Neutral Citation Number: [2022] EWHC 1383 (QB)

Case No: QB-2019-004608

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 June 2022

Before :

Deputy Master Toogood QC

- -

Between :

(1) DR FATIMA JABBAR **Claimants**

(2) DRJ55 LTD

- and –

(1) AVIVA INSURANCE UK LIMITED **Defendants**
(2) AVIVA INSURANCE LIMITED
AVIVA PLC

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Ian Silcock (instructed by **Samuels Solicitors**) for the **Claimants**
Adam Wolanski QC (instructed by **BLM Law**) for the **Defendants**

Hearing date: 26 May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.00 am on 20 June 2022.

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DEPUTY MASTER TOOGOOD QC

Deputy Master Toogood QC :

Background to judgment

1. Save for the conclusion, the subsequent sections of this judgment were drafted on 10 June 2021 following a hearing on 26 May 2021. On 11 June 2021, prior to the circulation of my draft judgment, I was informed that the parties had agreed an order whereby the Claimants' claims were dismissed and the Claimants agreed to pay the Defendants' costs of the action. On being informed that my judgment had been drafted, there was a dispute between the parties as to whether it should be handed down. I gave judgment on that issue on 25 June 2021 ([2021] EWHC 1729 (QB) – 'the hand-down decision'). The Claimants' appeal against the hand-down decision was dismissed by Chamberlain J on 13 April 2022 ([2022] EWHC 912 (QB)). By letter of 24 May 2022, the Claimants' solicitors confirmed to the court that no application had been made to appeal Chamberlain J's decision and therefore this judgment can now be handed down.

Introduction

2. This is my reserved judgment in relation to the Defendants' application dated 2 November 2020 for an order striking out the Claimants' claims for conspiracy to injure, unlawful means conspiracy and tortious interference with contract pursuant to CPR Part 3.4(2)(a) on the ground that the Particulars of Claim disclose no reasonable grounds for bringing these claims, and for summary judgment on the defamation claim pursuant to CPR Part 24.

3. On 21 May 2021 the Claimants served draft Re-Amended Particulars of Claim on the Defendants. No formal application has been made to amend the claim but both parties have addressed the draft amendments in their submissions and I will consider them further below.

4. I have been assisted by detailed oral and written submissions from both counsel instructed in this matter and I am very grateful to them both.

Documents considered

5. I have been provided with a bundle of 1,191 pages which includes the Statements of Case, Orders, Defendants' Application Notice with two witness statements of Timothy Smith dated 2 November 2020 and 27 January 2021 in support, a witness statement of the First Claimant dated 17 May 2021 with 8 further witness statements on behalf of the Claimants and selected inter partes correspondence.

6. The Statements of Case comprise the Claim Form, Particulars of Claim and three responses by the Claimants to Part 18 Requests by the Defendants. No Defence has yet been filed.

7. I have also been provided with a bundle of 27 authorities, three extracts from textbooks and Practice Direction 53B. Two further authorities were submitted by the Claimants' counsel on the morning of the hearing. I have considered the submissions of both parties in relation to this material.

Factual background

8. The First Claimant qualified as a doctor in 2006, according to her witness statement. She states that she opened a practice on Harley Street in 2008 focussing on cosmetic treatment. In the same year, she started providing medico-legal reports as an expert witness and states that by 2013 – 2015 her medico-legal report practice replaced her cosmetic treatment practice. The First Claimant states that she has a wealth of experience in diagnosing, assessing and managing soft tissue injuries but I have not been provided with any details regarding how this experience was obtained and it does not appear that the First Claimant has held any posts within the NHS, at least since 2008.

9. The Second Claimant is a company that the First Claimant incorporated on 2 January 2019 to collect her fees and perform administrative tasks in connection with her medico-legal practice. At the time that the hearing before me took place the First Claimant was the sole director of the Second Claimant.

10. The First and Second Defendants are corporate entities which form part of the Third Defendant, a multinational insurance company headquartered in the UK. I will refer to the Defendants collectively unless it is necessary to do otherwise.

11. In 2015 an entity called MedCo was established to facilitate the sourcing of medical report providers in claims brought under the Ministry of Justice RTA Small Claims Pre-Action Protocol or the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("RTA Protocol"). The First Claimant was registered with MedCo and provided reports through its system.

12. There is some evidence available regarding the number of reports produced by the First Claimant. In her witness statement, she states that, prior to receiving instructions via Medco, she undertook around 300 reports per month for a fee between £350 to £550 per report, indicating that she billed approximately £1,620,000 per year if an average fee of £450 per report is applied. After the introduction of MedCo, she states that she produced 280 – 300 medico-legal reports each month for various solicitors at the standard fee of £180 plus VAT per report, of which £60 plus VAT was payable to Orion Medical Services, an agency which assisted her in the preparation of the reports. The First Claimant assigned the rights to collect the sums due to Orion and documents exhibited to her witness statement indicate that the sums due were £509,106 to 31 December 2015, £844,686 to 31 December 2016, £662,668 to 31 October 2017 and £539,232 to 31 December 2018.

13. The First Claimant has also produced spreadsheets of the number of clinics she undertook to provide these reports, which indicate 50 clinics in 2015, 67 clinics in 2016, 45 clinics in 2017 and 46 clinics in 2018. If her evidence is correct, this suggests that she produced between 50 and 60 reports per clinic. I admit that I struggle to understand how it is possible to identify the subject of the report, take a proper history, consider the medical records if relevant, undertake an examination and reach a conclusion regarding condition and prognosis that many times in one day, but fortunately that difficulty does not need to be resolved as part of this judgment.

14. Between 21 October 2015 and 1 July 2016, the Defendants sent 7 letters or emails to various firms of solicitors as set out in paragraph 7 of the Particulars of Claim. Five

of these communications state that the Defendants have concerns regarding the expert instructed, which was the First Claimant in each case. The other two state that they will not be making any offers and their solicitors are liaising directly with the First Claimant.

15. On 8 November 2017 Karleen Marshall was unfortunately involved in a road traffic accident. She instructed Knightsbridge Solicitors to bring a claim on her behalf and they duly issued a claim notification form pursuant to the RTA Protocol on 10 November 2017.

16. On 8 February 2018, the First Claimant examined Ms Marshall and prepared a medical report which states that it was typed on 16 February 2018.

17. On 12 July 2018, Mr Jerry Xavier, an employee of the First Defendant's claims department who is based in Bangalore, India, sent an email to Knightsbridge Solicitors noting that they had not received a Stage 2 pack in accordance with the RTA Protocol, which he erroneously described as the Pre-Action Protocol for Personal Injury Claims (MOJ), but I do not consider this error to be material.

18. It appears that the Stage 2 pack was eventually filed by Knightsbridge Solicitors on 12 December 2018 and included the report prepared by the First Claimant.

19. On 31 December 2018 Mr Xavier sent an email to Mr Shafique of Knightsbridge Solicitors with a letter attached which was headed *"Part 35 Questions to Claimant's Medical Expert"* and which contained a list of questions including the allegedly defamatory statement pleaded at paragraph 8 of the Particulars of Claim:

"The GMC have confirmed that you can prepare medico-legal reports only if the report does not require her to examine or have contact with patients. Is that true. Was this followed."

20. Mr Xavier also confirmed that the case had been taken out of what he described as the MOJ process, by which he was referring to the online portal used by claims proceeding under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

21. On 7 January 2019 Knightsbridge Solicitors wrote to the First Defendant notifying them that proceedings were being commenced against their insured, as is required by sections 151 and 152 of the Road Traffic Act 1988.

22. On 11 January 2019 Mr Shafique forwarded the letter to the First Claimant via an email which states only "*Please see attached letter from TPI"*.

23. I have not been provided with any reply from the First Claimant to this email.

24. On 28 January 2019 the claim was settled by the acceptance of a Part 36 offer which had been made by the First Defendant on 9 January 2019.

25. The GMC have never imposed any requirements on the First Claimant nor, so far as I am aware, have they conducted any investigations into her practice.

26. However the First Claimant has been the subject of investigations by both MedCo and the Insurance Fraud Bureau (IFB).

27. In her witness statement dated 17 May 2021, the First Claimant sets out details of an investigation carried out by MedCo in the second half of 2019, culminating in a report dated 1 November 2019 which concluded that the First Claimant's reports gave a prognosis for injuries which was regularly excessive with no justification provided and where treatment was recommended, there was no clinical reasoning for the recommendations made. The First Claimant takes issue with the report's conclusions, but I find it difficult to reconcile this report with the First Claimant's claim at paragraph 13 of her witness statement that she has *"an unblemished record of professional competence"*.

28. I also note that, in a letter dated 22 January 2021 which was written by the First Claimant to the BMA and which has been included in the bundle for this hearing, the First Claimant states that she has been investigated by MedCo between 2016 and 2020 in relation to the number of venues she consults from as well as challenging her opinion. Her witness statement contains no mention of the investigation into the number of venues where she examined patients and I have no details of the investigations which took place prior to 2019.

29. Her witness statement does reveal that she made a Subject Access Request of the IFB and their response dated 7 May 2021 is exhibited to that statement. The response indicates that between 2016 and 2020 the IFB created 14 Intelligence and Investigation reports which contain data about the First Claimant, relating to suspicions that physiotherapy and cognitive behavioural therapy treatments were fraudulent and concerns regarding elongated prognosis periods and unnecessary treatments which could be exploited by claimants and their representatives to inflate costs of the claims. The response noted that *"it is the current view of the IFB that there is insufficient evidence to escalate reports to law enforcement at this time, however due to the nature of the concerns raised the data subject remains a person of interest to the IFB"*.

Individual Voluntary Arrangement (IVA) and judgment in unrelated proceedings

30. Following a letter from the Defendants' solicitors dated 5 May 2021, the First Claimant's witness statement addresses at some length both the IVA into which she entered in 2017 and a judgment of the Court of Appeal involving her ex-husband, ***R v Abdul Mosaver Choudhuri*** [2019] EWCA Crim 2341, which included some comments regarding the First Claimant's evidence in writing in that matter. She did not give oral evidence and was therefore not cross-examined. I do not consider that the judgment in that case assists me in the matters which I have to decide for the purposes of the Defendants' application.

31. The documents in relation to the IVA will clearly be relevant to the First Claimant's case with regard to the losses of £1,181,520 claimed in these proceedings. I note that in her Proposal for an IVA dated 26 October 2017 but which is unsigned, the First Claimant stated that she was unemployed and in extremely poor health, such that she was unable to secure suitable permanent gainful employment (paragraphs 23 and 24). It appears that there was an earlier version of the Proposal as the First Claimant signed a *"Notice to intended Nominee of Proposals"* on 29 August 2017 in which she

stated that she attached a copy of her proposals for an IVA and understood that she was committing an offence if she made any false representation. I fortunately do not have to decide how her assertion that she was unemployed was consistent with the matters set out in paragraphs 11 and 12 above but this may be a matter for others to consider.

The current proceedings

32. A Letter of Claim was sent to the Third Defendant on 1 November 2019 which stated that it was sent in accordance with the pre-action protocol for defamation claims. The Letter stated that the First Claimant obtained her full registration as a doctor on 18 August 2007 and has been undertaking medico-legal reports since 2008. The Letter referred to six publications, three of which now appear in paragraph 7 of the Particulars of Claim and one of which is the statement in paragraph 8 of the Particulars of Claim. The Letter alleged that the publications were defamatory and also malicious, on the basis that the Defendants sought to dissuade solicitors from obtaining reports from the First Claimant *"in order to minimise the amounts payable to people injured by your insureds"*. It is also alleged that the *"very purpose"* of the Defendants' actions was to cause financial loss to the First Claimant.

33. The Letter of Claim included an allegation that the Defendants were negligent but did not include any allegations of conspiracy, tortious interference with contract, malicious falsehood or breach of data protection regulations.

34. The Claim Form was issued on 19 December 2019 and the Particulars of Claim are dated 31 March 2020. The Acknowledgement of Service was filed on 8 April 2020 and an extension of time for service of the Defence until 26 May 2020 was agreed between the parties. This was then extended to 23 June 2020 following a request for further information pursuant to Part 18 which was sent on 28 April 2020. The response to the first Part 18 request was served on 5 June 2020.

35. On 15 June 2020 the Defendants' solicitors wrote to the Claimants' solicitors notifying them that the Defendants would be applying for strike out/summary judgment on some or all of the claims, repeating two Part 18 requests and inviting the Claimants to consent to the meaning of the words complained of in the defamation action being determined as a preliminary issue.

36. On 22 June 2020 the Defendants' solicitors issued an application for a further extension of time in relation to the Defence which was agreed by consent.

37. On 21 July 2020 the Defendants' solicitors issued an application for a determination of meaning hearing to be heard at the same time as a strike out application which had yet to be issued, an order that the Claimants provide particulars of whether they are alleging malice and a further extension of time for the defence until after the determination of meaning hearing.

38. The parties agreed the meaning of the allegedly defamatory statement and the Claimants served Amended Particulars of Claim reflecting the agreed meaning on 4 September 2020. The Claimants provided further information which purported to set out the case on malice on 9 October 2020.

39. On 2 November 2020 the Defendants' solicitors issued this application to strike out the Claimants' claims for conspiracy to injure, unlawful means conspiracy and tortious interference with contract pursuant to CPR Part 3.4(2)(a) on the ground that the Particulars of Claim disclose no reasonable grounds for bringing these claims, and for summary judgment on the defamation claim pursuant to CPR Part 24.

Defamation claim

40. I will consider the application for summary judgment in relation to the defamation claim first. Pursuant to CPR Part 24.2(a)(i) the court may give summary judgment against a claimant on the whole of a claim or a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

41. The principles that I must apply are not in dispute between the parties and were summarised by Lewison J in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at [15]. The claimant must have a realistic as opposed to a fanciful prospect of success.

42. I note that the pleadings in relation to the defamation claim relate only to the First Claimant.

43. The Defendants rely on four grounds to support their argument that the First Claimant has no real prospect of succeeding on the defamation claim:

    i) Absolute privilege

    ii) Qualified privilege

    iii) Absence of serious harm

    iv) Jameel abuse.

Absolute privilege

44. The issue of whether absolute privilege should apply to communications within a Pre-Action Protocol has not yet been decided by the courts. At paragraph 16.34 of the Fifth Edition of Duncan and Neill on Defamation, it is stated that *"it is arguable that a letter of claim sent in accordance with the requirements of a relevant Pre-Action Protocol under the Civil Procedure Rules should be covered by absolute privilege"*.

45. Mr Silcock, for the Claimants, submitted that the issue of whether absolute privilege applies in this case is unsuitable for determination on a summary judgment application because novel points of law should be decided on actual findings of fact. However in ***ICI Chemicals & Polymers Limited v TTE Training Limited*** [2007] EWCA Civ 725, Moore-Bick LJ stated:

    "It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in

truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

46. Considering all the matters in this case, including the absence of factual dispute regarding the letter, the detailed written and oral submissions made by the parties, the time which has already elapsed since the communication was sent and the need to deal with cases justly and at proportionate cost, I consider that it is appropriate to decide the applicability of absolute privilege to the communication in this case at this stage.

47. The Defendants argue that absolute privilege would apply to the letter from Mr Xavier if it had been sent after the issue of proceedings and that by necessary extension it should apply to the letter sent within the context of the RTA Protocol and/or the Pre-Action Protocol for Personal Injury Claims.

48. The parties agree that the categories of absolute privilege are not closed but the privilege should only be extended where it is "*strictly necessary*" to do so in order to protect those who participate in the proceedings from "*flank attack*": ***Lincoln v Daniels*** [1962] 1 QB 237 at 263.

49. The First Claimant submitted that whether inter partes correspondence at any stage was covered by absolute privilege must depend on the context, but Mr Silcock for the Claimants conceded, inevitably in my view, that Part 35 questions asked in the course of proceedings by a party or their legal representative would be covered by absolute privilege. The question in this case is whether Part 35 questions asked in the course of a Pre-Action Protocol by the insurer of a proposed defendant should be covered by absolute privilege.

50. In deciding whether it is strictly necessary to extend privilege in such a way, I consider both the purpose of absolute privilege in the context of proceedings and the purpose of Pre-Action Protocols.

51. In ***King v Grundon*** [2012] EWHC 2719, Mrs Justice Sharp accepted the defendant's argument that:

"The rationale for the absolute privilege accorded to documents brought into existence for the purpose of litigation before a court of justice is one of public policy. Its foundation is to allow the free and frank exchange of information to allow justice to be achieved and to avoid ancillary litigation arising out of documents existing for the conduct of the litigation. As such, the protection afforded to the content of such documents is necessarily wide for fear that otherwise the public policy behind absolute privilege would be undermined. The test is not one of strict relevance, but one of no reference at all to the subject matter of the proceedings. Any doubt should be resolved in favour of the litigant and litigants should not be penalised for misjudging the true ambit of the matters of dispute."

52. In ***Jet 2 Holidays Limited v Hughes*** [2019] EWCA Civ 1858, [2020] 1 WLR 844, the Court of Appeal considered the issue of whether contempt proceedings could be brought in relation to a witness statement served pursuant to a Pre-Action Protocol prior to the issue of proceedings. The Court of Appeal described Pre-Action

Protocols as *"an integral and highly important part of litigation architecture"*. It was noted that Pre-Action Protocols were designed to have four purposes: *"(a) to focus the attention of litigants on the desirability of resolving disputes without litigation; (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and (d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings."* The Court of Appeal concluded that there was a close connection between witness statements served pursuant to a Pre-Action Protocol and the administration of justice and that, if those witness statements are false, they interfere with the administration of justice and may be the subject of an application for committal for contempt of court.

53. Pre-action protocols are now integrated into the litigation framework in the ways described in paragraphs 39 to 43 of the Court of Appeal's judgment in ***Jet 2 Holidays***. However the RTA Protocol has particularly close connections with litigation. The White Book states at paragraph C13A-005:

"By definition, the processes set out in the several pre-action protocols that have come into being since the CPR came into effect, are not pre-trial procedures; but they imitate them to an extent. The RTA Protocol imitates them more thoroughly than other pre-action protocols. Procedures that would normally apply at the pre-trial stages in a case where court proceedings are on foot, and the parties are preparing for a trial on quantum of damages, are found in the RTA Protocol; particularly in the Stage 2 processes relating to obtaining and exchanging of medical reports, to the making of offers to settle, and to the making of interim payments. Further, during the working through of the Protocol processes, liability for costs may be incurred and costs may become payable. The Protocol sets out an intense, time-sensitive process for defendant insurer and claimant solicitor negotiation. (There is not one mention of mediation in the Protocol.) The Protocol Stage 1 and 2 processes may be seen as a form of "civil diversion", that provide parties with a structure for clarifying their disputes and negotiating a settlement similar to that provided by the normal CPR pre-trial procedures.

Normally, CPR rules are supplemented directly by practice directions and indirectly by pre-action protocols. Here these relationships are reversed. The RTA Protocol is the primary source governing party behaviour in the claims to which it applies; Practice Direction 8B builds on the Protocol Stage 2 processes and provides special and limited court procedures for the purpose of determining the claim if settlement is not achieved (and for some other purposes); and Section II of CPR Pt 36 (RTA Protocol Offers to Settle) and Section VI of Pt 45 (Fixed Costs) provide the legal framework, not only for the Stage 3 procedure but also for the pre-action negotiating processes, in effect supplementing Practice Direction 8B and the RTA Protocol.

The terms of the RTA Protocol have to be read closely with the terms of the provisions in Practice Direction 8B (supplementing Pt 8) (see paras 8BPD.0 et seq, above), in Section II of CPR Pt 36 (see paras 36A.1 et seq, above), and in Section III of Pt 45 (see r.45.16 and following, above). In the commentaries on those provisions, the linkages with provisions in the RTA Protocol (which is set out immediately below) are noted. These various sources complement (and cannot be divorced from) one another. They constitute an integrated scheme for the disposal of low value personal injury claims arising from road traffic accidents."

54. I have also been referred to ***Waple v Surrey County Council*** [1998] 1 WLR 860 in which the Court of Appeal held that a letter sent by a local authority's solicitor following the issue of a contribution notice under section 22 of Schedule 2 to the Children Act 1989 was not covered by absolute privilege. Brooke LJ stated that the letter did not have an immediate link with possible proceedings and was not *"part and parcel of the legal proceedings which were contemplated"*.

55. Taking all these matters into account, I consider that it is strictly necessary to extend absolute privilege to Part 35 questions asked in respect to a claim which has been pursued under the RTA Protocol as I do not consider that a sensible distinction can be drawn between claims proceeding under that Protocol and claims in respect of which a Claim Form has been issued. It is necessary to permit a free and frank exchange of information to allow the claims to be negotiated and settlement achieved if possible.

56. The reasons given in ***Waple*** for finding that the letter in that case was not covered by absolute privilege reinforce my conclusion that absolute privilege should be extended to the letter sent by Mr Xavier. Mr Xavier's letter clearly had an immediate link with possible proceedings as the parties had been following the RTA Protocol which was specifically designed to replace litigation where possible and was part and parcel of contemplated legal proceedings.

57. I note that paragraph 7.40 of the RTA Protocol states that where the defendant does not respond within the initial consideration period following submission of the Stage 2 Settlement Pack, the claim will no longer continue under the RTA Protocol and the claimant may start proceedings under Part 7 of the CPR. In this case, the defendant did not respond within the initial consideration period and therefore the claim was no longer continuing under the RTA Protocol at the time Mr Xavier's letter was written. However again I do not consider that a distinction can reasonably be drawn between Part 35 questions asked within the RTA Protocol, those asked after the claim has exited the Protocol such that proceedings may be issued without the costs penalties which would apply if the RTA Protocol had not been followed, and those asked after the proceedings have been issued. The letter clearly had an immediate link with possible proceedings. I note that Knightsbridge Solicitors sent a letter on 7 January 2019 notifying the Road Traffic Act insurer that proceedings were being commenced, which demonstrates the understanding of both parties that, once the claim had exited the RTA Protocol, proceedings could and should be issued. The fact that the claim was then swiftly compromised is not relevant to the issue of privilege.

58. I do not consider that the fact that the letter was written by the proposed defendant's insurer, as opposed to the defendant or its legal representative, assists the First Claimant. I note that paragraph 1.1 of the RTA Protocol sets out definitions used in the Protocol and states *"'defendant' means the insurer of the person who is subject to the claim under this Protocol, unless the context indicates that it means – (a) the person who is subject to the claim; (b) the defendant's legal representative, (c) …"*. The insurer is effectively acting as the defendant in dealing with claims under the Protocol and I consider that privilege must apply to communications from the insurer as well as the person who is subject to the claim and the defendant's legal representative.

59. As I consider that the communication is covered by absolute privilege and there is no other compelling reason for a trial, the Defendants are entitled to summary judgment on the defamation claim.

Qualified privilege

60. Even if I am wrong in holding that absolute privilege applies to the letter from Mr Xavier, I consider that the letter was covered by qualified privilege. I do not accept that the defamatory comments were irrelevant to the issues in the proceedings, as submitted by Mr Silcock, as Mr Xavier was testing the reliability of the medical report served in support of the claim.

61. In order to defeat a defence of qualified privilege, the First Claimant must prove that the Defendants acted maliciously in publishing the words complained of.

62. The parties agree on the applicable law in relation to pleading malice. In ***Qatar Airways Group v Middle East News FZ LLC*** [2020] EWHC 2975 (QB) Saini J stated at [149]-[151]:

*"First, it is well-established that "there are stringent requirements imposed" on the pleading of malice. This is "because malice is recognised as being tantamount to an accusation of fraud or dishonesty and must not be made on a merely formulaic basis" (**Khader v Dowd** [2009] EWHC 2027 (QB) per Eady J at [31]). Accordingly, the mere assertion of dishonestly/malice (as in para. 23 of the Particulars of Claim before me) "will not do", per Eady J in **Seray-Wurie v Charity Commission** [2008] EWHC 870 (QB) at [35]:*

> *'A claimant may not proceed simply in the hope that something will turn up if the defendant chooses to go into the witness box, or that he will make an admission in cross-examination: see e.g. Gatley on Libel & Slander (10th edn) at 34.18, and also the remarks made by Lord Hobhouse in Three Rivers DC v Bank of England [2001] 2 All ER 513 , 569 at [160]: 'Where an allegation of dishonesty is being made as part of the cause of action of the plaintiff, there is no reason why the rule should not apply that the plaintiff must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross-examination of a witness at the trial does not suffice.'*

*Second, where malice is alleged against a corporate defendant it is necessary to identify in the pleading the individual(s) who is/are responsible for the publication of the words complained of and had the relevant state of mind. Neither was done in para. 23. In **Monks v Warwick District Council** [2009] EWHC 959 (QB) at [23]-[24], Sharp J explained:*

> *'[T]he Claimant must give particulars of the person or persons through whom it is intended to fix the corporation with the necessary malicious intent, as well as pleading the facts from which malice is to be inferred.'*

*In **HRH Duchess of Sussex v Associated Newspapers Limited** [2020] EMLR 21 Warby J cited Monks and emphasised (at [49]) that:*

> *'It is trite that dishonesty or malice cannot be established against a corporation by aggregating the conduct of one employee with the state of mind of another. Fairness requires the identification of the individual(s) said to have behaved dishonestly.'"*

63. The First Claimant accepts that in due course she will be required to give more detail as to whom, precisely, she alleges to have had malicious intent, but submits that she is not currently required to do so.

64. In considering an application for summary judgment, I must have regard not only to the evidence before me but also to 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). However there is nothing to persuade me that additional evidence will be available at trial on which malice will be established. The First Claimant has had the opportunity to plead their case on malice in response to the Defendants' Part 18 questions. The Claimants seek to amend their pleadings to allege malicious falsehood but have not complied with the stringent requirements in relation to pleading malice in their proposed amended pleading.

65. I do not consider that the First Claimant has any realistic, as opposed to fanciful, prospect of establishing malice in relation to the publication of the letter and therefore would grant summary judgment on this basis if necessary.

Serious harm and *Jameel* abuse

66. Given my findings above, I do not need to determine the Defendants' application for summary judgment on the basis of a failure to establish that the publication of the statement has caused or is likely to cause serious harm to the reputation of the First Claimant.

67. However I consider that there is significant merit in the Defendants' submissions that the First Claimant cannot establish serious harm.

68. There is no evidence that the publication of the letter was to anyone other than Mr Shafique of Knightsbridge Solicitors, who forwarded it to the First Claimant without comment. I do not consider that the First Claimant can rely on the *"inevitable grapevine effect of the publication to the judiciary, First Claimant's client, and others who would ordinarily receive questions made under Part 35 of the Civil Procedure Rules"* as pleaded in paragraph 11 of the Particulars of Claim in circumstances where there is no evidence that the questions were ever answered and the claim was concluded within a short period of time without proceedings being issued. Clearly publication to the judiciary would be subject to absolute privilege.

69. There is evidence, in the form of an email from Mr Aziz, a solicitor at Knightsbridge Solicitors, dated 21 February 2019 that *"we have had 3 insurance companies contact us to state that they are not accepting medical reports from you"*. If the First Claimant did have a reduction in instructions from Knightsbridge Solicitors, it is difficult to see how she will establish that this was due to the letter from Mr Xavier, as opposed to the positions of two other insurance companies (assuming one of the three was Aviva), that they would not accept medical reports from the First Claimant.

70. There is also evidence that the First Claimant had been investigated by both MedCo and the IFB by the time of the publication.

71. In the absence of any evidence from Mr Shafique as to the impact of the publication on him, I consider that the First Claimant's case on serious harm is very weak (see ***Lachaux v Independent Print Ltd*** [2019] UKSC 27 at [14]). Having regard to findings on privilege, I do not need to consider the matter further but I note that many of the same considerations would apply to the issue of ***Jameel*** abuse.

Strike out applications

72. I now consider the Defendants' application to strike out the other claims in both the Amended Particulars of Claim dated 5 September 2020 and proposed draft Re-Amended Particulars of Claim on the basis that they disclose no reasonable cause of action.

73. I note the Defendants' submission that these claims are an attempt to subvert the limitation period which applies to claims for defamation, however I must consider whether the allegations disclose a reasonable cause of action and, if they do, I do not consider that the fact that limitation has expired in relation to a different cause of action would necessarily be a bar to the claims proceeding.

74. The pleadings as they currently stand seek to bring claims for (i) conspiracy to injury, (ii) unlawful means conspiracy, and (iii) tortious interference with contract in addition to the defamation claim considered above. The Claimants seek to amend their pleadings to add claims of malicious falsehood and breach of data protection legislation. I will consider each of these in turn.

Conspiracy to injure

75. In paragraphs 23 to 26 it is alleged that *"the Defendants agreed that they would refuse to settle claims in which the First and later the Second Claimant was the medico-legal expert instructed by the litigant, regardless of whether (a) they accepted the veracity of the medical report, (b) the offer put forward by the Claimants was a reasonable one; or (c) it made commercial sense to accept the offer".*

76. I do not understand the allegation that the Second Claimant was ever a medico-legal expert, but more importantly it is submitted by the Defendants that the allegations are not adequately particularised and do not fulfil the requirements for a claim for conspiracy set out in ***Kuwait Oil Tanker Co SAK v Al Bader*** [2002] 2 All ER Comm 271 at [108].

77. I accept the Defendants' submissions for the following reasons:

    i) There has been no attempt to identify the alleged perpetrators of the conspiracy save for the purported clarification provided in a Part 18 response that the individuals party to the agreement were "*those who authored the communications or caused those communications to be sent*". However the Claimants have failed to identify which communications are being referred to as part of the conspiracy.

ii) In paragraph 26 of the Particulars of Claim, it is alleged that "between 2015 and 2019 the Defendants consistently refused to settle claims in which the Claimants were the medico-legal expert". However the Claimants have not identified a single claim which the Defendants refused to settle. I cannot help but note that Karleen Marshall's case was settled, which seems to suggest that Mr Xavier at least was not part of the alleged conspiracy.

iii) There is no particularisation of the allegation that the predominant purpose was to cause damage to the Claimants. I note that the Second Claimant was not incorporated until 2019, whereas it is alleged that the agreement was formed in or before 2015. I note the allegation in the Letter of Claim that the Defendants sought to minimise the amounts they paid out, which I consider is a far more plausible explanation if indeed the Defendants did refuse to settle claims, of which no examples have been given.

78. I therefore do not consider that the current or proposed Particulars of Claim disclose reasonable grounds for bringing the claim. I have considered whether the Claimants should be given the opportunity to amend their case further but I consider that they have had ample opportunity to plead their case in both the Part 18 replies and the recent Re-Amended Particulars of Claim. I therefore strike out the claim for conspiracy to injure pursuant to CPR 3.4.2(a).

Unlawful means conspiracy

79. It is alleged that there was a conspiracy to injure by unlawful means both in relation to the matters pleaded under the conspiracy to injure by lawful means and the statements pleaded in paragraphs 7 and 8 of the Particulars of Claim.

80. For the reasons set out above, I consider that absolute privilege covers communications made pursuant to the RTA Protocol as well as those made in relation to proceedings. I therefore consider that a claim based on those communications is bound to fail, pursuant to ***Marrinan v Vibart*** [1963] 1 QB 528 at 535.

81. In addition, the allegations face the same difficulty addressed above in that there is no identification of the alleged conspirators. Further, the proposed amendment to plead that the publications attempted to mislead the parties to the action in question is unsustainable. The publications state that the insurers have concerns regarding the expert or were conducting further investigations. This is not misleading in circumstances where the First Claimant was being investigated by MedCo and the IFB.

82. I consider that the claim for unlawful means conspiracy should be struck out pursuant to CPR 3.4.2(a).

Tortious interference with contract

83. It is alleged in paragraphs 16 to 22 of the Particulars of Claim that the Defendants intended to induce solicitors to breach a contract with the First and Second Claimant or intended the solicitors to instruct a different expert.

84. The Claimants have not pleaded a single contract which it is alleged was breached by reason of any action of the Defendants.

85. There is also a failure to identify the particulars of alleged acts of inducement or procurement.

86. In relation to the claim that the Defendants intended the solicitors to instruct a different expert, this does not constitute tortious interference with contract as demonstrated by ***Middlebrook Mushrooms Limited v TGWU*** [1993] ICR 612 at 623B. There is no evidence that the solicitors had entered into a contract with the Claimants to provide repeat instructions and I do not consider that such a contract can be inferred.

87. I therefore consider that the claim for tortious interference with contract must be struck out pursuant to CPR 3.4.2(a).

Malicious falsehood

88. The proposed draft Re-Amended Particulars of Claim seek to introduce a claim for malicious falsehood, long after the limitation period has expired, on the grounds that it arises out of the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings. CPR Part 17.4 grants the court a discretion to permit an amendment in these circumstances.

89. In ***SPR North Ltd v Swiss Post International (UK) Ltd*** [2019] EWHC 2004 (Ch) the court (at [5]) confirmed that the test to be applied in an opposed application to amend is the same as the test applied to an application for summary judgment. The question is whether the proposed new claim has a real prospect of success.

90. I have no doubt that I should not exercise my discretion to permit the amendment to plead malicious falsehood:

    i) The claim will be defeated by a defence of absolute privilege for the reasons set out above;

    ii) The pleading does not satisfy the requirements for pleading malice, not least because it is does not identify any individual alleged to be malicious;

    iii) The pleading fails to identify the meaning which it is alleged the publishee understood the words complained of to bear (see ***Peck v Williams Trade Supplies*** [2020] EWHC 966 (QB));

    iv) There is no explanation as to why the allegation of malicious falsehood has not been made previously.

Breach of data protection rights

91. The First Claimant seeks further to amend the Particulars of Claim to include a claim for breach of her data protection rights.

92. Crucially, the proposed pleading does not identify the personal data which she alleges was unlawfully processed. It is therefore impossible to know whether the data was false and/or inaccurate as alleged.

93. The First Claimant had provided reports in the context of medico-legal claims and it is therefore difficult to see how she could not have consented to her data being processed for the purpose of dealing with those claims.

94. If the First Claimant is referring to emails and letters created for the purpose of the RTA Protocol and/or legal proceedings, they are protected by absolute privilege.

95. I do not consider that there is any realistic prospect of the data protection claims succeeding and therefore do not permit the proposed amendment.

Conclusion

96. The consent order agreed between the parties on 10 June 2021 reflects the order that would have been made following my judgment. No further order is required.