IN THE HIGH COURT OF JUSTICE **Claim No. HQ09X03163**

QUEEN'S BENCH DIVISION

B E T W E E N:

HAYS PLC **Claimant**

- and -

JONATHAN HARTLEY **Defendant**

CLAIMANT'S SKELETON ARGUMENT

For Hearing of Application Notices

Wednesday 5th May 2010

References below are to Volume/Tab/Page number of the Bundles prepared by C's solicitors. The Court is recommended to read the following documents in advance, which, together with this skeleton and the documents referred to therein, are likely to take about 1 ½ to 2 hours:

(1) Particulars of Claim [1/9]
(2) Defence [1/10]
(3) Reply [1/11]
(4) 1st WS Allan Dunlavy in support of C's application , without exhibits [1/3]
(5) 1st WS Jonathan Hartley in response, without exhibits [1/5];
(6) 2nd WS Jonathan Hartley in support of D's application, without exhibits [1/6];
(7) WS Timothy Senior in support of the Defendant's application, without exhibits [1/7];
(8) 2nd WS Allan Dunlavy in response, without exhibits [1/4]

Introduction

1. There are 2 applications before the Court in this libel action:
   (a) The Claimant's ("C") application to strike out the Defendant's ("D") plea of qualified privilege, together with a paragraph relying in mitigation of damages on the same [1/1];
   (b) D's application to strike out the entire claim as an abuse of process, alternatively to strike out C's reliance on the republication of the words complained of in the *Sunday Mirror* [1/2].

2. It is respectfully submitted that C's application is the first to be dealt with both in terms of chronology and logically. D's plea of qualified privilege is the only substantive defence which he has advanced and if struck out the

action (which D contends is "not worth the candle") will be substantially reduced.

The Parties

3. C is a public limited company well-known for carrying on business as a specialist recruitment agency.

4. D is a publicity agent, journalist and owner of KNS News ("KNS"), an independent news and press agency which profits from the sale and exploitation of stories to newspapers and magazines. KNS runs several different websites through which he obtains stories from members of the public and then publishes them to the press, such as:

   "**cash4yourstory.co.uk**",
   "**cash4yourreallifestory.com**",
   "**cash4yourpix.co.uk**",
   "**sell-my-photo.co.uk**";
   "sellmyvideo.co.uk", and
   "whistleblower.co.uk"

5. As is clear below, the precise nature of D's business is critical to the outcome of the applications. The claim which at lies at the heart of D's defence is that his activities provide such an essential public interest function that he should not only be free as a matter of both principle and practice from the usual journalistic responsibilities of ensuring that the stories which he publishes to the press are lawful (namely that they are not libellous) but he is also in effect immune from suit on the basis of privilege.

6. When the precise nature of his journalistic function is examined, this claim does not bear much scrutiny. For this purpose, a paginated print-out of some examples of his websites is attached to this skeleton. In terms of his journalistic output, D himself boasts as his latest and greatest 'pay-outs' on these websites stories such as:

- "*Human Weather Vane*", a story about a woman whose migraines predict bad weather, which D published to the Daily Mail in February 2010 [14-16];

- "*Betrayed by my best friend*", a story about how the woman she comforted after the death of her husband stole her husband as a 'thank you', which D published to the Daily Mail in January 2010 [6-13];

- "*I gave birth in a hospital lift*", a story about a woman who gave birth inside the lift of a maternity ward, which D published to the News of the World in February 2010 [19-20];

- "*I raffled my house to start a brand new life*", a story about a woman who got revenge on her cheating husband by raffling off their house on the internet, which D published to Now magazine in February 2010 [21-25];

- "*Michael Jackson in clouds*", a photo-story of a cloud formation spotted on a car which looked like Michael Jackson's face, and which D published to the national press [26]

- "*Susan Boyle makes 'debut'*", a photo-story about how Britain's Got Talent singer Susan Boyle had been accidentally caught on camera walking in front of the lens of a family's photograph in Edinburgh railway station years before she was famous, which D published to the Daily Mail in January 2010 [17-18];

- "*Rude Roof*", a photo-story about a 60ft phallus drawn on the roof of a property by the owner's son without his parents' knowledge which had been spotted by chance by an aerial photographer, and which D published to the Sun [27].

7. In his role as a publicity agent, D states that he "*works at the centre of the British media on a daily basis*", offering what he describes as a unique "*No Fame No Fee*" policy [28]. He explains that "*journalists are busy people and*

don't have time to trawl through press releases and instead rely on personal relationships with trusted contacts. 'My strength is delivering tailor-made stories that I know will be used by national newspapers and most importantly read by potential customers." [29] He offers to be paid purely on results. "*Examples of a variety of clients who have been helped to hit the headlines after contacting publicist Jonathan Hartley*" include:

- a rejected "Dragon's Den" contestant who wanted press coverage for her non-spill dog bowl, whose story was published by D to the Sunday Mirror [30-31];

- a boyfriend of Paul Gascoigne's step-daughter Bianca whose 'kiss-and-tell' story was published by D to the News of the World [32]

- a former girlfriend of Kerry Katona's fiancée, whose 'kiss-and-tell' story was published by D to the News of the World.

The Action

8. This libel action is brought by C against D over the publication to the *Sunday Mirror* of allegations that it was guilty of committing or condoning gross acts of racism: C's pleaded meaning is at ¶17 Particulars of Claim [1/9/8]. The allegations had originally been made by three of C's former employees (Snagg, Berkoh and Dube) who had approached and instructed D to publicise their 'story' to the press from July 2008 onwards, shortly after they had raised internal employment grievances but before they had commenced tribunal claims (which claims were ultimately discontinued by them in December of last year).

9. Whilst the employees' tribunal claims contained a raft of race discrimination complaints (such as about unequal wages, promotion, parking space allotment etc), there were three striking and specific allegations of direct racist acts, namely:

(a) the throwing of a banana at Mr Snagg, by Simon Gerhardt (a manager) during the course of a meeting and calling him "a big monkey";

(b) the widespread circulation within the Claimant company of an email depicting Barack Obama with a blacked up Al Jolson/Black and White Minstrel type face and suggesting him winning the Presidential Election would lead to the economy crashing; and

(c) the wearing of a Ku Klux Klan-style hood by Simon Cadogan (an employee of the Claimant) at a company meal in a curry house in New Malden where Mr Cadogan encouraged others to join him in racially abusive chanting in the presence of Mr Berkoh and Mr Dube, such as *"lynch them niggers, burn them niggers and burn them fuckers"*;

10. On 11 January 2009, despite complaints by C's solicitors, these allegations of specific racist acts appeared in an article in the *Sunday Mirror* entitled "***KKK chants and racist abuse claim at top firm***", on 11 January 2009, ("the Article"). A copy of this is to be found at [1/20/354]. However, although the Article contains these allegations, they are referred to in the context of a firm denial by C and are carefully hedged so as not to endorse their truth. As such, C did not bring any action against the publishers of the *Sunday Mirror*.

11. C's case is that the allegations were published to *Sunday Mirror* journalist Nick Owens by D [see ¶13-14 Particulars of Claim [1/9/4-5]:

(a) on a date between 7th and 9th January 2009 by means of an email attaching the Employment Tribunal Claim Form ("ET1") in a claim by Mr Snagg against C which contained the allegations complained of; and

(b) in the course of a series of telephone conversations between D and Mr Owens on or about 7th to 10th January 2009.

12. Whilst the allegations published by D to the *Sunday Mirror* were the same as those made by the three employees, D's role in ensuring or procuring their publication was crucial. In effect, without him and his contacts with the

British media in general (of which he boasts on his websites) and the *Sunday Mirror* in particular, there would have been no Article. It is no coincidence that, as Mr Dunlavy states in ¶10-11 Dunlavy 1st WSS [1/3/11-12], the employees had not made any complaint of these specific acts of gross racist conduct at the time when they contacted D in July 2008, at which point they had already submitted their internal grievances. It is also no surprise that when Mr Owens emails D on 7th January 2009 about the 'story' he has provided him with, and in particular the employees' ET1 forms, he says [1/3/52]:

"*I will have a proper read...all the wage discrimination and parking space stuff is clearly boring. Banana stuff isn't nor is KKK...*"

13. Equally, there was only one reason for the employees contacting D, a publicity agent who specialises in "*devising a media strategy to ensure that [you] remain on the news agenda*", especially prior to their complaints being determined in the employment tribunal. An insight into this media strategy can be seen in Mr Dube's email to a friend on 1 July 2009 [see ¶18 Dunlavy 1st WSS [1/3/13]:

"well if [Hays] think the issues to do with the Sunday Mirror were bad they will be sweating buckets soon when they find out what media companys [sic] are involved… this will be a PR disaster for Hays like the Mcdonalds two case".

14. Although D admits emailing the ET1 to Mr Owens at the *Sunday Mirror*, it appears that: (a) he does not admit that it contains words defamatory of C (although those three specific allegations are repeated therein), and (b) he denies that he published these allegations in the conversations he had with Mr Owens: ¶16-17 Defence [1/10/218].

15. It is important to remember, as referred to below, that the reason why C commenced an action against D was the fact that in the libel claim against the employees over the publication of their allegations to the *Sunday Mirror*, they denied responsibility for this publication, effectively citing D as the person responsible for authorising this with Mr Owens. Despite being given a chance

to resolve this without recourse to proceedings, D refused to explain his role or to offer the remedies sought by C, thereby necessitating legal proceedings: see ¶6-7 Dunlavy 2nd WSS [1/4/117].

16. The only substantive defence which D advances is his assertion that the publication of these allegations by him to Mr Owens was on an occasion of qualified privilege (on traditional duty/interest grounds) and/or is protected by *Reynolds* privilege ¶21 Defence [1/10/219-222].

17. The circumstances surrounding D's publication to Mr Owens are set out in ¶7-19 Dunlavy 1st WSS [1/4/11-13]. The essential facts are not in dispute. Mr Snagg first contacted D in July 2008 by means of D's "*publicityagent.co.uk"* website. He contacted him again in December 2008, having submitted his ET1, a copy of which he sent D on 23 December 2008. In early January 2009, D had conversations with Snagg, Berkoh and Dube about their complaints against C and how the *Sunday Mirror* was interested in publishing a story about them.

18. Following D's publication(s) to Mr Owens, the Article appeared in the *Sunday Mirror*. C issued proceedings against its former employees for the publication to the Sunday Mirror on 31st March 2009 [1/17]. As stated above, in their Defence, dated 5th June 2009, the employees denied authorising or participating in the publication of the allegations to Mr Owens [1/18]. The claim was settled, along with the employment tribunal proceedings brought by the employees against C, with the parties making a joint public statement in which the employees conceded that the alleged incidents of racial discrimination (including those referred to in the words complained of) were not racially motivated, that they did not believe C to be institutionally racist and that they regretted the publication of the *Sunday Mirror* article.

19. Whilst it appears that none of the employees themselves received any payment from the *Sunday Mirror* for the Article, D has now admitted receiving £2,000 himself for publishing it to the newspaper: ¶14 Hartley 1st WSS [1/5/127].

The summary of C's case

20. C's position is straightforward. D communicated defamatory allegations to a third party, namely a national tabloid newspaper. He must therefore prove one of the well-established 'defences' if he is to escape liability.

21. Although the Article itself is not sued over (as explained above), there would have been no such Article or publication to the *Sunday Mirror* without D's involvement. There is no attempt by D to defend the allegations as true, which he is free to do (and as the employees themselves sought to do in the libel action against them: see ¶8 Defence [1/18/319-322]).

22. Instead, D seeks to argue that his activities were entirely protected in terms of public policy grounds in the form of 'qualified privilege' since he provides an invaluable public interest service as a news provider which should leave him not only free from any responsibility to verify the stories he publishes but also immune from suit no matter how false and defamatory they might be. As such, he claims at once both the benefit of the responsible journalist defence created in *Reynolds v Times Newspapers*, without any of the well-known safeguards, and also the statutory defence of section 1 of the Defamation Act for 'innocent dissemination', whilst still being a 'commercial publisher' who was involved in editing the material and was plainly aware of its defamatory nature. This position cannot be right.

23. In effect, D seeks to establish a new form of qualified privilege which might be termed '*the Max Clifford*' defence, which allows a person to publish defamatory allegations to the press in return for substantial financial gain without any possible liability. As Mr Dunlavy states in ¶22-23 Dunlavy 1st WSS [1/3/14]. This cannot be justified either in terms of the common law, or (as appears to be D's claim in the Defence) by applying the balancing exercise of Article 10 ('freedom of expression') with Article 8 ('the right to protect reputation').

C's Application to strike out

24. C applies to strike out ¶21 Defence and the particulars set out thereunder [1/10/219-222], namely D's plea of qualified privilege (along with ¶27 Defence [1/10/223], which relies on the defence by way of mitigation) on the grounds that it has no realistic prospect of success. See CPR Part 24, the provisions of which will be very familiar to the Court.

25. D's case is that he had a duty/interest to publish the words complained of to Mr Owens, and Mr Owens had a corresponding legitimate interest or duty in receiving the information. The circumstances are certainly not a typical qualified privilege situation. The privilege is said to arise from the following:

    (a) The subject matter of the publications concerned a matter of public interest: ¶21.1 Defence [1/10/219];
    (b) D used to work as a journalist and has been a publicist for 5 years: ¶21.2 Defence [1/10/219];
    (c) D takes steps to filter out stories supplied to him by members of the public that are obviously false, including attempting to obtain further information (and did so in respect of Mr Snagg), before passing them on to journalists, whom he expects to independently corroborate them ¶21.3, 21.6, 21.12, 21.13 Defence [1/10/219-221];
    (d) D has an "established relationship" with Mr Owens and has provided him with stories for publication in the *Sunday Mirror* ¶21.4-5 Defence [1/10/219-220];
    (e) D told Mr Owens about the employees' allegations against C, and that he thought they were worth investigating, although they would need to be reviewed by the *Sunday Mirror*'s lawyers before publication in the newspaper: ¶21.7-21.9 Defence [1/10/220];
    (f) D had no reason not to believe what the Employees told him, and did believe them ¶21.10-11 Defence [1/10/220];
    (g) The media and the public's Article 10 rights depend upon the provision of stories by third parties to the media, and such third parties are entitled to use agents such as D. The rights of the subjects of such stories are sufficiently protected by their being able to sue the ultimate publisher.

Therefore, to require agents such as D to prove the truth of what they publish would be "an unjustifiable restriction on freedom of expression" ¶21.14 Defence [1/10/221].

26. This argument is very difficult to follow. The fact, for example, that D is a former journalist, or that he has supplied a journalist with a number of stories on previous occasions, or that he believed what the employees told him, cannot possibly give rise to a sufficient duty or interest such as to create an occasion of privilege.

27. D appears to be trying to create some entirely new form of 'public interest' privilege for agents such as himself who profit from publishing stories from members of the public to the media – a sort of 'Max Clifford Privilege', as C's solicitors have referred to it in correspondence.

28. However, English law already has a fully-formed defence for public interest publications – *Reynolds* privilege, the limits and terms of which have been clearly defined at the highest level of authority.

29. Whilst D does alternatively plead (¶21.16 Defence [1/10/222]) that his publication to the *Sunday Mirror* was protected by *Reynolds* privilege, this plea cannot be sustainable in circumstances where:

    (a) D admits that he has made no attempt to verify these serious allegations with C prior to publishing them to Mr Owens;

    (b) D made no attempt to communicate the gist of C's position to Mr Owens prior to publication;

    (c) Indeed, D not only failed to do either of these, but positively disavows any need for him to have done so as part of his 'function';

    (d) The allegations are self-evidently the product of individuals with an obvious 'axe to grind' against C, since they were bringing discrimination and victimisation claims against the company in the employment tribunal.

30. In such circumstances, no examination of authority is indeed necessary. The plea of Reynolds privilege on this *admitted* basis must be bound to fail. This could never be regarded as 'responsible journalism' even if public interest subsisted in such a story (which is not admitted). Furthermore, given that the tribunal was due to investigate and determine these allegations (although not for several months, thereby removing also any 'need for urgency'), it is difficult to see how a single one of the Lord Nicholls' criteria could possibly weigh in D's favour, let alone sufficient numbers of them so as to give rise to a sustainable plea.

31. The application of these criteria is no less strict simply because the publication complained of here is not in the traditional form of a newspaper story published to the world at large. In *Malik v Newspost* [2007] EWHC 3063 (QB), the claimant, a Government minister, sued in respect of a letter published in a local newspaper written by a former Conservative councillor, in which it was alleged that the claimant had organised gangs of youths to intimidate voters at a polling station, and a subsequent newspaper article quoting the councillor making the same allegations. The defendants were the councillor, the newspaper publisher and the editor. In respect of the councillor's *Reynolds* plea, Eady J held as follows:

> "8. It might be thought, therefore, as a matter of first impression, that *Reynolds* privilege would have no application to either of the publications. Yet, it is necessary to have regard to the broader issues of public policy upon which are founded not only the defence now associated with the *Reynolds* case, but also the closely related public interest privilege previously applied from time to time on the basis of *Adam v Ward* [1917] AC 309.
>
> 9. Sometimes, it may be in the public interest for allegations to be generally disseminated through the media by means which cannot be labelled as investigative (or indeed any other form of) journalism. It is possible to conceive of circumstances where it is the information itself, and the public interest in receiving it, that is important rather than the means of conveying it. In such a case, some or all of the public policy considerations identified in *Reynolds* may well be engaged. Thus it obviously cannot be said that privilege must be ruled out of court altogether merely because these circumstances, in the respects I have identified, do not exactly match

those discussed in earlier *Reynolds* cases. There must still be a form of public interest protection.

10. There is no doubt that the subject-matter of these publications is of public interest. Allegations of undermining the democratic process, including by intimidation, are very serious indeed. As is well established, however, that alone does not mean that it is in the public interest to publish any such allegations irrespective of their truth or falsity.

11. If a defendant is to be spared the burden of proving the truth of such defamatory imputations, and to avail himself of a public interest defence, certain conditions must be fulfilled. As Lord Nicholls explained, that is because the public interest itself requires that some filter must be applied to allegations which are liable to damage the reputations of those who are attacked and to undermine their rights under Article 8 of the European Convention on Human Rights: see *Reynolds* at p. 201 A-D. The public interest in protecting the reputation of those in public life has been emphasised also in Strasbourg on a number of occasions: see e.g. *Lindon v France* [2007] ECHR 836.

12. The question arises, therefore, what is the nature of the filter in circumstances falling outside the formulations of *Reynolds* privilege hitherto appearing in the decided cases.

13. It would presumably not be appropriate to express the criteria exactly as in *Adam v Ward*, but rather to assume that, if a publication can be shown to be in the public interest (irrespective of truth or falsity), then a social or moral duty to impart the information can be assumed. Nevertheless, there must be some safeguards in the interests of fairness and the protection of reputation.

14. So far as Mr Scott is concerned, he was simply making defamatory allegations directly – allegations which I have already ruled are, in all essential respects, factual in character rather than comment or opinion. There is no question of his merely reporting allegations. He was asserting them directly. There is no authority to support the proposition that he can do so to the world at large without having to prove that they were substantially true. No doubt he could have raised his concerns on a more limited basis which would, almost certainly, have attracted the protection of privilege – for example to the police, to the returning officer, or to the appropriate body within the Labour Party. But there is no comparable defence for simply making serious allegations of this kind to the general public."

32. Here, as well as failing the basic criteria set out by Lord Nicholls, as referred to above, the allegations were plainly not of public interest "irrespective of truth or falsity", affording a social or moral duty to pass them on regardless.

In fact, in return for his immunity, D seeks to avoid any "filter" or safeguard whatsoever in the interests of fairness or the protection of C's rights.

33. In the context of D's assertion here that C's rights are sufficiently protected by a claim against the *Sunday Mirror*, it is notable that Eady J made no suggestion that the fact that Mr Malik could have brought his claim solely against the ultimate publisher, the newspaper and editor, gave rise to any Article 10 basis for depriving him of the right to also sue the councillor. Nor has such a suggestion ever been made in any case where a source or contributor other than the ultimate publisher has been published.

34. The Privy Council in *Seaga v Harper* [2008] UKPC 9; [2008] 3 WLR 478, which concerned a speech given by a politician at a public meeting attended by media representatives, strongly affirmed the position that any extension of the *Reynolds* defence to publications beyond those in a national newspaper must still satisfy "*the conditions framed by Lord Nicholls as being applicable to "responsible journalism*": see [11]. In that case, the Privy Council upheld the Judge's finding that the defendant had failed sufficiently to verify the information provided to him by third parties to be able to benefit from the *Reynolds* defence.

35. Significantly for present purposes, their Lordships also rejected the submission that the publication was protected on traditional qualified privilege grounds at [15]:

> "Mr Henriques QC argued on behalf of the appellant before the Board that the case did not fall within the *Reynolds* principles but was governed by the doctrines of traditional qualified privilege. Their Lordships consider that this was a misconceived argument. The *Reynolds* test is more easily satisfied, being a liberalisation of the traditional rules, and it is more difficult to bring a case within the latter. They are satisfied that the publication was not covered by traditional qualified privilege, for the element of reciprocity of duty and interest was lacking when the appellant knowingly made it to the public at large via the attendant media. If privilege was to be successfully claimed, it could only be under the *Reynolds* principles and, as they have said, those principles applied to the case. For the reasons given by the judge, however, with which their Lordships agree, the appellant failed to take sufficient care to check the

reliability of the information which he disseminated and is unable to rely on the defence.

36. As to the traditional 'duty and interest' limb of his defence, D seeks to create what would be a completely new and far-reaching exception to the repetition rule, in circumstances where, unlike with *Reynolds* privilege, he has taken no steps to verify the information, nor, as in reportage cases, is he seeking to dispassionately report the conflicting sides of a dispute. As Ward LJ said in *Charman v Orion* [2008] 1 All ER 750, at 766:

"No matter how overwhelming the public interest, it is not reportage simply to report with perfect accuracy and in the most neutral way the defamatory allegations A has uttered of B……".

37. Moreover, the immunity which he seeks is akin to being an innocent disseminator under section 1of the Defamation Act 1996, despite being in the commercial publishing business. Indeed, D in fact asks for more protection than a truly neutral intermediary such as a wholesaler or an ISP. Such intermediaries are not given the protection of privilege, despite their vital role in the media fulfilling its Article 10 functions. Rather, they have a defence under s.1 of the Defamation Act 1996 if they can establish that:

(a) They were not the author, editor or (commercial) publisher of the statement complained of;

(b) They took reasonable care in relation to its publication; and

(c) They did not know and had no reason to believe that what they did caused or contributed to the publication of a defamatory statement.

38. Plainly, D would fail on all three counts. Firstly, even leaving aside his role as a commercial publisher of the story, he selected which parts of the information the employees gave him was passed to the journalist, and is therefore an 'editor' as well. Secondly, he did not take reasonable care, simply taking the employees' allegations at face value, despite the fact that they were obviously highly defamatory. Thirdly, he certainly had reason to believe that

what he did contributed to the publication of a defamatory statement, even if (which is not accepted) he thought that defamatory statement to be true.

39. The fact that Parliament has considered the appropriate protection that should be given to intermediaries and D would be unable to avail himself of it should be fatal to any claim that he should be granted a new and special form of defence. Neither would D be able to avail himself of the old-fashioned common law defence 'innocent dissemination' available to distributors and news vendors since his 'publication' was plainly of a type likely to contain a libel.

40. Indeed, such a novel extension of the privilege defence would allow anyone (for it surely could not be limited to professional publicity agents) who hears a false and defamatory statement, which they believed to be true, to communicate it to a journalist, provided it carried some public interest, in the hope that it may lead to publication of the statement in the media. There is no proper need or basis for such an extension.

41. In the premises, D's publication to the *Sunday Mirror* was not an occasion of qualified privilege, on traditional duty/interest or *Reynolds* grounds, and the plea (and the attendant mitigation paragraph, paragraph 27 [1/10/8]) should therefore be struck out. There is no compelling reason why the action should still proceed regardless. It is in the interests of all concerned, especially given D's position on costs, that the case is limited to those 'real' and essential issues which need to be determined. Here, it is simply D's responsibility for publication of the statements complained of.

D's Application to strike out

42. D applies to strike out the entire claim on the basis that it: [1/2/1-2]

    (a) does not disclose any real or substantial tort and/or the legal costs and court resources necessary to try it would be totally disproportionate; or

(b) C brought the claim for the ulterior purpose of obtaining advantage in its libel claim against the employees.

Alternatively D seeks to strike out ¶19/20 Particulars of Claim [1/9/192-194] in which C relies on the republication of the sting or substance of the words complained of in the *Sunday Mirror*. It is said that it is an abuse to claim in respect of such republication as anything other than a freestanding tort and/or C's decision not to sue the publishers of the *Sunday Mirror* themselves is inconsistent with any desire to seek vindication or compensation in respect of the Article.

Game not worth the candle

43. There is an irrebuttable presumption in English law that publication of a defamatory statement causes some damage to the person defamed by it: see Lord Phillips MR giving the judgment of the court in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 [32] p960F-G. Such a presumption is compatible with Article 10 of the Convention on Human Rights: see [41] p962G, ibid**.**

44. It would therefore only be in very rare cases that it would be proper to exercise this draconian power by striking out an action as an abuse of process on the basis that the Claimant had suffered no or no minimal damage to his reputation, or that there was 'no real and substantial tort'. Save in such exceptional and very rare cases, striking out a legitimate claim for libel will prevent a claimant seeking a remedy for breach of his Article 8 right to reputation, and infringe his Article 6 rights.

45. This approach was recently affirmed by Eady J in *Mardas v New York Times & anor* [2008] EWHC 3135 where the Court overturned the Master's order striking out two claims brought by a Greek citizen over what was alleged to be relatively minimal publications by two American newspapers within the jurisdiction of fairly historic allegations about the claimant's involvement with the Beatles back in the 1960s. At paragraph [13] the Judge stated that:

> "It is necessary to remember that both generally and in its application to specific case the law of defamation is concerned to strike a balance between freedom of information, on the one hand, and the protection of the honour and reputations of individual citizens on the other hand. The right to protect reputation is expressly recognized in Article 10(2). Furthermore, it is increasingly being recognized in the Strasbourg jurisprudence that the right to protect one's honour and reputation is to be treated as falling within the protection of Article 8: see eg Radio France v France (2005) 40 EHRR 29 and Pfeifer v Austria (App No 12556/03), 15 November 2007 at [35] and [38]. It is thus obvious that care must be taken on application s of this kind not to deprive a litigant too readily of his Article 6 right of unimpeded access to the court in pursuit of his remedies."

46. The *Jameel* case was an exceptional one. It involved a publication to only 5 people, 3 of whom were "in the claimant's camp": [17] p957B, [68] p969G-H. In an obvious case of 'forum shopping', the claimant was an unknown foreign resident and the Court held that he had no realistic prospect of achieving vindication since there was no plea of justification. However, Sedley LJ in *Steinberg v Pritchard Englefield* [2005] EWCA Civ 288 emphasised that the '*Jameel* abuse' jurisdiction is one which needs to be exercised with some caution.

47. *Wallis v Valentine* [2003] EMLR 175 was also exceptional (or an "extreme case" as Lord Phillips MR described it in *Jameel* at [58]). The Court struck out the claim there, brought in respect of a "technical publication" to one person (of no importance), because it reached the conclusion that the claim was not being brought to vindicate a right but rather to "cause expense, harassment, prejudice beyond that normally encountered in the course of properly conducted litigation" as part of a personal vendetta against the defendant: [34] p192-3.

48. Similarly, *Schellenberg v BBC* [2000] EMLR 296 was a case with extremely unusual facts. In that case, the Claimant had had an opportunity in previous proceedings, which he had voluntarily abandoned after a lengthy total, of having a determination on the merits of substantively the same issues as those in the later action he brought. The case was struck out by Eady J who, in an ex tempore judgment commented that "*the game is not worth the candle*".

49. However, as Eady J made clear in *Howe v Burden* [2004] EWHC 196, the Court's decision in *Schellenberg* is not authority for:

> "a principle to the effect that the court will strike out a libel action if there is no tangible advantage to the claimants in pursuing it; in other words, "the game is not worth the candle"…
>
> It will be remembered that [in Schellenberg] there had been a lengthy trial which the claimant had abandoned without a definitive result having been achieved. The essential point was that he had the opportunity in those proceedings of having a determination on the merits of substantively the same issues as those in the later action which came before me. That was the context of the remarks. It would not be right to elevate that phrase into a general principle of some kind to be applied in other libel actions
>
> It is important to note [in this case] that the allegations complained of in the recorded telephone conversations… are very serious. It was said of the Claimant firm… that acts or omissions had regularly taken place with regard to public funding which were not only professional improper but also tantamount to criminal offences. By contrast with the *Schellenberg* case, the Claimants have not yet had the opportunity of having those matters determined on the merits. It is to be noted that there is no plea of justification and accordingly, any outcome would be predicated upon the presumption that these serious allegations are false. Mr Price's submissions, if successful on any of the grounds put forward, would have the consequence that the Claimants would be prevented from achieving vindication in respect of those allegations through the court process". (at [5]-[6])

50. It appears that D contends "the game is not worth the candle" since the complaint is about a publication to a single newspaper journalist (albeit that the allegations were repeated in the newspaper), and therefore whilst damages may be modest, the costs are likely to hit six figures. There is nothing particularly unusual about this situation though in libel.

51. As numerous authorities demonstrate, the fact that the publication complained of may be very limited or the damages recoverable extremely modest, especially when compared with the likely costs, does not entitle a court to strike out a case as an abuse of the process: see *Steinberg*. In that case the damages awarded for publication on the internet were £1,000 to Pritchard Englefield and £4,000 to the second claimant, Mr Cohn. The costs awarded

against the defendant, Mr Steinberg, up to the date of the appeal were £191,000. Notwithstanding the enormous disparity, Sedley LJ said [21]:

> "It was a long way from the situation found in *Jameel*. The copy letter from Mr Steinberg to Pritchard Englefield, suggesting in no uncertain terms that the latter artificially and unprofessionally inflated their solicitor and own client costs, was accessible to anyone, including in particular a potential client, who fed the claimant's name into a standard search engine. It was also readable by anyone who accessed the defendant's own professional website. The inference of substantial publication was, it seems to me, irresistible."

52. As Eady J stated in *Mardas* at [15] "*what matters is whether there has been a real and substantial tort… (or at this stage, arguably so). This cannot depend upon a numbers game*". This principle was repeated by Mrs Justice Sharp more recently in *Haji-Ioannou v Dixon* [2009] EWHC (QB) 178, where she refused to strike out, as here, a claim for libel brought over the publication of allegations by D to a single journalist which were ultimately repeated in the newspaper (as was foreseeable) but no claim was made over the eventual article. Having emphasised the draconian nature of the power and the exceptional basis on which this should be exercised if at all, she held at [31]

> "Publication of a libel or indeed a slander, to one person may be trivial in one context, but more serious than publication to many more in another. Much depends on the nature of the allegation, and the identity of the person about whom and the person or persons to whom it is made. To that extent, the decision in each case is "fact sensitive". However, the court should not be drawn into making its decision on the basis of contested facts material to the issue of abuse which ought properly to be left to the tribunal of fact to decide."

53. The case of *Clarke v Davey* [2002] EWHC 2342 (QB), [50], is a further and important illustration of the extreme rarity and wholly exceptional nature of those cases where the Court will be willing to strike out as an abuse. In that case, Gray J refused to strike out the claim, even though damages were likely to be very modest, since the slander was published to only one person who did not think any worse of the claimant, and there was no threat to repeat the slanderous words. The allegation was that there were reasonable grounds to suspect that the claimant (a solicitor's clerk and freelance journalist) had been

guilty of professional misconduct. At paragraphs 49-50, the Court held as follows:

> "The question remains whether, even if the claim in slander is otherwise viable, it should nevertheless be struck out or dismissed as being an abuse of the process. The essence of the argument of Ms Rogers that the court should take this course is that the claim is devoid of merit or substance: the slander was published to only one person, Mrs Munson, and she did not think the worse of Ms Clarke because of what she was told by Mr Davey. The raft of factual disputes which would arise if the matter were permitted to proceed to trial would involve an inordinate amount of court time and would be disproportionate. There is no threat to repeat the words complained of. It is also said to be relevant that the case would be bedeviled by problems of legal professional privilege. Even if Ms Clarke were to succeed, the damages would be trivial. In support of her contention Ms Rogers drew attention to Wallis v Valentine and to the reference in paragraph 26 of the judgment of Sir Murray Stuart-Smith to the disparity in that case between the costs and the likely award of damages.
>
> But it appears from *Broxton v McClelland* [1995] EMLR 485 at 497-498 that, in order for an action to amount to an abuse of process, it must be established that the claimant is seeking to achieve by the litigation an improper collateral advantage. It does not appear to me to follow from the fact that damages for any injury to reputation might be very modest (because Mrs Munson did not think the worse of Ms Clarke) that Ms Clarke must be seeking a collateral advantage. It is in any case by no means beyond the realms of possibility that she might recover a significant sum by way of aggravated damages. That of course depends on the view taken of the evidence by the jury at trial. … I do not accept that this action constitutes an abuse of the process."

54. In *Hughes v Alan Dick & Co* [2008] EWHC 2695 (QB), Eady J declined to strike out as an abuse a slander claim in respect of the oral publication of an allegation of theft (or possible theft) to an immigration officer (and arguably also a police officer), saying, at [21]:

> "Subject to the defences of privilege and justification, it seems to me that it cannot be said that the claim would "not be worth the candle". It is a genuine claim in relation to a serious allegation and, albeit on a very limited scale, the publication would be one in respect of which the claimant would be entitled to claim a remedy and, in particular, to clear his name. It is true that there is no evidence at the moment of any particular damage being done to his reputation by those publications and it may very

> well be that the damages, if the claimant is successful, would be at a very modest level. But I would not feel able to describe the claim as one which amounts to an abuse of process, although there are quite plainly significant hurdles to be overcome by way of privilege at least.

55. Here, the allegations of are of gross acts of racism towards its employees, which are of a particular sensitivity given C's reputation as a recruitment consultant. The publication may only be 'one' in number but it is an influential one, namely a national newspaper, who clearly thought it of sufficient importance to publish despite complaints in advance from C's solicitors.

56. As Tugendhat J recognized in *Crossland v Wilkinson Hardware Stores* [2005] EWHC 481, at [57] :

> "the fact that a libel or slander has been communicated only to very few publishees within an organization does not of itself give any indication of what is at stake. For example, if one employee makes an allegation of dishonesty or sexual harassment at work against a claimant, then the claimant may have very much at stake in bringing a libel action. Without vindication, that single accusation may seriously impair or destroy his or her prospects of obtaining employment in the future. In such a case, with so much at stake, the overriding objective may require the court to be very slow to find that the claim has no real prospect of success, or to exercise its power to give summary judgment."

57. The time and resources which this action is likely to involve is relatively small for a libel action: it is listed for 3-4 days, although if the qualified privilege defence is struck out, it will be significantly shorter. Nevertheless, a court should not use its case management powers to strike out an action which can properly be brought merely because it will take up a large amount of court resources or be expensive or burdensome to a defendant (regardless of their means). As was said by Thomas LJ in *Aldi Stores Ltd v WSP Group Plc* (2007) EWCA Civ 1260, [24]*:*

> "I do not see how the mere fact that this action may require a trial and hence take up judicial time (which could have been saved if Aldi had exercised its right to bring an action in a different way) can make this action impermissible. If an action can properly be brought, it is the duty of the state to provide the necessary resources; the litigant

> cannot be denied the right to bring a claim (for which he in any event pays under the system which operates in England and Wales) on the basis that he could have acted differently and so made more efficient use of the court's resources… the problems that have arisen in this case should have been dealt with through case management".

58. Nor can the mere fact that the costs of a claim are all out of all proportion to the possible monetary recovery be by itself indicative of abuse, especially in actions for defamation where this state of affairs is far from unusual: see *Campbell v MGN (No 2)* [2005] 1 WLR 3394, and *Adelson v Associated Newspapers Ltd (No 3)* [2008] EWHC 278 QBD.

59. The difference between striking out as an abuse and the achievement of the overriding objective through efficient case management was recently emphasized by Briggs J in *Bank of Tokyo-Mitsubushi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2008] EWHC 659 (Ch), [7]:

> "In my judgment the overriding objective is achieved both under CPR 3.4(2) and CPR 24.2 by ensuring that unreal, fanciful or hopeless cases (or defences) are dealt with without the effort and expense of a trial, for the simple reason that a trial has been shown to be unnecessary. By contrast, where a statement of case discloses reasonable grounds for a claim or the evidence relied upon in answer to a claim for defendant's summary judgment discloses a real prospect that the claim will succeed, then the core of the overriding objective, namely enabling the court to deal with cases justly, set out in CPR 1.1(1), can only be achieved by a trial, albeit that the court will use its case management powers to minimalise inequality of arms, and to ensure that the case is dealt with proportionately, expeditiously and fairly".

60. The facts here share many similarities with the case of *Haji-Ioannou v Dixon*. Both involve publication to only one person, but of serious allegations, and to a journalist with the intent that those allegations should be published to the general public. D has himself emphasised that he had a reputation for being reliable and only passing on stories that were true, and had built a relationship on this basis with the recipient Mr Owens (see the ¶21Defence [1/10/218]; ¶3 Hartley 1st WSS [1/5/2]). As such the allegations were likely to have carried more weight coming from D than they would if they had come directly from

the disgruntled employees. This is why D received a fee for the material he published to the journalist but none of the employees did.

61. The fact that the ultimate article included C's denials (no doubt on legal advice) does not mean that there is nothing for D to answer for or that C should be denied any opportunity to seek vindication. D has refused to admit that the words published were defamatory, and has failed to undertake not to repeat them. C has offered D an entirely reasonable way to resolve this action which D has refused: see ¶7-13 Dunlavy 2nd WSS [1/4/117-119].

62. In any event, this cannot be described as such an exceptional case that the Court should take the draconian step of striking it out even though it is a good claim in law.

Ulterior purpose

63. It appears that D's fall-back position is to argue that the action has not been brought by C for genuine reasons, but rather for an ulterior purpose, although the precise purpose is not articulated by D.

64. The Court of Appeal stated the relevant principles for considering strike out for abuse of process on this basis in *Broxton v McClelland* [1995] EMLR 485 at p497-498:

> "(1) Motive and intention as such are irrelevant (save only where 'malice' is a relevant plea): the fact that a party who asserts a legal right is activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent is nothing to the point. As was said by Glass JA in Champtaloup v Thomas (1976) 2 NSWLR 264, 271 (see Rajski v Baynton (1990) 22 NSWLR 125 at p.134):
>
> > "To impose the further requirement that the donee [of a legal right] must be actuated by a legitimate purpose, thus forcing a judicial trek through the quagmire of mixed motives would be, in my opinion, a dangerous and needless innovation."
>
> (2) Accordingly the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the Court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted

proceedings. The cases appear to suggest two distinct categories of such misuse of the process:…

> (ii) The conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment and commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation.

(3) Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial."

65. Whilst this case pre-dated the CPR, the underlying principles still apply. Before striking out an action for abuse on the basis that it is not a genuine claim, the Court must be satisfied that the claimant has brought the claim not to vindicate him or her rights but rather deliberately to cause expense etc to the defendant which is beyond those ordinarily encountered in properly conducted litigation. This is an extremely high hurdle for D to surmount here, not least because it involves an assessment of evidence and a finding of fact which is pre-eminently a matter for the jury to determine.

66. It is a cornerstone of defamation that when there is an issue which depends on the evaluation of evidence, eg. as to the genuineness of the claimant's motives for bringing a claim, that is a matter for the jury, and the issue cannot be withdrawn from the jury unless the jury, properly directed, could not properly decide that issue in the party's favour: see *Alexander v Arts Council* [2001] 1 WLR 1840, [37].

67. The authorities strongly caution that the Court should be extremely reluctant in this area from trespassing in any way upon this role of the jury, except in the most obvious of cases. The approach of the Court of Appeal to this can be seen from *Spencer v Sillitoe* [2002] EWCA Civ 1579 where Buxton LJ sought, as he put it, to summarize the effect of authorities such as *Alexander.* At paragraphs 23-4, he said:

> "Bearing in mind the emphasis placed on the right to jury trial in section 69 and the analogy drawn by this court in Alexander with the criminal practice in Galbraith, the question in a case such as the present comes down to whether there is an issue of fact on which, on the evidence so far available, the jury could properly, and without being perverse, come to a conclusion in favour of the claimant.
>
> That question has to be answered against the background of the great respect that is paid to a jury's assessment of witnesses after seeing and hearing them, and hearing them cross-examined. It is unlikely that a Judge will be able to find that a witness will necessarily be disbelieved by a jury; or that for a jury to believe him would be perverse; when he has not actually heard that witness give evidence and be cross-examined: unless, of course, there is counter evidence that plainly demonstrates the falsity of the witness's evidence, as opposed, in this case, to rendering it, in the Judge's view, implausible."

68. In *Howe v Burden,* the Court refused to strike out a claim for slander contained in recorded telephone conversations despite the fact that it held that there were a number of grounds for suspecting that the court's process had been used in the litigation in an oppressive and bullying way so as to silence a "*vulnerable ex-employee*": [8]. Eady J explained his reasoning for this:

> "It is, I need hardly say, impossible for me to come to a final determination on that suggestion on paper. Nevertheless, there are a number of aspects to the litigation which will no doubt at some stage require careful scrutiny by the court."

Again, in that case, despite the very limited nature of the publication, the Court recognized the need for extreme circumspection [10]:

> "It is true that these words published over the telephone to Miss Pavlow do not seem to have reached a wider audience or done the Claimants any harm. Nevertheless, the allegations are serious and damage is presumed. In the light of these factors, it seems to me that I could not possibly make a finding of abuse of process on the basis of triviality".

69. The reason C commenced proceedings against D is clear and unimpeachable. In its libel action against Snagg, Berkoh and Dube, the defendant employees denied responsibility for or authorizing the publication to the *Sunday Mirror*, suggesting that this was down to D. That is why D was joined since, on the pleaded basis of

the Defence in that action, he was alleged to have published the allegations complained of to Mr Owens. As Mr Dunlavy states in his 2nd witness statement, at ¶6-7 [1/4/117], it was "*perfectly proper, indeed sensible*" to complain to D.

70. It is the fact that D refused to explain his role and offered none of the remedies which C was seeking that has necessitated a legal claim against him. The fact that the action against the employees has now settled does not deprive C of his remedies in law, or make his complaint an abuse of the process. C wishes to have not just a retraction but also an undertaking not to repeat these allegations, neither of which is agreed to by D. There are similarities again with the *Sir Stelios Haji-Ioannou* case where C still sought vindication (and was entitled to) in circumstances where D had stated that it did not intend to call him a liar, but did not accept that is what the words meant. In that case, however, unlike here, D had already agreed not repeat the allegations.

71. There is also no merit in the suggestion (if there is one) that this action was brought, or continues to be brought, by C "*in a manner designed to cause the defendant problems of expense, harassment and commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation*".

Republication in the Sunday Mirror

72. By way of an alternative, D applies to strike out the reliance by C in relation to damages on the fact that the allegations complained of did appear in the newspaper, albeit that the Article is not sued over as a separate cause of action. This is again the same position as in *Sir Stelios Haji-Ioannou* case.

73. It is well established that where one publication leads to further publications, a claimant can choose to sue in respect of those further publications as independent torts, or can rely on those further publications in respect of the damage caused by the original publication. See *Gatley on Libel and Slander* (11th edn) at 6.36, the law is stated as follows:

> "Where a defendant's defamatory statement is voluntarily republished by the person to whom he published it or by some other person, the question arises whether the defendant is liable for the damage caused by that further publication. In such a case the claimant may have a choice: he may (1) sue the defendant both for the original publication and for the republication as two separate causes of action, or (2) sue the defendant in respect of the original publication only, but seek to recover as a consequence of that original publication the damage which he has suffered by reason of its repetition, so long as such damage is not too remote. The cases do not always distinguish clearly between the two situations and in many cases it will make no practical difference whether the defendant's liability is based upon one rather than the other. However, it is clear that the second principle is wider than the first: where the defendant showed a television film defamatory of the plaintiff, the plaintiff was allowed to rely on the effect of newspaper reviews of the film as damage flowing from the broadcast of the film, but the differences between the film and the reviews were such that he could not have relied on the reviews as amounting to a republication of the film. Provided a media report of the initial publication conveys the sting of the original, in whole or in part, it may be relied on to increase the damages flowing from the initial publication even if it cannot be said to 'repeat' what was then said."

74. This passage is based on the Court of Appeal decision in *Slipper v BBC* [1991] 1 QB 283, in which Bingham LJ (as he then was), at 296G-H acknowledged the legitimacy of a claim seeking to recover in respect of those reviews as part of the damage flowing from the original publication, *even though the plaintiff could not found a cause of action on the film reviews as amounting to publication or republication of the original libel by the defendant*.

75. The position was reaffirmed more clearly in *McManus v Beckham* [2002] 1 WLR 2982, especially at 2984F, where the Court of Appeal explained that where the republication is relied on only by way of damages, as opposed to a separate cause of action, it is necessary merely for the sting to be repeated '*in whole or in part*', and not for the meaning to be the same in the overall article. Otherwise, there would be no reason for the distinction between the two bases on which republications could be sued over.

76. This case also emphasized the need to relax the artificial limitations which had previously been applied in this area so as to be more (as opposed to less) permissive of such claims, in accordance with common sense.

Here, the jury would be entitled to take into account the fact, as was always intended by D in his role as a publicist for the employees, that the allegations did find their way into the press, and therefore had the effect and influence desired by all concerned.

77. `Furthermore, in seeking to strike out this claim on the basis that he should not be 'penalised' for the ultimate Article, and this would have a 'chilling effect' on his Convention rights, D is asking the Court to overturn binding Court of Appeal authority. It would be wrong in principle therefore if this claim as struck out.

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