IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION Claim No. HQ09X03163
B E T W E E N:

HAYS PLC

Claimant

- and -

JONATHAN HARTLEY

Defendant

DEFENDANT'S WRITTEN SUBMISSIONS
FOR HEARING ON 5 MAY 2010

Reading list: Application notices (Bundle 1 tabs 1 & 2), witness statements and exhibits (1/3-7), statements of case (1/8-10), orders (1/12), part 18 responses (2/22 & 23), skeleton arguments and (if necessary) relevant authorities.
Estimated length of reading time: 2 – 3 hours
Estimated length of hearing: 1 day

The Applications

1. There are three applications before the court. First, D applies to strike out the claim as an abuse of process. This is on the basis of the *Jameel* jurisdiction and/or the existence of a dominant collateral motive. It involves the application of relatively settled principles to the unusual facts of the present case. Second, (and in the alternative) D applies to strike out the parts of the Claim Form and POC which seek to rely on an article in support of C's claim for damages. This application raises previously undecided points of principle. Third, C applies to strike out D's qualified privilege defence. This may also raise points of principle.

2. This skeleton argument will address the applications in the manner set out above. If the first succeeds, the second and third become academic. Moreover, the outcome of the first should not be conditional on the outcome of the second or third. Having said that, if C is not entitled to rely on the article in support of its claim for damages, the *Jameel* abuse of process argument is even stronger.

3. There are two witness statements from D. The first is in relation to qualified privilege. It expands on the plea in the Defence. The second addresses his personal position and the effect of the litigation on him, which, it is submitted, are relevant to abuse of process. The

witness statement of Timothy Senior ("TS1"), on D's behalf, sets out the history of the litigation and identifies the matters relied on in support of the abuse of process application. There are two witness statements from Allan Dunlavy ("AD1 and AD2") on behalf of C. They consist primarily of argument, not evidence. Significantly, no officer or employee of C has provided a statement.

The facts

4. A chronology and dramatis personae is attached. C is a large multi-national recruitment consultancy. In December 2008 Raymond Berkoh, Chiuta Dube and Kevin Snagg, three of C's former employees ("the Employees") commenced proceedings in the Employment Tribunal alleging racial discrimination ("the Employment Proceedings").

5. Mr Snagg made contact with D, a publicity agent, and provided him with form ET1, the initiating process in the employment tribunal. D, in turn, made contact with Nick Owens, a Sunday Mirror journalist, with whom he had an existing relationship, and forwarded the ET1 to him. On 11 January the newspaper published a neutral report of the claims in the Employment Proceedings including a prominent rebuttal by C ("the Article"). The Article has remained accessible on the internet since 11 January on the newspaper's site and a number of other sites that picked up the story. No complaint has been made to the newspaper's publishers ("MGN"). C's solicitors ("Schillings") have recently stated that this was because there were potential Reynolds and "neutral reportage" defences.

6. Instead, on 31 March C commenced a libel claim ("the Employee libel claim") against the Employees in relation to the "publication" to MGN for the purposes of publishing the Article. The publication of the Article was not relied on as a free-standing tort, but in support of a claim for damages arising from publication to MGN. At the same time, Schillings obtained an order from Master Fontaine restricting public access to the statements of case and preventing the Employees from disclosing copies of them other than for the purpose of the proceedings ("the non-disclosure order"). It was made following a without notice hearing in private.

7. It is apparent from POC [6(f)] in the Employee libel claim that C was aware of D's involvement. Nevertheless, no attempt was made to contact him at the time. The

Employees' Defence to the libel claim was served on 5 June and contained substantive defences of justification, qualified privilege and fair comment. It sought to distance the Employees from supply of the ET1 to MGN and the Article. In particular, it was denied that the Employees were aware that the Article was to be published (or that it was a foreseeable consequence of their actions). It suggested that the Employees were unaware that documentation provided by them to D was passed to MGN. It alleged that Mr Snagg first approached D "in or about August 2008".

8. This prompted Schillings to write to D on 24 June. For reasons that are addressed in greater detail below, it is submitted that C's dominant purpose in its dealings with D has been to obtain advantage in its dispute with the Employees and in particular, to obtain material to attack the Employees' credibility. The letter of 24 June sought to interrogate D in relation to the account in the Defence and requested retention of documentation that would be relevant to the Employee libel claim. It was not a pre-action protocol letter. It was principally directed to D's involvement in the Employee libel claim as a witness with relevant documentation. An undertaking not "to publish <u>any material</u> that is defamatory of our client" [emphasis added] was requested but no other relief was sought. There was no suggestion, nor could there be, that D had "published" any material about C other than in relation to passing the ET1 to Mr Owens.

9. D's solicitors ("DPSA") responded on 1 July, stating that D had no intention of publishing anything defamatory of C and would keep safe relevant documents, but was not obliged to respond to the queries raised in relation to the Employees' Defence. In their response of 7 July, Schillings stated that C intended to hold D responsible for publication of information to MGN unless he was prepared to pay "very substantial damages" costs, apologise in a statement in open court and undertake not to repeat. By letter of 14 July DPSA questioned C's motive for threatening a claim in light of the limited publication complained of which could not have had any material impact on its corporate reputation. The letter asserted that "*we suspect that your primary motivation relates to some perceived tactical advantage in relation to the existing claim*".

10. No response was received. Instead C issued a Claim Form on 20 July. The claim mirrored the Employee libel claim in that the publication complained of was to "the Sunday Mirror" and the Article was relied on solely in relation to damages. C obtained an identical non-

disclosure order from Master Fontaine. In the witness statement in support, the following was stated in relation to the Article: *"...whilst defamatory of the Claimant, did at least include in part the Claimant's response to the allegations as a result of the Sunday Mirror having contacted it prior to publication"*. The order was subsequently set aside by agreement, with costs, shortly before the hearing. The skeleton argument set out a number of fundamental defects in the procedure giving rise to the order. They have never been challenged by C. In short, it is obvious that there was no jurisdiction to make the order without notice.

11. The Defence was served on 18 September. It raised substantive defences of qualified privilege and abuse of process. The Reply was served on 26 October. It set out C's rebuttal of the privilege defence, but there was no malice plea.

12. TS1 sets out the various steps taken by C in relation to the present claim, which are relied on to support D's case on collateral motive. It appears that C's strategy was successful. C relied on information and documentation provided by D to seek disclosure orders against the Employees' ISPs. This led to a "walk-away" settlement on or about 8 December in the course of the Tribunal hearing in which the Employees dropped the Employment Proceedings and C dropped the Employee libel claim.

13. As part of the settlement, the parties made a joint public statement in which the Employees accepted that the incidents of which they complained were not motivated by racial discrimination and that there was no evidence to suggest the Claimant was an institutionally racist company. They expressed "regret" that the dispute had entered the public domain through the Article.

14. By letter of 18 December DPSA informed Schillings that, in the light of the settlement with the Employees, D was intending to strike out the present claim as an abuse of process. This led to an exchange of correspondence culminating in D issuing the present application. At no stage, have Schillings provided any convincing explanation of what C legitimately expects to achieve in terms of vindication by continuing with the claim against D.

15. On 17 February C issued a strike out application in relation to qualified privilege. The application could have been issued at any stage after service of the Defence. It is to be inferred that it is a tactical response to D's statement of intention to strike out the claim. C

has not complied with the agreed case management directions, which required it to make an appointment to fix a trial before 29 January to be heard in a window between 13 April and 2 July and has shown no interest in pursuing the claim to trial.

Abuse of Process – the relevant legal principles

16. The court has a duty to prevent its processes from abuse. The categories of abuse are not fixed. Nevertheless, in defamation claims two categories of abuse have become well-established. First, where the claim does not amount to a "real and substantial tort". Second, where the claimant is pursuing a collateral purpose but for which he would not have commenced the claim. They are distinct categories, although, inevitably, there will be cases which involve both – a claimant is more likely to have a collateral purpose for bringing a claim which is not real or substantial.[1] The first category is objective and involves a form of cost / benefit analysis by the court. It is underpinned by the recognition that the expense and hassle of a defamation claim can be a severe restriction on freedom of expression and must therefore be justified as necessary to protect the claimant's reputation. The second category is subjective and depends solely on the intention of the claimant. It is implicit in both categories that the claimant may be pursuing available legal remedies and his claim may have a real prospect of success on an application of the law to the facts. It is therefore accepted that such applications will be relatively rare.

Jameel – relevant legal principles

17. The following principles emerge from *Jameel* and the subsequent cases[2]:-

    17.1. It is an abuse of process to litigate a claim which does not amount to a real and substantial tort.

    17.2. This is because the fact of being sued at all is a serious interference with the defendant's freedom of expression[3] and the court has its own interest in ensuring that its resources, including substantial judge and possibly jury time, are not committed to a claim where so little is seen to be at stake.[4]

[1] See for example *Lonzim Plc & Ors v Sprague* [2009] EWHC 2838 (QB) at [51].
[2] See *Jameel v Dow Jones & Co Inc* [2005] QB 946, *Lonzim Plc & Ors v Sprague* [2009] EWHC 2838 (QB), *Mardas v New York Times Company & Anor* [2008] EWHC 3135 (QB) and *Haji-Ioannou v Dixon & Ors* [2009] EWHC 178 (QB).
[3] *Lonzim* at [33].
[4] *Jameel* at [80].

17.3. The proper purpose of the tort of defamation claim is to protect the claimant's reputation. The determination of whether a defamation claim constitutes a real and substantial tort requires a focus on the particular facts of the case, in order to evaluate what legitimate purpose in terms of vindication can be served by the continuation of the proceedings.[5]

17.4. The determination must be made on the basis of the prevailing circumstances at the time of the application. They may include factors that have arisen after the proceedings have been issued. In particular, it may be relevant that the claimant has achieved vindication in other proceedings, thereby diminishing or extinguishing the potential of the pending proceedings to provide any vindication.[6] The conduct of the defendant is also potentially relevant. For example, where the defendant pleads justification and continues to publish the article complained of, this is relevant in determining whether there is any purpose to be served in the claimant pursuing vindication.[7]

17.5. The number of publishees and the seriousness of the allegations are also obviously relevant, but ultimately these matters must be judged by reference to the fundamental question of what legitimate purpose is served in terms of vindication by pursuing this claim against this defendant. In *Jameel*, for example, the allegation was funding al Qaeda.

18. None of the previous *Jameel* cases have involved a sole corporate claimant. The question of whether a corporation should be entitled to maintain a claim for defamation has given rise to much debate.[8] For the moment, we are left with the 3-2 decision of the House of Lords in *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359. However, the fact that a corporation is entitled to maintain a defamation claim without proof of financial loss does not mean that the court will approach such claims in the same way as claims brought by individuals. In *Steel and Morris v United Kingdom* [2005] EMLR 15 at [95], the ECHR recognised that if a State does decide to provide a remedy to a corporation it needs to ensure that there are proper procedural safeguards to protect freedom of expression. This

[5] See for example *Haji-Ioannou* at [31]

[6] In *Schellenberg v BBC* [2000] EMLR 296, referred to in *Jameel* at [57] the failure of a libel claim against the Guardian meant that the BBC claim no longer served any purpose. It must follow that a claimant could also be a victim of his own success.

[7] See *Mardas* at [18].

[8] See for example the Culture, Media and Sport Committee Report HC 362 [164-178]

was said in the context of the potential "chilling effect" or corporations resorting to defamation claims on the "free circulation of information and ideas".

19. The *Jameel* jurisdiction should play an important role in ensuring that the concerns expressed in *Steel* (and by all their Lordships in *Jameel v Wall Street Journal* notwithstanding the overall conclusion) are properly recognised in domestic procedure. In determining whether the claim discloses a "real and substantial" tort, a relevant factor must be whether the claim is brought by an individual or a corporation. The effect on an individual of a defamatory publication is a factor that can make the wrong "real and substantial" even where the extent of publication is relatively limited. In contrast, a corporation has no Article 8 rights and no "soul" or "immortal part". Notwithstanding *Jameel*, it remains the case that a corporation can only be injured in its pocket. Moreover, a large multi-national corporation is likely to be more resilient to the publication of a defamatory allegation.

20. Not only is the corporate status of the claimant relevant, it is submitted that the position of the defendant should also be taken into account. Historically, English defamation law and procedure treats an individual defendant of limited means in the same way as a large media organisation. However, the *Jameel* jurisdiction is explicitly derived from the CPR's overriding objective which requires the court to consider "the financial position of each party" in dealing with a case in a "proportionate" manner. Moreover, in *Steel* the ECHR regarded the huge disparity in means between the parties was a relevant factor in ensuring that there were proper safeguards to protect freedom of expression in cases brought by large corporations against individuals.

Application of the principles to the facts

21. The following factors (set out in no particular order) are relevant in this unusual case:-

    21.1. The allegedly tortious act is the publication by D to "the Sunday Mirror". D's only communications were with Mr Owens. There is no evidence that any other MGN employees saw the ET1. Even if they had, the extent of publication is minimal.

    21.2. D's sole involvement in any publication was to act as the intermediary between the Employees and Mr Owens. He was simply the messenger. In contrast to *Haji-Ioannou*, he is not the author of the allegations complained of.

    21.3. C is a large multi-national corporation. The "publication" to Mr Owens has not caused it any harm. Insofar, as it is permissible to take into account the Article (which is only relied on in support of damages), there is no evidence that it has caused C any

harm. No special damage or particulars of any actual injury to reputation are alleged. Moreover, C has taken no action against MGN, notwithstanding the continuing publication online.

21.4. It is accepted that an allegation of indifference to racism in the workplace is potentially serious. However, such allegations are commonly made by employees in tribunal claims. It is a fact of life for large companies, which are generally resilient to them, unless they are upheld by the tribunal or court. Moreover, the scope for any harm is minimised by neutral reporting and the inclusion of the employer's rebuttal. Readers can see the allegations for what they are i.e. unsubstantiated claims.

21.5. C has already brought a libel claim against the Employees in relation to the same publications and the same alleged damage. The claim has been resolved. The settlement included a public statement by the Employees (who made the allegations complained of) that has fully vindicated C. There is no tangible vindication that can be provided by D. Moreover, any acceptance by D that the allegations were untrue would be parasitic on the statement made by Employees. He has no independent basis for concluding that they are untrue.

21.6. There is no defence of justification. Any trial will not determine the truth or falsity of the allegations and can add nothing to the public statement made by the Employees.

21.7. There is no threat of any republication of the allegations by D. This was a one-off assignment. He has no personal interest in the dispute between C and the Employees other than as the Employees' agent, a role that he fulfilled in January 2009.

21.7.1. AD2 [11-12] seeks to justify the need for an injunction on D's successful application to set aside the non-disclosure order and the denial of defamation in the POC. There was no jurisdictional basis for the order and D's justifiable conduct in setting it aside cannot be relied on in support of an injunction against repetition. C may wish to close off all public discussion of the issues raised by this case, but this is not a remedy that is properly available.[9]

21.7.2. Contrary to what is suggested in AD2, D has made clear that he has no intention of publishing the allegations complained of.[10] The standard denial of defamation in the Defence does not rationally afford any basis to infer an intention to publish the allegations complained of.

[9] See correspondence at pages 489-492, 494, 495-496, 499, 503, 504 of Bundle 2

[10] See letter of 29 March at page 504 of Bundle 2

21.7.3. There remains no rational basis for inferring the necessary intention on D's part that would justify the injunction sought in the Claim Form.

21.8. The litigation has caused D considerable stress and anxiety and the potential financial consequences for him and his family are serious.

21.9. As at 2 November, C's estimated future costs were over £135,000. Little has been done to pursue the litigation since then. C's estimated trial costs are around £100,000. The trial is estimated to last 4 days.

21.10. There is no witness statement from any officer of C. This is a remarkable omission in the light of the issues raised by the application. A company can only act through the agency of individuals. There is no proper evidence before the court of why C commenced this claim or what it hopes to achieve by continuing with it. AD2 gives evidence of the remedies to which, he submits, C is entitled. However, he is not in a position to give evidence of C's intentions and aspirations and does not seek to do so. He could, in theory, give hearsay evidence of what he has been told by identifiable officers of C, but he does not even seek to do that. The court is entitled to draw an adverse inference from the absence of any evidence from C.[11]

21.11. Insofar as is necessary, D will submit that the factors set out in [24-30] below, relied on in support of the case on dominant collateral purpose, are also relevant in relation to *Jameel*.

22. In the light of the above, it is clear that no legitimate purpose in terms of vindication can be served by the continuation of the proceedings such as would outweigh the costs, use of court resources and anxiety to D in prolonging the claim. There are no contested facts that need to be resolved in order for such a determination to be made.

Dominant collateral purpose – relevant legal principles

23. The following principles are relevant[12]:-

23.1. Where a claimant commences or pursues a claim with a dominant collateral purpose it is liable to be struck out as an abuse of process.

23.2. The principle applies throughout civil litigation, although defamation claims are particularly vulnerable to such abuse.

[11] In accordance with established principles. See, for example, Phipson on Evidence 17th ed at [11.15]

[12] See *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478.

23.3. The purpose does not have to be malign, merely collateral i.e. "one which the law does not recognise as a legitimate use of the remedy sought".

23.4. In cases of mixed motives the test is whether but for the collateral purpose the claimant would have commenced the claim.

23.5. It is an abuse of process to commence a defamation claim with the dominant purpose of obtaining documentation and information that might assist the claimant in relation to the defence or prosecution of a claim against a different person. The provision of documentation and information in such circumstances is governed by the rules relating to third party disclosure. They provide proper protection for the third party. It is far less burdensome to be a third party than a defendant. For example, a third party is generally protected as to costs. In contrast, a defendant is at risk as to the costs of the entire claim and specifically in relation to Part 18 requests and applications for disclosure. Moreover, a defamation claim consumes more resources than an application for third party disclosure.

23.6. The claimant's purpose may be inferred from an objective assessment of his actions. Where, however, the claimant provides a witness statement in which he denies the collateral purpose and explains his true purpose that may negative such an inference. Where the claimant does not give any evidence of his motivation in response to evidence that suggests it may be collateral, the court will be entitled to draw the appropriate adverse inference. [13]

Dominant collateral purpose – application of the principles to the facts

24. Judged objectively, all of C's dealings with D (as set out in TS1) have been directed to the provision of information and documentation to assist its rebuttal of the Employees' allegations. C was aware of D's involvement at the time it commenced the Employee libel claim. Yet, it showed no interest in D until the Employees' Defence sought (unconvincingly) to distance them from the Article and provided a date for their first contact with D that C suspected to be false. The information that Schillings originally sought from D was primarily directed to the credibility of the Employees' account in the Defence. It was only when D refused to provide this information that he was sued. Following the settlement with the Employees there has been a marked lacked of interest in pursuing the claim against D.

[13] See for example *Goldsmith* at 499 B-G. The corollary must also be true.

25. Judged objectively, there was (and remains) no reason, in terms of the protection of C's reputation, to commence and pursue proceedings against D. It was obvious that D was the messenger who had performed a one-off function for the Employees. The factors set out in [21] above in relation to *Jameel* are equally relevant in this regard.

26. Judged objectively, the only reasonable inference is that C pursued D for tactical advantage in relation to the Employees.

27. C provides no rebuttal to this compelling objective case. There is no evidence from any officer of C. For the reasons stated above, AD2 is inadmissible as regards C's motive. Moreover, while it purports to be a response to TS1, it fails to address the matters relied on in TS1 to support the inference contended for by D. AD2 is essentially a submission on the law as to C's entitlements. The issue as regards dominant collateral motive is not what a claimant is entitled to do i.e. whether he is seeking available remedies from a recognisable cause of action, but his purpose in pursuing them.

28. A striking absence from AD2 is an explanation of why C has pursued the remedies from D that AD contends are its entitlement. For example, AD states that C was entitled to pursue D following the equivocal position taken by the Employees in their Defence to the provision of information to the Sunday Mirror. But the relevant question is did C do so because it judged it necessary to obtain a remedy from D or to assist in C's battle against the Employees? TS1 and D's application notice allege that it was the latter. AD does not respond to this.

29. The only positive evidence as to C's motivation that AD seeks to give is to assert that C did not pursue the Sunday Mirror because of potential Reynolds and "neutral reportage" defences. But he does not state why C pursued D.

30. A similar picture emerges from the correspondence. There have been numerous opportunities for C to deny that the expectation of tactical advantage in relation to the Employees played a part in the decision to proceed against D. Schillings have consistently refused to deny this. C's silence on its motivation provides cogent support to the objective inference to be drawn from its actions.

Republication in support of a claim for damages – the relevant legal principles

31. A claimant may recover damages from a defendant in relation to an act committed by a third party in consequence of the defendant's tortious act. In a defamation context, this, in principle, allows a claimant to recover from the defendant the additional damage caused by intended or foreseeable republications of the sting of the defendant's libel (in whole or part), without having to sue on any republication as an independent tort. However, for the reasons set out below, D submits that, in certain cases, this may be unjust and/or contrary to Article 10 ECHR and should not therefore be permitted. A claimant does not have an unfettered right to additional damages arising from the republication of part of the sting, merely because he has established a valid claim in relation to the original publication and the republication is intended or reasonably foreseeable.

31.1. English law relating to recoverable damage is underpinned by policy considerations. In *McManus v Beckham* [2002] EMLR 40 Laws LJ stated:

> "39. It might be thought that the ascertainment of a causal relation between an act and a result is always a question of fact; and a decision on pure fact is, so to speak, always value-free. In very many ordinary cases, that will be quite right. But where the court has to decide whether D should be responsible to C for the effects of what was done or omitted by a third agency X, the court's task is not purely one of ascertaining fact, and is certainly not value-free In every such case D's act may credibly be called a cause of the damage which flows after X has done whatever he has done. If it were otherwise, if the consequences of X's part in the story simply had no perceptible connection with D or with the consequences of what D had done, the case would admit of a very short answer indeed: D would not be liable upon any rational approach to causation and legal responsibility. The issue for the court is not, therefore, purely one of factual causation. The true nature of the exercise does not consist in an ever closer examination of the facts to find some feature which one might at first have missed. The reality is that the court has to decide whether, on the facts before it, it is just to hold D responsible for the loss in question."

31.2. In *McManus* (and in the preceding case of *Slipper v BBC* [1991] 1 QB 283), the Court of Appeal sought to equate defamation with other torts. The Court formulated a test of reasonable foreseeability in relation to liability for damage caused by a republication. Laws LJ stated:

> "42. The law needs to be simplified. The root question is whether D, who has slandered C, should justly be held responsible for damage which has been occasioned, or directly occasioned, by a further publication by X. I think it plain that there will be cases where that will be entirely just. The observation of Bingham LJ as he then was in Slipper at 300 that "[d]efamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs" states an ancient and persistent truth, long ago vividly described in Vergil's account of Aeneas and Dido Queen of Carthage (Aeneid IV, 173-188).
> 43. It will not however in my judgment be enough to show that D's slander is a cause of X's further publication: for such a cause might exist although D could have no reason to know of it; and then to hold D responsible would not be just. This is why the old formula, "natural and probable cause", is inapt even as a figurative description of the relationship that needs to be shown between D's slander and the further publication if D is to be held liable for the latter. It must rather be demonstrated that D foresaw that the further publication would probably take

place, or that D (or a reasonable person in D's position) should have so foreseen and that in consequence increased damage to C would ensue.

44. Such an approach, I hope, may go some modest distance to demythologise the law of defamation. I make it clear that I intend what I have said to be in conformity with Waller LJ's suggestion at the end of his judgment as to how a jury might be directed, though with deference to him I think that any avoidance of the term "foreseeability" is commended by the need for clarity rather than adherence to principle, for in principle the approach he proposes, and for what it is worth my own reasoning, require that the damage in question flowing from X's act be foreseen or foreseeable by D, or the reasonable person in D's position."

31.3. It is submitted that the overriding principle is as stated at [42], namely, whether it is just to hold the defendant responsible for the additional damage which has been occasioned by a further publication. The fact that the further publication is an intended or reasonably foreseeable consequence does not mean that it will always be just to hold the defendant responsible for it. The judgments in *McManus* do not drive the court to such a conclusion.

31.4. While it may be desirable to equate defamation with other torts as much as possible, there are material distinguishing features. In particular, the "additional damage" in most tort cases is almost always something deleterious, such as the destruction of a wharf or the loss of an eye. The "additional damage" in a defamation case is the exercise of freedom of expression by means of a republication by a third party. Even where the original publication may be unlawful, the republication of part of the sting may be lawful and even in the public interest.

31.5. The Human Rights Act 1998 requires the court to approach any issue in a defamation claim from the standpoint of Article 10 ECHR (and where applicable Article 8). This includes issues relating to recoverable damage. As Lord Steyn observed in *Reynolds* at 208:

"It is worth considering why Lord Goff and Lord Keith could so confidently assert that the law of England and article 10 of the Convention is the same. In my judgment the reasons are twofold. First, there is the principle of liberty. Whatever is not specifically forbidden by law individuals and their enterprises are free to do: see Lord Goff, at p. 283G, where he stated that in England "everybody is free to do anything, subject only to the provisions of the law." By contrast the executive and judicial branches of government may only do what the law specifically permits. Secondly, there is a constitutional right to freedom of expression in England: see Broome v. Cassell & Co. Ltd. [1972] A.C. 1027, 1133 A-B per Lord Kilbrandon. By categorising this basic and fundamental right as a constitutional right its higher normative force is emphasised. These are perhaps some of the considerations which enabled Lord Goff in 1988 and Lord Keith in 1993 to hold that article 10 of the Convention and the English law on the point are in material respects the same. Now the Human Rights Act 1998, which will corporate the Convention into our legal order, is on the statute book. And the government has announced that it will come into force on 2 October 2000. The constitutional dimension of freedom of expression is reinforced. This is the backcloth against which the present appeal must be considered. It is common ground that in considering the issues before the House, and the development of English law, the House can and should act on the reality that the Human Rights Act 1998 will soon be in force.

> The new landscape is of great importance inasmuch as it provides the taxonomy against which the question before the House must be considered. The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need. These are fundamental principles governing the balance to be struck between freedom of expression and defamation."

31.6. It is recognised that an award of damages is a "penalty" within the meaning of Article 10(2) and therefore requires justification. The greater the damages, the greater penalty and the greater the justification required.

31.7. *Reynolds* plays a vital role in ensuring proper protection for freedom and expression on matters of public interest, including the public's right to receive such information. In contrast to the traditional form of qualified privilege, *Reynolds* attaches to the publication itself, not the occasion of publication by the particular defendant.

31.8. It cannot be justifiable in Article 10 terms to impose a penalty (or an additional penalty) on a defendant for his responsibility in relation to the publication of a publication protected by *Reynolds*.

31.9. Any principle of recoverable damage that is based solely on intention or reasonable foreseeability and fails to give any consideration to the legality of the republication cannot accord with Article 10 or be just.[14] For example, the republication of the partial sting of a libel may well be protected by *Reynolds*. This is particularly so where the original publication is only held to be libellous by virtue of the operation of the repetition rule. Alternatively, the republication may contain an antidote to the repetition of the sting.

31.10. It follows from the principles set out above that where a) the publication complained of is the communication by a source to a journalist, b) the republication is a newspaper article and c) the claimant does not pursue a claim against the publisher because he perceives that the article is protected by *Reynolds*, it cannot be just or

[14] In *Clift v Timms* [1997] QCA 61, the Queensland Court of Appeal questioned, by reference to the approach of Salmon J in *Cutler v McPhail* [1962] 2 QB 292, how a plaintiff could recover in damages for a consequential publication if he had no right to bring a claim in relation to it. *Cutler* was obiter as the plaintiff failed to establish liability for the first publication. Moreover, the second publication was the subject of a release not a substantive defence and the case significantly pre-dates the "new legal landscape" with its emphasis on freedom of expression. See also *Belbin v McLean* [2004] QCA 181 at [30] referred to in Gatley at [6.34] and the submissions of counsel for the defendant in *Baturina v Times Newspapers Ltd* [2010] EWHC 696 (QB) at [52-54].

compatible with Article 10 for the source to be made liable for the article by way of "increased damages" arising from the publication to the journalist.

31.11. Moreover, it is not just or practicable to place the burden on the source to make good a *Reynolds* defence in relation to the article in order to avoid paying damages in relation to it as a republication. Under English law the burden of proof in relation to all aspects of damages lies on the claimant.[15] This is consistent with the Article 10 jurisprudence that requires any penalty arising from the exercise of freedom of expression to be justified. The source will not necessarily have access to the material available to the newspaper to make good a *Reynolds* defence. Such a time consuming and costly enquiry should also be unnecessary. The fact that the claimant decides not to pursue the publisher because of the perceived availability of *Reynolds* should, of itself, deprive him of the opportunity of seeking additional damages in relation to it from the source, without the need for the source to establish that the claimant's perception is well-founded.

31.12. Any contrary conclusion to [3.10] and [3.11] would potentially leave the source picking up the entire tab for a public interest article. This would significantly deter sources from "assisting the press in informing the public on matters of public interest" (see further [39.4] below). The prospect of such litigation would be chilling in itself. It is also difficult to see how the source could pursue a successful Part 20 claim against the publisher, given the availability of *Reynolds* as a defence to the publisher.

32. There are also case management considerations in relation to a damages claim based on additional articles. It increases the costs and length of trial. It can give rise to unnecessary complexity, particularly where the claim is to be tried by a jury.[16] A judge is entitled to limit the ambit of a damages claim on case management considerations alone.[17]

33. It is a question of fact for the jury whether a republication is an intended or foreseeable consequence of the publication complained of. Insofar, as any issues of "justice" and policy arise, they must be for the judge and can be determined before trial.[18] Similarly, it is for the judge to decide whether to exclude a claim for damages on grounds of proportionality.

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[15] See McGregor on Damages 18th edition at [6-002].
[16] See, for example, *Collins Stewart Ltd v The Financial Times Ltd* [2006] EMLR 5.
[17] See, for example, *Collins Stewart* at [37].
[18] See, for example, *Baturina v Times Newspapers Ltd* [2010] EWHC 696 (QB) at [60].

Republication – Application of relevant principles to the facts

34. For the reasons stated above, C's decision not to pursue MGN because of the perceived availability of a *Reynolds* defence is fatal to the claim for damages against D in relation to the Article.

35. There are further reasons why it would be manifestly unjust and/or disproportionate to allow C to seek damages from D in relation to the Article:-

    35.1. Following the settlement of the dispute with the Employees, with no payment of damages, C now seeks to make D solely liable in damages for the entire printed and continuing online publication of the Article. This is notwithstanding that D has no editorial control over MGN and C has never sought any redress from the publishers. C did not even bother to inform MGN that the Employees had withdrawn their allegations so the online article could be removed or amended to reflect this. D was not responsible for the decision to publish the Article or had no editorial role in relation to it. He cannot procure the publication of an item in the newspaper informing readers that the Employees' allegations have been withdrawn and he has no power over MGN's website.

    35.2. As Laws LJ recognised in *McManus,* a defendant is potentially liable for the "increased damage" caused by a republication. This presupposes that the publication complained of has caused some damage, which has been increased by the republication. The "publication" to Nick Owens and/or Sunday Mirror journalists is a purely technical publication that cannot have caused any harm. There is no meaningful sense in which the Article has "increased" the damage caused by the publication to Mr Owens.

    35.3. Moreover, C has never explained why it did not sue over the Article as an independent tort and allege that D was responsible for its publication. AD2 states that C chose not to pursue MGN because of the availability of a *Reynolds* defence. But that is a different question. It does not explain why, having chosen to sue D and not MGN, C has not complained of the Article as an independent tort. In the absence of a proper explanation from C, it is to be inferred that the decision to sue over the publication to Mr Owens and not the Article was tactical. It allowed C to make the Part 18 and disclosure requests that were subsequently used against the Employees and it further isolated D from MGN.

35.4. It appears to be C's case from POC [19] & [20] that all it needs to establish to recover "increased" damages is that the Article repeated part of the sting of the ET1 and was the intended or reasonably foreseeable consequence of D supplying the ET1 to Mr Owens. If D had been sued over the Article as an independent tort, it would have been necessary for C to establish that D caused its publication (which is a stricter test than whether it was a reasonably foreseeable consequence of the provision of the ET1). The jury would also have to determine the meaning of the article (it would not be sufficient that it repeated part of the sting). Consideration would also have to be given to available substantive defences, such as *Reynolds*.

35.5. If the court were to agree that the sole consideration is reasonable foreseeability, D could end up paying damages for a publication for which he may not have been liable if he had been sued on it. Alternatively, if the court were to hold that it was necessary to establish that D was a joint tortfeasor in relation to the Article as a pre-condition to permitting an award of damages, it would create a trial within a trial. This would consume further costs and court resources in determining, among other matters, whether the *Reynolds* defence applied to the Article and if so, whether it would be available to D. It would also be potentially confusing to the jury.

35.6. There is no evidence that the Article has caused any harm to C. As C appears to accept, it was a neutral report that did not adopt the Employees' allegations and prominently stated C's rebuttal.

35.7. There is no plea of malice against D. He was not the author of the allegations that were reported in the Article. The entire claim against him in relation to publication to Mr Owens and his liability for damages in relation to the Article rests on an inflexible application of the repetition rule without the necessary countervailing balance of *Reynolds*.

36. The court is therefore in a position to conclude now, on the unusual facts of the present case, that it would be unjust, disproportionate and contrary to Article 10 for C to be allowed to claim damages from D in respect of the publication of the Article. There is no relevant conflict of evidence that needs to be resolved in order for such a conclusion to be reached.

The qualified privilege strike out application

37. It is important to note that the qualified privilege defence applies to the communication of information by D to MGN. This is not, therefore, a qualified privilege defence that seeks to apply to publication "to the world". There are essentially three forms of qualified privilege relied on by D. First, as the authorised agent of the Employees who had their own legitimate interest in providing the information to MGN. Second, an independent privilege arising from D's occupation and his relationship with Mr Owens and MGN. Third, as a part of the process leading to the publication of an article to which the *Reynolds* defence may apply.

38. The qualified privilege defence is strong on each of the three grounds. D would be seeking summary judgment in his favour, but for the existence of potentially relevant facts in issue. As Eady J recognised in *Howe & Co v Burden* [2004] EWHC 196 (QB) [15-18] and [29], where a qualified privilege defence is not "off the peg" or the relevant law is in a state of development, it may be preferable to make findings of fact at trial before determining whether the defence applies.

Qualified Privilege – the relevant legal principles

39. The following principles are relevant:-[19]

    39.1. The protection afforded by the defence of qualified privilege is based on "the common convenience and welfare of society". The categories of qualified privilege are not closed and will change as the requirements of public policy change. The defence is fact sensitive.

    39.2. Traditionally, the policy factors are reflected in the application of the concepts of duty and interest. The existence of a pre-existing relationship between the maker and recipient of the statement may also be relevant.

    39.3. The present case involves the communication of information to the media with a view to possible publication to the public. Modern public policy seeks to encourage the communication of information by sources to the media. Without the provision of such information to the media it would be impossible for the media to fulfil its vital role as watchdog and bloodhound.

[19] See Duncan and Neill [16.01-16.04]

39.4. This has also been recognised in the Strasbourg jurisprudence in the context of source confidentiality, most recently in *Financial Times & Ors v The United Kingdom* Application no. 821/03 [2009] ECHR 2065:

> "59. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that, in that context, the safeguards guaranteed to the press are particularly important. Furthermore, protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital "public watchdog" role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect that an order for disclosure of a source has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest (see Goodwin, cited above, § 39)."

This principle must also apply to the protection of a source from a defamation claim in relation to the communication of information to the media. To impose an obligation on the source to prove truth (in combination with the repetition rule) would be a significant deterrent.

39.5. Affording the protection of qualified privilege to the communication by the source to the journalist is not a significant inroad into the protection of reputation because of the limited extent of such a communication. If an article is subsequently published on the basis of the information provided, different considerations apply. The newspaper publisher must either prove substantial truth or establish compliance with the objective standard of responsible journalism, the purpose of which is to provide adequate protection to the claimant's reputation. In addition, the source may be jointly liable with the publisher for the publication of the article. The authorities recognise that qualified privilege is more readily applied to limited publications than publications to the world because of the greater potential of the latter to cause harm.

39.6. The recent recognition that Article 10 encompasses a right on the part of the media to receive information provides further justification for protection of communications between a source and a journalist.[20]

39.7. There appears to be no previous claim involving the application of qualified privilege to the provision of information to a journalist in order to alert him to a potential news story. The obvious explanation for this is that where it does not lead to the publication of an article, the claimant may not find out about it and there would, in any

[20] See *A v Independent News & Media Ltd & Ors* [2010] EWCA Civ 343 at [25-45].

event, be little point in taking action. Where it does lead to the publication of an article a rational claimant with no ulterior purpose obtains his remedy by suing over the article.

39.8. It is submitted that conferring qualified privilege on the publication by the source to the journalist is consistent with the policy of encouraging and protecting this important line of communication. This is especially so where the subject matter of the potential story appears to be one of legitimate public interest. In the language of duty and interest, the source will have a legitimate interest in communicating the information to the journalist and possibly a duty to do so in a public interest story. The journalist will have a reciprocal interest or duty in considering and assessing the information arising from his role in the process of imparting information to the public. This role can only be fulfilled by the receipt and evaluation of information from sources.

39.9. Applying the ordinary principles of agency, if the source has a privilege for such a communication to the media, so will the agent who is instructed to make it.[21] Malice on the part of the principal will not infect the agent.[22]

39.10. The cases of *Regan v Taylor* [2000] EMLR 549 CA (a solicitor), *Richardson v Schwarzenegger* [2004] EWHC 2422 (QB) (a political publicist) and *Khader v Aziz* [2009] EWHC 2027 (QB) (a solicitor) involve communications by agents to the media where qualified privilege was upheld (or held to be properly arguable). They implicitly recognise that it is in accordance with "the common convenience and welfare of society" for people to be able to instruct agents with specialist knowledge and experience. The existence of a profit motive on the part of the agent does not detract from the privilege. A publicity agent, whose role is facilitating the communication of information to the media, is no different, in principle, from any other agent. A modern democracy relies on commercial organisations to facilitate freedom of expression. Qualified privilege has never been based on altruism.[23]

39.11. In *Regan*, *Richardson* and *Khader*, the principal had (or arguably had) the benefit of a "reply to attack" privilege. The agent was the means by which the reply was communicated. For the reasons stated above, the existence of a prior attack should not be a necessary element of qualified privilege in relation to the communication by a source or his agent of information to a journalist on a matter of public interest.

[21] Gatley at [14.19]
[22] Gatley at [17.25]
[23] See also the observations of the editors of Duncan and Neill at [16.04] f/n 6.

39.12. In an appropriate case, it will also be properly arguable that the agent has a privilege independent of the source's privilege arising from a) the instructions given to him by the source and/or b) his own interest in the publication of the information and/or c) any existing relationship that he has with that journalist.

39.13. As an alternatively to duty and interest privilege, there is no reason why *Reynolds* should not extend to the "publication" of information by the source (or his agent) to the media. This is a necessary part of the process that leads to the finished product to the public that *Reynolds* seeks to protect. *Seaga v Harper* [2009] 1 AC 127 establishes that *Reynolds* is not only available to media defendants. In *Seaga* the publication complained of was the communication to journalists at a press conference. On the facts, it was held that the defendant had not shown the requisite care before making what was, in effect, a publication to the world. The level of care that is required must depend on the nature of the person's role in the publication process.

39.14. Finally, in the light of Schillings' reference to the "Max Clifford Privilege", it should be noted the facts of *Hamilton & Anor v Clifford* [2004] EWHC 1542 (QB) are far removed from the present case. In particular, Mr Clifford was not acting as an agent when he spoke the words complained of. Insofar as [79] suggests that the malice of the principal infects the agent, it is *obiter dicta* and inconsistent with what the learned judge held in [14] of *Richardson* and the Court of Appeal decision in *Egger v Viscount Chelmsford* [1965] 1 QB 248.

Qualified Privilege– Application of relevant principles to the facts

40. C does not allege – nor could it be alleged – that D will be unable to establish at trial the facts set out in the Defence and in his first witness statement. In assessing whether the qualified privilege defence is properly arguable the court must therefore assume that the following matters will be established at trial:-

40.1. The publications complained of were made with the authority of the Employees.

40.2. D had an existing relationship with Mr Owens and the publications complained of were relevant to that relationship. Mr Owens had expressed interest in receiving potential news stories from D.

40.3. He obtained documentary evidence of the Employees' claim, in the form of the ET1, before approaching Mr Owens.

40.4. The contents of the ET1 and the fact of the claim were matters of legitimate public interest and/or D reasonably believed that they were.

40.5. Mr Owens requested that D provide him with the ET1.

40.6. D had no reason to doubt that the claim was genuine and that the purpose of the Employees was to draw public attention to a matter of public interest and to obtain legal representation.

40.7. D was instructed by the Employees to seek media coverage in order to fulfil that purpose.

40.8. D did not "put up" the Employees to making a claim, suggest what could be put in the ET1 and/or advise them not to pursue an internal grievance procedure.

40.9. D did not endorse the allegations in the ET1.

40.10. D believed that the Sunday Mirror would treat the information responsibly e.g. carry out any necessary investigations before publication, obtain legal advice, put the allegations to C and report the matter neutrally. He did not seek to shape the article and had no involvement in its composition or in the decision to publish it.

41. The Employees pleaded qualified privilege in relation to the publication to the Sunday Mirror. No attempt was made to strike out the plea. If the Employees had a viable defence of qualified privilege, D would be able to rely on it as their agent. There is no plea of malice against him and he would not be infected by any malice on the part of the Employees.

42. D also had an independent duty or interest in relating to the communication of information to Mr Owens arising from his occupation and his relationship with Mr Owens and MGN.

43. Mr Owens had a legitimate interest or duty in receiving information about the Employment dispute arising from his role as a news reporter for MGN.

44. As regards *Reynolds*, it is sufficient that D reasonably believed that the subject-matter of the proposed article was a matter of legitimate public concern and MGN would handle the story responsibly. For the reasons set out in [31.11] above, it is not necessary for D to establish that the Article is protected by *Reynolds.* D's responsibility is to provide information to the media. It is for the media to exercise its judgment in whether to publish it. In certain cases, the decision may be not to publish. There is no reason why *Reynolds* should not nevertheless be available for the process of assessment.

45. Applying the principles in [39] above to the facts in [40-41] D clearly has (at least) a real prospect of establishing qualified privilege at trial on each of the three grounds identified in [37].

David Price

Solicitor-Advocate for the Defendant

4 May 2010