and signed a consent order giving vacant possession of 22EM, plus mesne profits and costs.

5. On the same day the consent order was signed, the Defendant sent a photograph of the Claimant sitting with his wife and solicitor to the WhatsApp group. They had been sitting in a sandwich shop near to the Royal Courts of Justice when they were photographed by the Defendant. The photograph was accompanied by the Messages in Arabic which, when translated, were as follows:

    a. 'A photograph of the Zionist, Riad [ie, the Claimant], whilst he was arranging with the attorney how he can rob his brother's house, whilst he had sworn on the Quran and before everyone falsely without respecting the sanctity of the Quran'.

    b. 'When we confirmed the level of his audacity to lie and that he had the audacity to lie whilst holding the Quran in his hands, we withdrew our case from court. I ask God to be the judge – I say to you, my brothers and beloved ones that this the Palestinian who is fighting to smash his brother. However, God's love for us is a blessing, for which we always praise Him.'

    c. 'My love and respect for the Al Sadek family, which I'm proud to belong to. I ask God to punish this Zionist who claims that he is a Palestinian …'.

6. The pleaded defamatory imputations arising from these words are as follows (Amended Particulars of Claim (APOC), [11]). The Claimant asserts they meant that he had:

   a. Arranged to rob his brother's house.

   b. Lied, even after having sworn on the Quran to tell the truth; and

   c. Committed perjury in order to dishonestly promote his interests at the expense of his own brother.

7. The Defendant's application is based upon three alternative grounds:

   a. Firstly, that this court does not have jurisdiction to hear and determine the action by virtue of s 9 of the Defamation Act 2013 because at the relevant time she was domiciled outside the UK (the DA 2013) (Ground 1).

   b. Second, there is no real prospect of the Claimant establishing that the publication of the statement of which he complains has caused or is likely to cause serious harm to his reputation within the meaning of s 1 of the DA 2013 and so they are not defamatory (Ground 2).

   c. Third, pursuit of the claim is an abuse of process pursuant to the principles established in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 (Ground 3)

8. At the core of the application are the admitted facts that:

   a. There were only 34 publishees of the Messages, each of whom are members of the Claimant's and Defendant's extended family (APOC, [8]).

   b. The publishees are not based in the UK. With the exception of one person who lives in the United States, they live in the various countries in the Middle East listed beside their names in Schedule A to the APOC. Schedule A to the APOC pleads that it is to be inferred that they were in the specified countries when the words were published.

9. The decision of the Supreme Court in *Lachaux v Independent Print Limited* [2019] 3 WLR 18 on the threshold question of serious harm under s 1 of the Defamation Act 2013 (DA 2013) was given on 12 June 2019. As this decision is relevant to Ground 2, the parties requested the opportunity to file written submissions on it, which I granted. This meant, however, that publication of this judgment has been delayed as a consequence.

The parties and the factual background

10. The Claimant is a businessman and philanthropist who lives in Dubai and spends 30 to 35 days in London each year. As I have said, the Claimant and Defendant are brother and sister in law: the Claimant is the brother of the Defendant's husband and she is the sister of the Claimant's wife. She has a house in Kuwait with her husband. There is an issue about the Defendant's residence which I will discuss later, but it is common ground that

until at least 19 September 2017 she lived at 22 Ennismore Mews, London SW7 (22EM), whilst also maintaining a house in Kuwait.

11. This libel claim arises out of the property litigation in 2016 – 2017 between the Claimant and Defendant (together with her husband and son) about the ownership of 22EM. This property was at the time owned by the Claimant, but the Defendant's case was that he agreed to sell it to her husband in 1992. The Claimant contended that there was no such agreement. 22EM was owned by a company called Fourstar Limited ('Fourstar') in a trust structure for the benefit of the Claimant's son.

12. The Defendant's family commenced a claim for proprietary estoppel against the Claimant and Fourstar in the County Court. Fourstar issued its own claim seeking possession of 22EM and mesne profits; the two claims were consolidated and tried before His Honour Judge Gerald in the Central London County Court between 11 and 18 September 2017 (the 22EM Litigation). The litigation was very acrimonious.

13. On 18 September 2017, the last day of the trial, the Defendant encountered the Claimant, his wife and his solicitor in *Pret a Manger* on the Strand. There was an exchange between them, the details of which are disputed but do not matter for present purposes. She then took the photograph which accompanied the Messages complained of.

14. Later on 18 September 2017, the Defendant's family discontinued their claim and agreed terms of settlement which were embodied in a consent order dated 19 September 2017. This required the Defendant and her family to deliver up vacant possession of 22EM by 4pm on 19 October 2017; and to pay costs in the sum of £550 000 to the Claimant and Fourstar and mesne profits of £242 880 to Fourstar. The Defendant vacated 22EM the same day and went to live with her daughter in London. Around the same time, she sent the Messages that are complained of.

15. As I have said, the members of the WhatsApp group to whom the Messages were sent are identified by name in Schedule A to the APOC and are based in the countries appearing by their name. It is expressly pleaded that these individuals read the words in the countries in which they live, and not the UK or anywhere else. The Claimant's evidence in his Third Witness Statement at [23] is that, 'There are perhaps a dozen names in the WhatsApp Group that I have a very close relationship with… There are perhaps 12 names for people whom I recognise but have no contact with. There a further dozen names that I do not recognise.'

16. Immediately after publication, the Defendant left the WhatsApp Group. She is aware that at least two of its members published messages defending and praising the Claimant (see the Defendant's Second Witness Statement at [78]-[80]).

Procedural Background

17. The procedural history to this claim is as follows.

18. The Claimant states that he learned of the words complained of on 19 September 2017. His lawyers wrote a letter before action on 20 September 2017 which was delivered to 22EM.

19. On 26 September 2017 the Claimant issued a Claim Form and filed Particulars of Claim seeking £25 000 in damages and an injunction against the Defendant in both defamation and harassment. The harassment claim was later discontinued. The same day the Claimant sought to serve these on the Defendant at 22EM, together with an Application Notice by which the Claimant sought an interim injunction against the Defendant in both harassment and defamation (the Interim Injunction Application). On 4 October 2017 Nicklin J heard the Interim Injunction Application and rejected it.

20. On 24 May 2018 the Claimant applied for judgment in default in respect of his defamation claim, together with summary disposal pursuant to s 8 of the DA 1996 (the Default Judgment Application). On 26 June 2018 Nicklin J heard the Default Judgment Application. I have an approved transcript of his judgment. He held that the Defendant's messages were seriously defamatory of the Claimant, that the claim satisfied the requirement of serious harm under s 1 of the DA 2013, and that it warranted at least £10 000 in damages (the maximum award available under the summary disposal procedure). He also granted an injunction to restrain the Defendant from making further similar publications.

21. Taking matters thereafter shortly, in due course the Defendant says that she became aware of the proceedings for the first time and applied to set aside the judgment in default. That application was granted by consent by Warby J on 24 October 2018.

22. On 7 November 2018 the Claimant filed and served his APOC. On 5 December 2018 the Defendant filed and served her Defence. This alleged, *inter alia*, that the words were published on an occasion of qualified privilege and that the action constituted a *Jameel* abuse of process. On 25 January 2019 the Claimant served his Reply taking issue with the Defence and alleging that the Defendant had acted maliciously.

23. On 28 January 2009 the parties exchanged Costs Budgets. The Claimant's Budget is £537 431.93. The Defendant's (which includes a substantial sum for expert evidence) is £409 780.33.

24. On 30 January 2009 the Defendant made this application.

25. On 29 March 2019 the Claimant applied to amend his Claim Form to increase the amount of damages claimed to £50 000 and for an order pursuant to s 12 of the DA 2013 that the Defendant publish a summary of the court's judgment in the event that it gives judgment in the Claimant's favour. The Defendant consented to the application she says, on grounds of proportionality.

The Defendant's application to strike out the claim and/or for summary judgment

The Defendant's submissions

Ground 1

26. The Defendant submits, first, that this court has no jurisdiction to hear and determine the claim by virtue of s 9 of the DA 2013. Section 9 provides:

> **"***Action against a person not domiciled in the UK or a Member State etc*
>
> (1) This section applies to an action for defamation against a person who is not domiciled -
>
> (a) in the United Kingdom;
>
> (b) in another Member State; or
>
> (c) in a state which is for the time being a contracting party to the Lugano Convention.
>
> (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.
>
> (3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.
>
> (4) For the purposes of this section -
>
> (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;
>
> (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention."

27. 'The Brussels Regulation' and 'the Lugano Convention' are defined in s 9(5), to which the reader is referred.

28. The Defendant is prepared to accept for the purposes of this application that the relevant date for determining domicile is the date proceedings were commenced, ie 26 September 2017: see *High-Tec International v Deripaska* [2007] EMLR 15, [5]; *JSC BTA Bank v Mukhtar Ablyazov* [2016] 3 WLR 659, [31] (upheld on appeal in the Court of Appeal: [2017] EWCA Civ 40, [57]-[65]; and was not pursued in the Supreme Court: [2018] 2 WLR 1125, [26]). However, she says that by that date she had left 22EM and was domiciled in Kuwait and not in the UK.

29. The Defendant says that by the time the claim was issued on 26 September 2017 she had, on 19 September 2017, been served with an eviction notice for 22EM (in fact, it was the consent order which she signed giving vacant possession of the house to the Claimant no

later that 4pm on 19 October 2017). She says that 22EM was the only property that she could possibly be said to have resided at in the UK, and that she moved out on the same day on which the litigation was settled (19 September 2017). She says that she was so upset by the outcome that she could not bear to spend a further night at the property even though she was not required to give vacant possession until a month later. Hence, she says that s 9(2) applies.

30. Accordingly, the Defendant says that the Claimant cannot possibly satisfy the test in s 9(2). That is because the Claimant does not complain of *any* publication within this jurisdiction: APOC, [10] and Sch A. She submits that s 9 implicitly requires the words complained of to have been published in England and Wales: 'of all the places in which the statement complained of has been published…'. In effect, she says that s 9 means that this court does not have jurisdiction to hear a claim against a defendant not domiciled in the jurisdiction (or within a Brussels/Lugano state) for a claim in respect of solely foreign publication. In the alternative, if is necessary for the court to compare jurisdictions to determine which is the most appropriate forum for trial (see *Ahuja v Politika Novine I Magazini* [2016] 1 WLR 1414), the Defendant submits that the burden is on the Claimant to demonstrate that England and Wales is clearly the most appropriate forum, and there is no realistic prospect of him being able to discharge that burden. She points in particular to the fact that both of the parties are based in the Middle East, as are all of the publishees of the Messages, save for one, who is based in the United States.

Ground 2

31. The Defendant submits that the Claimant has no realistic prospect of showing that the words in question were defamatory of him pursuant to s 1 of the DA 2013, because he has no realistic prospect of showing they caused him serious harm of that they were likely to. Section 1 provides:

> "*Serious harm*
>
> (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss."

32. At the hearing, the argument on Ground 2 proceeded on the basis of the Court of Appeal's decision in *Lachaux v Independent Print Limited* [2018] QB 594, and I was referred to a number of decisions interpreting and or summarising the principles set out by the Court of Appeal. As I have said, the parties' submissions on this topic were overtaken by the decision of the Supreme Court in *Lachaux,* supra, which was addressed by them in additional written submissions.

33. In the Supreme Court, Lord Sumption, giving the only judgment for a unanimous Court, held that the Court of Appeal's decision was wrong. He held that the effect of s 1 is that the common law rule that in defamation claims the claimant does not need to prove

damage to reputation because it is presumed, no longer exists. Section 1 requires serious harm in fact to be proved.

34. The Defendant submits that the effect of the Supreme Court's decision is that Ground 2 must succeed. She argues that summary judgment should be granted because the Claimant has no realistic prospect of showing that the consequences of publication for him amounted to serious harm to his reputation, or that they were likely to do so, in accordance with the approach established in the Supreme Court's decision. She says that he relies only upon the meaning of the words complained of and has not adduced any evidence of actual consequences or the impact which the statement is shown actually to have had on publishees. His case can therefore only be based upon inference.

35. The Defendant says that whilst this is in principle permissible, it is very difficult for such an inference to get off the ground other than in a case of very substantial publication. She says that it does not do so in this case because: publication was to a very 'small number of people'; these were family members in a closed, transient medium (as opposed to being online) and would have been interpreted as venting from a position of personal involvement, in a family dispute. The Defendant points out that the only evidence that there is from any of the publishees shows that serious harm to Claimant's reputation was not caused in their eyes.

Ground 3

36. The Defendant submits under this ground that the claim should be struck out as an abuse of process pursuant to the *Jameel*, supra, jurisdiction. In that case Lord Phillips MR said at [55]:

> "Section 6 [of the Human Rights Act 1998] 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."

37. Other relevant and well-known formulations of the test for striking out defamation proceedings as an abuse of process, cited with approval by the Court of Appeal in *Jameel* at [57] and *Cammish v Hughes* [2012] EWCA Civ 1655 at [56], are those 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.' The question is whether there has been or arguably has been a real and substantial tort committed here: *Ames v Spamhaus Project Ltd* [2015] 1 WLR 3409, [58].

38. The reasons the Defendant argues that the claim in this case is an abuse of process are set out in the Defence at [11(1) to (17)] and in the Second Witness Statement of Mr Wilson, the Defendant's solicitor, at [22]-[41] and [48]. These include: that the Claimant and the Defendant are based abroad; the Messages were published abroad to just 34 people; no publication within this jurisdiction has been pleaded; the Claimant does not claim to have suffered serious harm to his reputation within this jurisdiction; the trial would cost a significant amount of money (nearly £1 million, as opposed to maximum claimed damages of £50 000); there are no grounds for fearing repetition; vindication does not arise because the Defendant does not claim the imputations were true; and the time and expense of the trial are wholly disproportionate to the minimal benefit which the Claimant might achieve.

The Claimant's submissions

Ground 1

39. The Claimant submits that the Defendant has submitted to the jurisdiction and so can no longer dispute the Court's jurisdiction under s 9 of the DA 2013, or otherwise. Further or alternatively, he submits that provision is of no assistance because she was domiciled within the jurisdiction at the relevant time.

40. As to the first point, the Claimant points to CPR Part 11, which is entitled 'Procedure for disputing the court's jurisdiction'. This provides:

> "(1) A defendant who wishes to –
>
> (a) dispute the court's jurisdiction to try the claim; or
>
> (b) argue that the court should not exercise its jurisdiction
>
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
>
> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
>
> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
>
> (4) An application under this rule must –
>
> (a) be made within 14 days after filing an acknowledgment of service; and
>
> (b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim."

41. The Claimant says that the Amended Particulars of Claim were served on 7 November 2018. The Defendant did not file an Acknowledgement of Service, but pleaded a substantive Defence, which was served on 5 December 2018. He says that she did not make any application relating to jurisdiction within 14 days. Instead, she waited until after the Reply was served on 24 January 2019, before issuing her application on 30 January 2019. In these circumstances, he says she has lost the right to challenge this court's jurisdiction under s 9 of the DA 2013.

42. Secondly, the Claimant says that the evidence clearly shows that the Defendant was domiciled in the UK at the relevant date, and indeed afterwards. He points to her evidence in the property litigation in which she referred to 22EM as having been her home for many years, and also to evidence which he says shows that she has continued to reside in London even after she left 22EM. Accordingly, he says that he has at least a realistic prospect of showing that s 9 has no application in this case.

Ground 2

43. The Claimant submits that in *Lachaux,* supra, the Supreme Court determined that when assessing whether a publication has caused serious harm to reputation, the meaning of the words complained of is not the sole factor, as the Court of Appeal had suggested. The court must look at 'a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated' [14]. The Claimant submits this ground for seeking summary judgment should be dismissed because:

    a. The meaning of the words, and the gravity of the allegation made against a claimant, will always be one of the primary factors to consider when considering the harm to reputation;

    b. It is entirely proper for the Court to infer serious harm to reputation from the inherently damaging tendency of the words complained of and the circumstances of their publication; and

    c. There is therefore no requirement for a claimant to produce witness evidence from those in whose eyes his reputation has been damaged (see *Lachaux*, supra, [21]).

44. The Claimant emphasises that this is not a trial of the issue of serious harm; the claim has not reached disclosure or witness statements. To grant summary judgment on this issue I would have to be satisfied that the Defendant had established that the Claimant had no real prospect of establishing at trial that the publication of the words complained of, with their undoubtedly very serious defamatory meaning, had caused serious harm to his reputation. Given the meaning, this would require clear evidence that the

circumstances of publication and the impact on publishees was such that they obviously outweighed the clear inherent tendency of the words to damage the Claimant in readers' minds. Not only is there not such clear evidence, there is no basis for such a finding at all, and all of the circumstances still point clearly towards the Court making a finding of serious harm at trial. The Claimant relies on the following Points:

a. In his judgment of 26 June 2018 at [16] Nicklin J said the meaning of the words complained of was obviously serious.

b. These words have been initially published to 34 members of C's extended family – persons who matter to Claimant - with evidence of substantial further circulation to significant persons within the Palestinian diaspora;

c. Although no such evidence is necessary and an inference should be drawn without it, the Claimant says he has gone further and served positive evidence as to the circulation of the Defendant's allegations and the damage to his reputation, from his daughter Gheeda.

45. Therefore, Claimant submits that the Supreme Court's decision does not assist the Defendant and that Ground 2 should be dismissed.

Ground 3

46. The Claimant submits in response that the claim should not be struck out. He emphasises that the *Jameel* abuse jurisdiction is one only to be exercised in exceptional cases, and that this is not such a case.

47. He says the words complained of make very serious allegations of criminality and dishonesty against him. The Defendant does not assert that these allegations are true, but has never apologised, retracted, or agreed not to repeat her allegations. In the face of such a stance, the Claimant says that he is left to seek his remedies from the Court.

48. He accepts the extent of direct publication was 34 people. However, he says this was not 34 unknown readers of a website, but 34 members of the Claimant's extended family. He says that such a targeted publication is undoubtedly many times more damaging than a publication larger in number to persons with whom the Claimant will never come into any form of contact, or for whom he does not care. He also says there has been grapevine publication. He says that the Defendant's attempted reliance on the fact that the direct publishees were abroad is misconceived. He says that publication abroad in libel is dealt with by the well-known rules as to double actionability; it certainly does not render claims an abuse of process. The Claimant sues the Defendant for all of the publication of her messages, which she sent from England.

49. Overall, the Claimant says this is a claim about the publication of seriously defamatory allegations to persons who matter to the Claimant. It is far from the sort of exceptional case that should be struck out as an abuse of the Court's process

Discussion

The test to be applied on this application

50. The relevant principles are contained in *Attrill v Dresdner Kleinwort and another* [2011] EWCA Civ 229, [22]-[23], and in the *White Book* 2019, Vol 1, [24.2.3], and are not controversial. They are as follows:

a. In order to defeat an application for summary judgment the respondent to the application must show that he has realistic prospects of success: *Swain v Hillman* [2001] 1 All ER 91, 92.

b. A 'realistic' case is one that is more than merely arguable: *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472, [8].

c. In reaching its conclusion the court must not conduct a mini-trial: *Swain*, supra,

d. This does not mean that a court must take at face value everything that a claimant says in 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* [2003] EWCA Civ 472, [10].

e. 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 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.

f. 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 a summary judgment hearing. Thus the court should hesitate about making a final decision without a trial, even when 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 100 Ltd* [2007] FSR 3.

Ground 1

51. I begin with the issue whether the Defendant has lost the right to challenge this court's jurisdiction under s 9 of the DA 2013, as the Claimant argues that she has, because of her failure to comply with the procedure under CPR Part 11.

52. I begin with the mischief at which s 9 was aimed. It was recently considered by Nicklin J in *Wright v Ver* [2019] EWHC 2094 (QB). In that case the defendant filed an Acknowledgement of Service indicating that he intended to contest the court's jurisdiction. In the accompanying letter from his solicitors, the defendant indicated that the basis of the challenge was lack of jurisdiction under s 9 based on the defendant's domicile. Before that case, the terms and effect of s 9 had only received direct consideration in one earlier case, *Ahuja v Politika Novine I Magazini DOO & others* [2016] 1 WLR 1414. Nicklin J made some observations on it in *Huda v Wells* [2018] EMLR 7, [84]-[85], but as he said in *Wright*, supra, [11], the case was decided on other grounds and so his observations were strictly *obiter*¸ and they have to be understood in the context of that particular case.

53. The Explanatory Notes to the DA 2013 state, in relation to s 9:

> "65. This section aims to address the issue of 'libel tourism' (a term which is used to apply where cases with a tenuous link to England and Wales are brought in this jurisdiction). Subsection (1) focuses the provision on cases where an action is brought against a person who is not domiciled in the UK, an EU Member State or a state which is a party to the Lugano Convention. This is in order to avoid conflict with European jurisdictional rules (in particular the Brussels Regulation on jurisdictional matters).
> 66. Subsection (2) provides that a court does not have jurisdiction to hear and determine an action to which the section applies unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement. This means that in cases where a statement has been published in this jurisdiction and also abroad the court will be required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. It is intended that this will overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in this jurisdiction only. This would mean that, for example, if a statement was published 100,000 times in Australia and only 5,000 times in England that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than England. There will however be a range of factors which the court may wish to take into account including, for example, the amount of damage to the claimant's reputation in this jurisdiction compared to elsewhere, the extent to which the publication was targeted at a readership in this jurisdiction compared to elsewhere, and whether there is reason to think that the claimant would not receive a fair hearing elsewhere."

54. Section 9 was therefore a Parliamentary response to the identified problem of libel proceedings being brought in relation to cases which only have a tenuous link with England and Wales, when they should have been brought in another jurisdiction. It specifies the conditions which have to be satisfied before an English court will have subject matter jurisdiction over the claim. In other words, for a defendant domiciled outside the jurisdictions specified, s 9 specifies a jurisdictional bar which the claimant must overcome.

55. In my judgment a failure by a defamation defendant to follow the procedure in Part 11 for contesting jurisdiction under s 9 does not mean that her right to make a jurisdictional challenge under that section has been waived. Section 9(2) is in mandatory form. Where the defendant is not domiciled within one of the specified jurisdictions then s 9(2) provides (emphasis added), 'A court <u>does not</u> have jurisdiction to hear and determine an action to which this section applies unless …'. In my judgment jurisdiction under s 9

cannot be conferred by waiver, submission or consent. It is concerned with the subject matter of the suit and not with personal jurisdiction over the defendant

56. In *Hoddinott v Persimmon Homes (Wessex) Ltd* [2008] 1 WLR 806, [23], [27], the Court of Appeal spoke in general terms and said that CPR r 11(1) referred to the court's power or authority to try a claim, and that if the conditions in CPR r 11(5)(a) and (b) are satisfied, then the defendant is treated as having accepted that 'the court has jurisdiction to try the claim'. But it is important to recognise the context in which those statements were made. That was whether or not the court had jurisdiction because of a failure to comply with the provisions of the CPR. In *IMS SA v Capital Oil & Gas Industries Ltd* [2016 4 WLR 163, [27], Popplewell J said that it is well known that in the context of challenges to jurisdiction, reference to the court's jurisdiction can be a shorthand for two different concepts: one is the court's jurisdiction to try the claim on its merits; the other is the court's exercise of its jurisdiction to try the claim, and referred to *Hoddinott*, supra. He said that service of process is the foundation of the court's jurisdiction to entertain a claim *in personam*, and accordingly the court has such jurisdiction only where the defendant is served, in England or abroad, in the circumstances authorised by, and in the manner prescribed by, statute or statutory order (typically the CPR): see Dicey, Morris and Collins, *The Conflict of Laws* (15th Ed, 2012), Rule 29. Where there has been no such service, the court does not have jurisdiction. Where such jurisdiction has been established by service of process, the court may nevertheless decline to exercise its jurisdiction, for example on grounds of *forum non conveniens* or *lis alibi pendens*. He went on to say at [34] that CPR Part 11 provides a single procedural code for both types of jurisdiction challenge.

57. However, nothing in *Hoddinott*, supra, or *IMS SA*, supra, were dealing with the sort of statutory jurisdictional bar which s 9 contains. They were dealing with issues of jurisdiction personal to the party concerned, such as whether the claim form had been properly served, which can be the subject of waiver or submission: see *Dicey*, loc cit, [11-133]. That is what Part 11 is concerned with. Just as jurisdiction cannot be conferred by consent, so supposed waiver for a failure to follow Part 11 cannot give the court jurisdiction to entertain defamation proceedings the subject of which lies beyond its competence because of s 9. Part 11 is concerned with matters of jurisdiction that are capable of being waived under the CPR. The CPR (which in legal substance are a statutory instrument, namely SI 1998/3132, as amended) cannot operate so as to confer jurisdiction on a court if, by statute, it cannot possess it. I therefore reject the Claimant's argument that the Defendant has waived the right to contest the court's jurisdiction under s 9 because she did not utilise the Part 11 procedure.

58. I turn to the merits of Ground 1. The first question is whether the Defendant can prove the Claimant has no realistic prospect of showing she was domiciled in the UK (s 9(1): it is not suggested she was domiciled in any other relevant state). If she does not succeed in showing this then Ground 1 fails. But if she succeeds in showing that there is not such a real prospect, then she must show that the Claimant has no real prospect of showing of all the places in which the statements complained of were published, England and Wales is clearly the most appropriate place in which to bring this action (s 9(2)).

59. Section 9(4) of the DA 2013 provides that for the purposes of s 9 a person is domiciled in the UK or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation. Paragraph 9(1)(2) of Sch 1 to the Civil Jurisdiction and

Judgments Order 2001 (SI 2001/3929) provides that a person is domiciled in the UK for the purposes of the Brussels Regulation if and only if (a) she is resident in the UK; and (b) the nature and circumstances of her residence indicate that she has a substantial connection with the UK.

60. As I have explained, the Defendant accepts for the purposes of this application that the date of domicile that I have to consider is the date the claim was issued, namely 26 September 2017. The Claimant does not strenuously argue otherwise (Skeleton Argument, [47]).

61. The law on residence is as follows, which I have gratefully adapted from Carr J's judgment in *Tugushev*, supra, [116]-[126].

62. 'Residence' is an ordinary English word and should be given its ordinary meaning: *Cherney v Deripaska* [2007] EWHC 965 (Comm), [19]; *Bestolov v Povarenkin* [2017] EWHC 1968 (Comm), [36].

63. In *Levene v Commissioners of Inland Revenue* [1928] AC 217 (in the context of assessing residence for tax purposes), Viscount Cave LC defined 'residence' as follows (at p222-3):

> "My Lords, the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place."… In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure… Similarly a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here … But a man may reside in more than one place. Just as a man may have two homes – one in London and the other in the country – so he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country."

64. In *Dubai Bank Ltd v Abbas* [1997] ILPr 308, Saville LJ cited *Levene* as the appropriate authority for assessing residence in the jurisdiction context (at [10]-[11]):

> "[10] … On the basis of *Levene* it seems to me that a person is resident for the purposes of section 41(3) in a particular part of the United Kingdom if that part is for him a settled or usual place of abode.
>
> [11] A settled or usual place of abode of course connotes some degree of permanence or continuity. In his judgment Potter J said that section 41(6) suggested that the threshold for residence under the 1982 Act was low. With respect, I do not find any such

> suggestion in this sub-section. It is true that the sub-section provides a rebuttable presumption of "substantial connection" if the residence has lasted for the last three months or more, but it provides no guidance on the question whether or not the person has become resident. Depending on the circumstances of the particular case time may or may not play an important part in determining residence. For example, a person who comes to this country to retire and who buys a house for that purpose and moves into it, selling all his foreign possessions and cutting all his foreign ties, would to my mind be likely to be held to have become immediately resident here. In other cases it may be necessary to look at how long the person concerned has been here and to balance that factor with his connections abroad. Since the answer to the question depends on the circumstances of each case, I did not find the other authorities cited to us of any real assistance."

65. In *Varsani v Relfo Ltd* [2010] EWCA Civ 560, the Court of Appeal considered the question of residence in circumstances where the defendant claimed to be domiciled in Kenya (the location of his business) but came to stay for four to eight weeks a year at a London address where his wife, children, parents and sister lived. Etherton LJ stated at [27]-[29]:

> "27. Whether a defendant's use of a property characterises it as his or her 'residence', that is to say the defendant can fairly be described as residing there, is a question of fact and degree ... In the present case, the Edgware house is owned by the defendant and his wife, and is the place where his wife, children, mother, father and sister permanently live. It is the place which the defendant has affirmed in court proceedings is not only his 'residence' but his 'home'. While such affirmation is not conclusive, it is plainly highly material. The defendant visits that home every year to see his family, staying for not inconsiderable periods of time, as and when his work in Kenya permits him to do so. It is, in an obvious and very real sense, his "family home". Taking those facts together, it seems to me quite impossible to contend that the defendant does not reside at the Edgware house at all…….
>
> 28. The deputy judge was also entitled, and indeed correct, to conclude that the Edgware house was the defendant's 'usual' residence for the purposes of CPR r 6.9. As I have said, Mr Jacob conceded that it is possible to have more than one "usual" residence. That is also borne out by the distinction between 'usual residence' and 'principal' place of business and 'principal' office in CPR r 6.9 which, contrary to Mr Jacob's submission, I consider the deputy judge was right to take into account.
>
> 29. I do not accept Mr Jacob's submission that, in determining whether a residence is a 'usual' residence within CPR r 6.9, the

> test to be applied is essentially one of merely comparing the duration of periods of occupation, taking little account of the nature or 'quality' of use of the premises, and ignoring altogether that the premises are occupied permanently by the defendant's family and that the premises can fairly be described as the family home. Mr Jacob's suggested approach is too narrow and artificial. I agree with Mr Peter Shaw, counsel for Relfo, that the critical test is the defendant's pattern of life. In *Levene v Inland Revenue Comrs* [1928] AC 217 the House of Lords considered whether the taxpayer was "ordinarily resident" for the purposes of income tax. …"

66. A useful summary of the relevant principles is set out in *Bestolov*, supra, at [44]:

> "(1) It is possible for a defendant to reside in more than one jurisdiction at the same time.
>
> (2) It is possible for England to be a jurisdiction in which a defendant resides even if it is not his principal place of residence (ie even if he spends most of the year in another jurisdiction).
>
> (3) A person will be resident in England if England is for him a settled or usual place of abode. A settled or usual place of abode connotes some degree of permanence or continuity.
>
> (4) Residence is not to be judged according to a 'numbers game' and it is appropriate to address the quality and nature of a defendant's visits to the jurisdiction.
>
> (5) Whether a defendant's use of a property characterises it as his or her 'residence', that is to say the defendant can fairly be described as residing there, is a question of fact and degree.
>
> (6) In deciding whether a defendant is resident here, regard should be had to any settled pattern of the defendant's life in terms of his presence in England and the reasons for the same.
>
> (7) If a defendant visits a property in England on a regular basis for not inconsiderable periods of time, where his wife and children live, in order to see his wife and children (including where the centre of the defendant's relationship with his children is England), such property has the potential to be regarded as the family home or his home when in England, which itself is evidence which may go towards supporting the conclusion that England is for him a settled or usual place of abode, and that he is resident in England, albeit that ultimately it is a question of fact and degree whether he is resident here or not, having regard to all the facts of the case including any discernible settled pattern of the defendant's life or as it has also been put according to the way in which a man's life is usually ordered."

67. *R v Barnet LBC ex parte Shah* [1983] 2 AC 309 was decided in the context of student appeals against local authorities' refusals to grant awards under the Education Acts 1962 and 1980. The House of Lords adopted the approach taken in *Levene*, supra, as to the meaning of 'ordinary residence' (at pp340F-342B). At p343G-H Lord Scarman stated:

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."

68. At p344C-D he said:

> "And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the 'propositus' intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.
>
> The legal advantage of adopting the natural and ordinary meaning, as accepted by the House of Lords in 1928 and recognised by Lord Denning MR in this case, is that it results in the proof of ordinary residence, which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind. Templeman LJ emphasised in the Court of Appeal the need for a simple test for local education authorities to apply: and I agree with him. The ordinary and natural meaning of the words supplies one. For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose."

69. Lord Scarman (at p348G) rejected the submission (recorded at p345A) that 'ordinarily resident' denotes the place where the student 'has his home permanently or indefinitely, ie his permanent base or centre adopted for general purposes, eg family or career. This is the 'real home test': it necessarily means that a person has at any one time only one ordinary residence, viz his 'real home'. He also stated (at pp347H-348B):

> "My Lords, the basic error of law in the judgments below was the failure by all the judges, save Lord Denning MR, to appreciate the authoritative guidance by this House in *Levene v. Inland Revenue Commissioners* [1928] AC 217 and *Inland Revenue*

> *Commissioners v. Lysaght* [1928] AC 234 as to the natural and ordinary meaning of the words 'ordinarily resident.' They attached too much importance to the particular purpose of the residence; and too little to the evidence of a regular mode of life adopted voluntarily and for a settled purpose, whatever it be, whether study, business, work or pleasure. In so doing, they were influenced by their own view of policy and by the immigration status of the students."

70. Lord Scarman concluded (at p349C) that the relevant question for local authorities to ask is:

> "…has the applicant shown that he has habitually and normally resided in the United Kingdom from choice and for a settled purpose throughout the prescribed period, apart from temporary or occasional absences ?"

71. In *Tugushev*, supra, [125], Carr J broadly agreed with the submission that the search for residence looks for an abode that is part of the individual's regular order of life for the time being, for a settled purpose, whether of short or long duration. It does not matter what that settled purpose is. It is not necessary to have a family home in the jurisdiction in order to be resident here, although the existence of a family home may readily demonstrate a settled purpose. But she also said that the existence of a family home (or the absence of a family home for someone with immediate family) in the jurisdiction may be a relevant factor. Ultimately, she concluded, as is correct (with respect) that the question of residence is all about the facts. This is emphasised in numerous authorities: see, eg, *Cherney v Deripaska*, supra, [17]; and *Shulman v Kolomoisky* [2018] EWHC 160 (Ch), [29].

72. Having established the principles I turn to the evidence. I consider it to be at least arguable that at the date the claim was issued, 26 September 2017, the Defendant was still domiciled in the UK because she was resident here and the nature and circumstances of her residence indicated that she had a substantial connection with the UK. The matter will need to be considered at trial, but in my judgment the Defendant cannot show at this stage that the Claimant has no realistic prospect of showing that she was domiciled here on the relevant date.

73. The Defendant's first Witness Statement in the property proceedings of 19 May 2017 includes the following. She says that from 1993 onwards 22EM was 'our family home' ([35-36]). At [41] she says that during the 1990s when her husband was working in Washington DC she could have resided with him but, 'I wanted to stay in London, which was home'. At [49] onwards she said that when her husband returned to Kuwait in 1999/2000, 'I moved to Kuwait but I do not regard it as home… I was happy with my surroundings and friends in London, my home. My heart is London and London is happiness. I am not a Kuwaiti resident … For me the Ennismore property [22EM] is still home. I left all my property there.' Later, at [51] she said that, 'since I moved to Kuwait, I have come back to London regularly. It is my home city. I have friends, neighbours and clothes there. When I come, I stay at [22EM], whether it is for a week or a month. I travel around a lot but London is my home, it is such a great city. I am in love with the cobbles outside the property and this is my home.'

74. At [19(g)] of his Third Witness Statement in these proceedings the Claimant referred to eight lever arch files of utility bills and the like during the 1990s and 2000s in the Defendant's name for 22EM. These were put into evidence by her in the property proceedings.

75. In her evidence for this application the Defendant referred to 22EM as 'the property my family regarded as their home in London for over 25 years' (Second Witness Statement at [12]). In [6] of her first Witness Statement, the Defendant said that when she was required to give up possession of 22EM by reason of the consent order she signed on 19 September 2017, 'it was very upsetting for me to return to the property I called home for over 25 year[s] as the property was no longer my home. I packed my suitcase and moved out of the property into one of my daughter's nearby properties [address given]'. This refers to events on the day the consent order was signed. In fact, that agreement did not require the Defendant to give vacant possession until a month or so later, on 19 October 2017. At [8] she says she left the UK on 30 September 2017, '… and arrived in Kuwait, back to my overseas residence [address given]'.

76. In summary, therefore, the Defendant's evidence is that: (a) 22EM had been her 'home' in London for around 25 years as at September 2017 even though from 1999/2000 she had also been resident in Kuwait; (b) on 19 September 2017, although she was entitled to lawful possession until 19 October 2017, she moved out to live with her daughter nearby.

77. On this basis, it seems to me to be at least arguable that after 25 years or so of residence at 22EM, which in her evidence she repeatedly called her 'home' and for which she had paid the bills for many years, the Defendant continued to be resident in, and have substantial connections with, the UK until at least the date she left for Kuwait, which was after these proceedings were issued. Whilst the Defendant's description of 22EM as her home is not conclusive, it is plainly highly material, as Etherton LJ said in *Varsani*, supra, [27].

78. It is not possible for me to conclude on this summary judgment application that between 19 September 2017, when the Defendant left 22EM to reside with her daughter, and 26 September 2017, when his claim was issued, that she ceased to reside in the UK. As a matter of law, she was still in possession of 22EM because she was not required to vacate it until 19 October 2017. Further, the Claimant says in his evidence that although the Defendant had to leave 22EM following the trial, she moved all her furniture and property into a house opposite in Ennismore Mews, where her son lives permanently. This suggests she continued to be domiciled in the UK. Also, the nature and circumstances of her residence indicate that she had a substantial connection with the UK because she regarded it as her home.

79. Taking a step back, there seems to me to be a degree of artificiality about the Defendant's argument on Ground 1. The words complained of in this case were published by the Defendant because she felt that the Claimant had cheated her and her husband out of the house they had regarded as their home in London for many years. She was still the legal occupier of the house when the words were published and the claim was issued and she was living in London on those dates. In these circumstances, the Defendant has failed to establish that the Claimant has no realistic prospect of showing she was domiciled in the UK on 26 September 2017. In my judgment it is plainly a matter for trial whether in the short period from 19 September 2017 (when she was unquestionably domiciled in the

UK) to 26 September 2017 the Defendant had ceased to be domiciled here for the purposes of s 9 of the DA 2013.

80. Ground 1 therefore fails.

Ground 2

81. I set out s 1 of the DA 2013 earlier but for convenience I will set out s 1(1) again:

> "(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."

82. In *Lachaux*, supra, Lord Sumption said that s 1 was to be interpreted in the light of the common law background, which he summarised as follows [6-7]:

> "6. [A] working definition of what makes a statement defamatory, derived from the speech of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237, 1240, is that 'the words tend to lower the plaintiff in the estimation of right-thinking members of society generally.' Like other formulations in the authorities, this turns on the supposed impact of the statement on those to whom it is communicated. But that impact falls to be ascertained in accordance with a number of more or less artificial rules. First, the meaning is not that which other people may actually have attached to it, but that which is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it. Secondly, in an action for defamation actionable *per se*, damage to the claimant's reputation is presumed rather than proved. It depends on the inherently injurious character (or 'tendency', in the time-honoured phrase) of a statement bearing that meaning. Thirdly, the presumption is one of law, and irrebuttable.
>
> 7. In two important cases decided in the decade before the Defamation Act 2013, the courts added a further requirement, namely that the damage to reputation in a case actionable *per se* must pass a minimum threshold of seriousness."

83. The case on behalf of Mr Lachaux was that the common law presumption of damage remained unaffected by s 1(1) but that its effect was 'that the inherent tendency of the words must be to cause not just some damage to reputation but serious harm to it' ([11]). In other words, the argument was that the presumption of harm remains, and all that s 1 did was to 'raise the bar' so that the claimant has to show a tendency to cause *serious* harm to reputation. This is the approach which was endorsed by the Court of Appeal: [2018] QB 594.

84. The appellants, who were two news organisations, submitted that s 1(1) abolished the common law presumption of damage. They argued that it introduced a new hurdle to be satisfied before a statement can be regarded as defamatory. This is that the words

complained of must not only be inherently injurious but 'must also be shown to produce serious harm in fact', which may require extraneous evidence to be submitted. This was the view taken by Warby J in his judgment at first instance.

85. The Court of Appeal favoured Mr Lachaux's interpretation of s 1, and found in favour of him.

86. The Supreme Court disagreed with the Court of Appeal and upheld Warby J's interpretation of s 1 (although it, too, found for Mr Lachaux on the facts). Lord Sumption gave four main reasons for favouring the Appellant's construction of s 1(1), which Warby J had also favoured.

87. First, he said it took into account Parliament's objective as stated in the preamble to the 2013 Act, which was to 'amend the law of defamation' ([13]). In the light of this, he considered that Parliament's choice to use the wording of 'serious harm' could only have represented an intentional departure from the previous decisions in *Jameel,* supra, and *Thornton v Telegraph Media Group* [2010] EWHC (QB) 1414. He said at [12]:

> "Although the Act must be construed as a whole, the issue must turn primarily on the language of section 1. This shows, very clearly to my mind, that it not only raises the threshold of seriousness above that envisaged in *Jameel (Yousef)* and *Thornton*, but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words."

88. Second, he considered that the words 'has caused' in s 1(1) naturally and necessarily referred to some actual historic harm and that 'likely to cause' must therefore refer to probable future harm. He rejected the view that serious harm could be established simply on the basis of the words' 'inherent tendency' to cause harm ([14]).

89. Next, he explained that s 1(1) must be read alongside (and consistently with) s 1(2), which requires an investigation of the actual impact of the statement ([15]).

90. Finally, he concluded that Warby J's interpretation was the only one which could bring about the substantial change to the law of defamation which was clearly intended by the significant amendment represented by s 1(1).

91. The effect of the Supreme Court's decision can be summarised by reference to the following propositions drawn from Lord Sumption's judgment:

    a. 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' [14].

    b. The reference 'has caused' is to 'the consequences of publication'; some historic harm 'which is shown to have actually occurred' [14].

    c. Harm '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' [14].

d. The 'same must be true' of the reference to 'likely' harm – it must 'be established as a fact' and is not (as the Court of Appeal had accepted) 'a synonym for the inherent tendency which gives rise to the presumption of damage at common law' [14].

e. He said at [16]:

> "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."

f. The 'defamatory character of the statement no longer depends only on the meaning of the words and their inherent tendency to damage the claimant's reputation … But I do not accept that the result is a revolution in the law of defamation' [17].

g. Subsequent events can 'be evidence of the likelihood of [serious harm] occurring' ([18]).

h. Warby J's findings on the facts of the case, which the Supreme Court upheld, were 'based on (a) the scale of the publications; (b) the fact that the statements complained of had come to the attention of at least one identifiable person in the United Kingdom who knew Mr Lachaux and (c) that they were likely to have come to the attention of others who either knew him or would come to know him in future; and (d) the gravity of the statements themselves, according to the meaning attributed to them by Sir David Eady.' [21]. Also:

> "Mr Lachaux would have been entitled to produce evidence from those who had read the statements about its impact on them. But I do not accept, any more than the judge did, that his case must necessarily fail for want of such evidence. The judge's finding was based on a combination of the meaning of the words, the situation of Mr Lachaux, the circumstances of publication and the inherent probabilities. There is no reason why inferences of fact as to the seriousness of the harm done to Mr Lachaux's reputation should not be drawn from considerations of this kind. Warby J's task was to evaluate the material before him, and arrive at a conclusion on an issue on which precision will rarely be possible."

92. I turn to the application of these principles to the facts of this case.

93. The starting point is the meanings complained of by the Claimant. Obviously, they are very serious. They are of dishonest conduct by him towards a family member and of

lying on oath. I respectfully agree with Nicklin J's assessment in his judgment of 26 June 2018 at [16]:

> "That is something which clearly touches upon the claimant's personal integrity and, indeed, his core attributes. This was a seriously defamatory allegation."

94. In addition, [14(a)] of the APOC pleads that 'the Claimant and all of the publishees of the messages are Muslim, such that the allegation of having lied after swearing on the Quran is particularly damaging and distressing to the Claimant'. I accept this factor is capable of exacerbating the extent of the harm suffered by the Claimant over and above that flowing from the bare allegation of having lied on oath.

95. As to the scale of publication, the messages were published directly to 34 individuals. That is a comparatively small number, but it is not trivial. And, as Nicklin J said in his judgment at [18], determining seriousness is:

> " … not a numbers game, as frequently has been said in the authorities. An allegation that is published strategically or targeted to a group of people who are important to an individual claimant may cause more damage to a claimant's reputation than indiscriminate publication to many more people."

96. As I will explain shortly, the Claimant says this is a case of strategic targeting by the Defendant.

97. In [23] of his Third Witness Statement the Claimant says that there about a dozen members of the WhatsApp group with whom he has a close relationship; a further dozen whose names he recognises but with whom he has no real contact; and the remaining names he does not recognise. He believes these to be the children and grandchildren of the names that he does recognise.

98. Paragraphs [54]-[59] of the Claimant's first Witness Statement are relevant. In those paragraphs the Claimant said he found the messages extremely distressing. He did not lie to the court when he gave evidence about the ownership of 22EM. He said the messages are highly damaging to him within his family. To be accused of stealing from his brother is 'deeply wounding'. Without an understanding of the matters involved he is concerned that people who read the allegations may have suspicions about him. He said the publishees are members of his wider family and he cares a great deal for them and he holds their opinion of him in high regard. He said that he believes the Defendant deliberately elected to make the statements to this group intentionally to hurt him as much as possible. He also said that the statements are likely to damage his professional reputation more widely among the Palestinian diaspora. He also explained his concern that the messages might be forwarded to others. Finally, he said he has a significant profile in the Middle East because of his professional and philanthropic activities and he has a reputation as a man of integrity.

99. The 'grapevine effect' is pleaded in the APOC at [12(e)]. There is evidence that the messages have been disseminated outside the WhatsApp group. In his Third Witness Statement at [28] the Claimant said that he has become aware through family and friends

that ‘many people’ in London and the Middle East have become aware of the statements complained of. Hassib Bishara has known the Claimant for 35 years. He is based in Dubai and London. In his witness statement he said that he was made aware of the statements by a friend on the day they were sent. He said although he did not believe them, the statements were being circulated widely and he was concerned that they were being gossiped about. The Claimant’s daughter Gheeda Al Sadik has also given a witness statement about onward circulation of the messages. She gives evidence about being contacted shortly after the messages were sent by Mr Bishara and others both inside and outside the WhatsApp group expressing their concern about the messages and about the fact they were being discussed in London. Her evidence is to the effect that although the persons she named expressed support for her father, there are others who are not closely connected with him who have also read them, and that there has been damage to her father’s reputation as a consequence.

100. Overall, in light of these matters, I am satisfied that the Defendant has not shown that the Claimant has no realistic prospect of showing that the publication of the Messages has caused him serious harm, or that it is likely to do so. I base this conclusion on the following:

    a. The very serious nature of the allegations, striking as they do at the Claimant’s honesty and integrity;

    b. The religious component I have mentioned, which is capable of exacerbating the harm suffered by the Claimant;

    c. The Claimant’s standing and reputation in the Middle East and elsewhere, including London;

    d. The identity of the person who sent them, namely his wife’s sister, which could cause some to think that there must be some substance to the accusations;

    e. The targeted nature of the persons to whom the messages were sent, ie, family members;

    f. The scale of publication, both directly to the WhatsApp group, and by further dissemination to those who do not know the Claimant. The latter cannot be quantified but, on the evidence, it is at least arguably significant.

101. I have not overlooked the fact that there is no direct evidence of adverse impact. Nor have I overlooked the fact that there *is* positive evidence of the opposite, namely that two recipients of the messages sought to defend the Claimant’s reputation (see his Third Witness Statement at [25]). However, there are a number of points to be made in response. First, in *Lachaux*, supra, at [21], Lord Sumption said that the absence of evidence of harm does not of itself mean a claim should fail. He also referred to the court’s ability to draw inferences and to the ‘inherent probabilities’. In this case there is evidence of dissemination beyond the WhatsApp group to people who do not know the Claimant. I regard it as an arguable inference that there will be some among that population, who do not know the Claimant, and in whose eyes he has suffered serious reputational harm. The inherent probabilities in this case, certainly at this stage, are that there will have been some people who have become aware of the Messages and concluded that the Defendant

would not have made such widespread and serious accusations against her sister's husband unless there was some substance to them.

102. Ground 2 therefore fails.

Ground 3

103. Nicklin J recently summarised the relevant principles on *Jameel* abuse in *Alsaifi v Trinity Mirror Plc* [2019] EMLR 1, [36]-[38] and [44]-[45]:

> "36. The Court has jurisdiction to stay or strike out a claim where no real or substantial wrong has been committed and litigating the claim will yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and use of court procedures: in other words, 'the game is not worth the candle': *Jameel* [69]–[70] per Lord Phillips MR and *Schellenberg v BBC* [2000] EMLR 296, 319 per Eady J. The jurisdiction is useful where a claim 'is obviously pointless or wasteful': *Vidal-Hall v Google Inc* [2016] QB 1003 [136] per Lord Dyson MR.
>
> 37. Striking out is a draconian power and it should only be used in exceptional cases: *Stelios Haji-Ioannou v Dixon* [2009] EWHC 178 (QB) [30] per Sharp J.
>
> 38. It is not appropriate to carry out a detailed assessment of the merits of the claim. Unless obvious that it has very little prospect of success, the claim should be taken at face value: *Ansari v Knowles* [2014] EWCA Civ 1448 [17] per Moore-Bick LJ and [27] per Vos LJ.
>
> …
>
> 44. At the heart of any assessment of whether a claim is *Jameel* abusive is an assessment of two things: (1) what is the value of what is legitimately sought to be obtained by the proceedings; and (2) what is the likely cost of achieving it?
>
> 45. … it is clear … that this cannot be a mechanical assessment. The Court cannot strike out a claim for £50 debt simply because, assessed against the costs of the claim, it is not 'worth' pursuing. Inherent in the value of any legitimate claim is the right to have a legal wrong redressed. The value of vindicating legal rights – as part of the rule of law – goes beyond the worth of the claim. The fair resolution of legal disputes benefits not only the individual litigants but society as a whole."

104. Applying these principles, in my judgment this is not a proper case to be struck out, exceptionally, under the *Jameel* jurisdiction. My conclusion on this ground largely follows from my earlier conclusions.

105. Nicklin J found, and I agree (having decided the matter for myself), that the allegations in question are of a very serious nature. I have found that the Claimant has a realistic prospect of showing that he has suffered or is likely to suffer serious harm as a result of the Defendant's Messages and that the condition in s 1 of the DA 2013 is satisfied. I have also found that the Claimant has a realistic case on jurisdiction because there is evidence which provides a realistic prospect of him showing that the Defendant was domiciled here at the relevant time. There is evidence of grapevine publication within this jurisdiction. Hence, in this case the Claimant has a realistic prospect of showing he has suffered a real and substantial tort in this country. This weighs heavily against striking out the claim on *Jameel* principles. As Warby J said in *Ames*, supra, [36]:

> "If a libel claimant has a real prospect of establishing a tort which is real and substantial, the court should be very reluctant to conclude that it is unable to fashion any procedure by which that claim can be adjudicated in a proportionate way, and that the only remaining way of dealing justly with the case is to dismiss it."

106. I accept that the budgeted costs are far in excess of the likely damages. But that is not an unusual feature of defamation litigation: *Haji-Ioannou v Dixon*¸ supra, [43]. Moreover, the court has power to control the parties' costs budgets.

107. As to vindication, and what this litigation might achieve (damages aside), I consider that the Claimant would at a minimum receive a measure of vindication through a public judgment in his favour. As Tugendhat J explained in *McLaughlin v London Borough of Lambeth* [2011] EMLR 8, [112]:

> "It is true that the number of addressees of the emails complained is small. But they are all persons who are or have been concerned with education and with the School. The words complained of are in electronic form. They may be stored indefinitely, and easily searched and republished, both generally to those concerned with education, and in particular to others in the Department for Education or in the first defendant. The damage so far suffered by the claimants may be small … But the main point of defamation proceedings is vindication. Vindication includes preventing, or reducing the risk of, future publications of the words complained of. The fact that the damage suffered so far may be small (if it is), is no indication of the extent of the damage which is prevented from occurring in the future, when a claimant in a libel action obtains a public retraction or a judgment in his favour from the court."

108. I have already referred to the Claimant's case on grapevine publication. A well-known feature of harm to reputation is the propensity for defamatory statements 'to percolate through underground channels and contaminate hidden springs': *Slipper v BBC* [1991] 1 QB 283, 300. As a result, a claimant may encounter a defamatory allegation being raised with him/her by someone many years after the libel action against the original publisher was concluded. Where libel proceedings have been pursued, such a person is equipped, either by means of an apology or retraction from the original publisher or a judgment in his or her favour, to refute the defamatory statement whenever and wherever it resurfaces

in the future. In my judgment, these proceedings have the potential to benefit the Claimant in this way.

109. Ground 3 therefore fails.

Conclusion

110. It follows that the Defendant's applications are dismissed.