Neutral Citation Number: [2023] EWCA Civ 1468

Case No: CA-2023-001253

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Mr Justice Nicklin
[2023] EWHC 1368 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7/12/2023

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
and
LORD JUSTICE WARBY

- -

Between :

MOHAMED AMERSI	**Claimant/ Appellant**
- and –	
(1) CHARLOTTE LESLIE **(2) CMEC UK & MENA LIMITED**	**Defendants/ Respondents**

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Hugh Tomlinson KC and **Kirsten Sjøvoll (instructed by Carter-Ruck)** for the **Appellant**

David Price KC and Jonathan Price (instructed by Rradar Limited) for the **Respondents**

Hearing date: 23 November 2023

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Approved Judgment

LORD JUSTICE WARBY: -

1. This is an application for permission to appeal against the order of Nicklin J striking out this libel action pursuant to CPR 3.4(2)(a) on the ground that the claimant had failed to plead a reasonable basis for a claim. The main issue in the proposed appeal is whether the claimant has shown any real prospect of proving that the publication of the matter of which he complains caused serious harm to his reputation or is likely to do so, as required by the Defamation Act 2013.

2. When the application came to me on the papers I decided it merited a hearing. After hearing argument from Mr Tomlinson KC for the claimant and Mr Price KC for the defendants we announced our decision that permission to appeal would be refused for reasons to be given later. These are my reasons.

Background to the application

3. There is a considerable procedural history to this case. It is set out in detail in the judgment under appeal. For present purposes it is enough to give an abbreviated account.

4. The claimant is a businessman and the founder of Conservative Friends of the Middle East and North Africa Limited. The defendants are a former Conservative MP and a company limited by guarantee, of which the first defendant is the managing director. The defendant company is said to be the operator of the Conservative Middle East Council, which was established in the 1980s by the then Foreign Secretary, Lord Carrington.

5. The claimant brought this action in respect of the publication of 16 written publications made by the defendants to various individuals between late December 2020 and early January 2021 ("the Memos"). The claimant is able to name some of the publishees but not all of them. Those he can identify are all associated in one way or another with the Conservative Party.

6. The Particulars of Claim alleged that the 16 memos conveyed 22 defamatory imputations about him, ranging in nature and gravity from there being "*grounds to suspect that the claimant … poses a threat to … national security*", to "*a senior executive at an organisation who was familiar with the claimant regarded him as a person to be avoided*". There are issues about whether the meanings complained of are all tenable meanings of the words complained of and, in some instances, whether they are defamatory of the claimant at common law. But the key dispute for present purposes was and remains about the adequacy of the claimant's pleaded case on the issue of harm to reputation.

7. Section 1(1) of the Defamation Act 2013 provides that "*a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant*". This is sometimes called the serious harm requirement. I have also referred to it as a test of "defamatory impact". That serves to distinguish it from the common law requirement that a statement must had an inherent defamatory tendency. What s 1(1) requires is proof that serious reputational harm has been caused or is likely to be caused as a matter of fact, although this can in principle be done inferentially: *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612. A

claimant cannot succeed unless he pleads and proves that this requirement is met. Para 4.2(3) of the Part 53 Practice Direction requires the claimant to set out in his Particulars of Claim the facts and matters relied on for that purpose.

8. The claimant originally did this compendiously in a single paragraph of his Particulars of Claim. This alleged that "*the publication of each of the statements set out above has caused and/or is likely, if not corrected, to continue to cause serious harm to the reputation of the claimant*." Relatively brief particulars of that general proposition were given. These advanced an inferential case of serious harm which relied on six matters: (1) the nature of the imputations complained of; (2)&(3) the first defendant's position as a former MP and managing director of the second defendant, which was said to lend authority and credibility to the allegations; (4) the incorporation of hyperlinks, which was said to give the impression that the published material was carefully researched, documented and accurate; (5) the standing and importance of the publishees, and the importance to the claimant of their good opinion of him; and (6) the likelihood, and the defendants' alleged intention, that the allegations or their substance would be repeated and republished by the original publishees and/or would "percolate" in the wider community and become the subject of media speculation and repetition.

9. This sixth point amounts to a claim for what are known as "*Slipper*" damages, that is to say damages to compensate for reputational harm caused when the original publishee repeats the defamatory statement or its gist to others. The label derives from the decision of this court in *Slipper v BBC* [1991] 1 QB 283. Onward publication of this kind is also referred to as "percolation" of the libel.

10. In compliance with directions made of the judge's own initiative on 23 May 2022 the claimant then applied for an order that the defendants disclose originals of the Memos and other documents relevant to his case on publication to the unidentified publishees. In response the defendants filed evidence that the identity of those publishees was confidential, but they had spoken to several of them, who had said that the memo sent to them had not had an adverse effect on the reputation of the claimant in their eyes. The defendants also maintained that there was no evidence of any percolation via any of the unidentified publishees.

11. At a hearing on 27 June 2022 the defendants argued that the disclosure application should be refused on grounds of relevance and proportionality, contending that the claimant had no real prospect of showing that publication to the unidentified publishees had caused serious harm to his reputation directly or by percolation. They also argued that the application was disproportionate to any proper litigation aim and they raised what they called "legitimate concerns" that the claimant had collateral motives for seeking disclosure when he could have proceeded solely in respect of the identified publishees.

12. The judge concluded that pursuit of the claims in respect of the unidentified publishees was unnecessary and disproportionate and exercised his case management powers under CPR 3.1(1) to order that those claims be stayed generally and hence excluded from consideration. That left a claim in respect of nine publications to six identified publishees: Sir David Lidington, Sir Julian Lewis, Crispin Blunt MP, Sir Alan Duncan, Ben Elliot, Sheikh Fawaz and Sir Nicholas Soames. The judge further concluded, at least provisionally, that the claimant's pleaded case on serious harm was

non-compliant with the provisions of the Part 52 Practice Direction. His view, as explained to counsel for the claimant, was that "*Each of the publications is a separate cause of action, and it must be supported in its own way by … proof of serious harm caused by that publication*." Here, the judge was using the term publication as it is used in the law of defamation, to mean the communication of the statement to one person other than the claimant.

13. The judge directed the claimant to serve an application notice with evidence in support seeking permission to amend the Particulars of Claim to particularise fully his case on serious reputational harm. Although the terms of the order did not spell this out the judge had made clear in the course of argument that what he wanted from the claimant was a pleading that "*set out his proper particulars of serious harm to reputation that was occasioned by each publication*", that is to say separately for each occasion of publication.

14. The claimant's application for permission to amend was accompanied by a draft amendment ("the November draft") which did not do what the judge had wanted. The nine remaining occasions of publication were all pleaded separately, each with its own meanings or imputations. As to reputational harm, as the judge put it,

> "the claimant has largely retained the approach of pleading a 'composite' case of alleged serious harm to reputation (now significantly expanded in §§65-128). However, he also sought to introduce several paragraphs relating to serious harm to reputation in earlier sections of the pleading …"

The defendant then applied to strike out the claim on the basis that the claimant had failed to plead any tenable case on the issue of serious harm, as well as on certain other grounds to which I shall refer later.

15. The claimant filed three witness statements of his own in support of the application to amend. This showed that the claimant's solicitors had sought information from people who had received the Memos but whilst some of these had yielded responses nobody had been prepared to give a witness statement to the claimant. The defendants filed signed witness statements from four of the identified publishees (Sir Nicholas Soames, Crispin Blunt MP, Sir Alan Duncan and Sheikh Fawaz). A statement from the defendants' solicitor Mr Lawrence exhibited an agreed but unsigned statement from Sir Julian Lewis. Mr Lawrence's statement also contained a detailed account of what he had been told orally and in writing by Sir David Lidington.

16. After hearing argument in January 2023 the judge reserved judgment. By a judgment of 7 June 2023 and his order of 12 June 2023 he refused the amendment application, granted the application to strike out, declined to give the claimant a further opportunity to apply to amend, and dismissed the action.

The judge's reasoning

17. The judge held that the original particulars of claim "*failed to disclose a proper pleading of serious harm to reputation alleged to have been caused by the relevant publications*" ([233]). This was because "*to satisfy the requirements of CPR 53B PD ¶4.2(3) and to disclose a proper cause of action, each publication relied upon by the*

claimant was required to be supported with particulars of serious harm to reputation that the claimant alleged was caused (or likely to be caused) by that publication" ([234]). The claimant had not done that. Instead he had set out a "composite case" on reputational harm, which did not distinguish between the publications alleged to have caused the harm (ibid.) The claimant's position was that a composite or aggregate case was sufficient in law to satisfy the serious harm requirement. The judge rejected that submission of law for reasons he set out at length at [147]-[163].

18. It is unnecessary to analyse this section of the judgment in detail. I have already identified the judge's core reasoning on this point. It is however necessary to refer to the judge's reliance on passages in my judgment in *Banks v Cadwalladr* [2023] EWCA Civ 219, [2023] 3 WLR 167, at [40]-[49] (with which Dame Victoria Sharp, the President of the King's Bench Division, and Singh LJ agreed). Although the decision in *Banks* was not directly in point the judge regarded some of the reasoning in the passages I have mentioned as containing statements of principle having wider application. Indeed, he went beyond that and concluded that the reasoning in these passages was conclusive of the issue before him.

19. At [160] the judge identified the argument advanced by Mr McCormick KC on behalf of the claimant: that he was entitled to rely on "*the cumulative reputational harm caused by the publication of the same or substantially the same allegation across the memos*". In the same paragraph he indicated his view that *Banks v Cadwalladr* provided a refutation of that point. He went on at [163] to say this:

> "The point about whether it is permissible to 'aggregate' reputational harm across multiple publications is a pure matter of law. It can, and should, be resolved now. For the reasons I have given, the argument is wrong and must be rejected. The point has been decided by the Court of Appeal in *Banks -v- Cadwalladr*. The proper course, in this case, is for the Court to assess, publication by publication, whether the Claimant has a real prospect of showing that it has caused or is likely to cause serious harm to his reputation."

20. The judge also held that the claimant's case on reputational harm could not be saved by his claim for "*Slipper*" damages. His reasoning was that damages of this kind are an aspect of compensation for the initial publication. They cannot be recoverable if, as the judge had concluded, that initial publication was not actionable because it did not cause serious harm to the claimant's reputation in the mind of the original publishee. As the judge put it at [155]:

> "If the claimant sues A over the publication to B (and relies on the republication to C as *Slipper* damage) then s/he must establish that the publication to B has caused serious harm to his/her reputation (or is likely to do so). If the claimant fails to show that the publication to B caused serious harm …. then the cause of action will fail."

21. The judge assessed the evidence to determine whether the proposed amendments "*demonstrate a case in relation to serious harm to reputation that, applying the principles I have set out, has a real prospect of success*" ([182]). Having done so he

concluded that the claimant had failed to demonstrate such a case in respect of any of the initial publications relied on.

22. Although it followed from the judge's legal analysis that the claim could not be salvaged by reliance on a claim for *Slipper* damages he dealt with the evidence on that issue also. He concluded at [232] that "*the claimant's evidence demonstrates that there has been some republication of the Memos and their contents beyond the original publishees*" but "*on the evidence the only publishee who further distributed a copy of the Memo was Sheikh Fawaz*". The claimant himself had distributed one of the Memos and it was not possible to draw any reliable conclusions as to those responsible for circulating the Memo(s) more widely. In any event the claimant had "*failed to produce any evidence that such republication has caused serious harm to his reputation*."

23. In these circumstances, as the judge observed at [235], it was not necessary for him to consider the merits of the two alternative bases on which the defendant advanced the strike out application. Those alternative bases were, first, that any vindicatory purpose that might have been justified by the limited publication complained of had been "superseded" by widespread media coverage, and second, that the claim was abusive and inconsistent with any real desire to obtain vindication.

24. The judge did however consider whether to give the claimant a further opportunity to try to remedy the problem he had identified. He gave two separate reasons for not doing so. The first was that there was no realistic prospect that the claimant could remedy the problem. He had not failed on a technicality but because the evidence on which he relied did not disclose a claim with a real prospect of success: [237]. The judge's second reason for not giving the claimant a further opportunity to amend was that even if there had been some prospect of a satisfactory re-pleading of the claimant's case on serious harm a further amendment application would not have served the overriding objective. This was because of the way in which the claimant had conducted the proceedings which the judge held had "*exhausted any claim he might have on the further allocation of the court's resources to this action*": [238]-[241].

25. Explaining his reasoning on this second point the judge made some reference to some of the matters on which the defendants had relied in support of their third ground for striking out the claim. At [240] he said that there were several aspects of the claimant's conduct which gave real cause for concern as to (1) whether his purpose in pursuing the proceedings had been to seek vindication rather than some other impermissible collateral purpose and (2) whether he had sought to obtain vindication at proportionate cost. The Judge identified four matters giving rise to such concern: inadequately explained delay in issuing and serving the libel claim; an exorbitant approach to litigating the issues, which included bringing a data protection claim which the claimant later withdrew; statements evidencing a deliberate tactical decision to proceed with the data protection claim before suing in libel, when "subjecting a person to successive civil claims can be a hallmark of abusive conduct"; and media interviews which "strongly suggested" that the claimant had treated the libel action as a vehicle for pursuing the illegitimate collateral objective of embarrassing the Conservative party.

26. The judge went on at [241] to say that he did not need to resolve whether the claimant had pursued the libel action for an impermissible collateral purpose. But he was entitled to conclude that "*by conducting the proceedings in the way I have identified, the Claimant has exhausted any claim he might have on the further allocation of the Court's resources to this action*." For that reason it would not serve the overriding objective to permit a further opportunity to replead the claim, which was at an end.

The appeal

27. A party can only appeal against a decision of the High Court with the permission of that court or the Court of Appeal. Ordinarily, a party wishing to appeal will first make an application to the court of first instance which is encouraged, although not required by the rules. In this case Nicklin J's judgment was handed down remotely without attendance from the parties on 7 June 2023. As is common practice, a date was fixed for a hearing to deal with all consequential matters, including any application for permission to appeal. That hearing was due to take place on 13 June 2023. In the event, the claimant did not apply to Nicklin J for permission to appeal, the parties agreed the terms of a consequential order, and on 12 June 2023 an order in the agreed terms was made. The appellant's notice was filed with this court on 28 June 2023. By that time there had been a change in the claimant's counsel team: Mr Tomlinson and Ms Sjøvoll had been instructed in place of Mr McCormick KC and his junior, Mr Dean, who had appeared before Nicklin J.

28. There are five grounds of appeal.

    (1) The Judge was wrong to proceed on the basis that s 1(1) requires a separate assessment of each publication by reference to what the publishees believed rather than an assessment of the impact of each defamatory statement.

    (2) The Judge was wrong to decide that *Slipper* damages were only available where it is first proved that the initial publication of a defamatory statement has caused or is likely to cause serious harm to a claimant's reputation. He should have held that any damage caused by the publication can be taken into account.

    (3) The Judge was wrong to conduct a "mini-trial" of the evidence on serious harm. He should have held that these were matters which had to be dealt with on the basis of oral evidence at trial.

    (4) The Judge reached erroneous conclusions as to the Claimant's conduct of the litigation which he wrongly took into account in his determination of the Defendant's strike out application.

    (5) The Judge was wrong not to provide the Claimant with a further opportunity to amend his Particulars of Claim.

29. Applications for permission to appeal to the Court of Appeal are determined on paper without an oral hearing unless the judge considering the application directs that it be determined at an oral hearing; and such a direction must be given if the judge is of the opinion that the application cannot be fairly determined without an oral hearing: CPR 52.5. CPR 52.6(1) lays down the threshold test for the grant of permission: "*permission to appeal may be given only where (a) the court considers that the appeal*

would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard".

30. When the claimant's application first came before me on the papers at the end of July 2023 I decided that a hearing of the application would be appropriate. I gave the following reasons:

> 1. My provisional view is that none of grounds 3, 4 and 5 has any realistic prospect of success, and I am not yet persuaded that there is any other compelling reason why any of those grounds should be argued.
>
> 2. But Grounds 1 and 2 raise points of law about the way that section 1 of the Defamation Act 2013 is to be interpreted and applied, each of which has wider importance and currently seems to me to be arguable.
>
> (1) Ground 1 raises the question of whether any individual publication of an imputation with a reputationally harmful tendency can be sued upon in the absence of proof that the particular publication actually caused serious harm to reputation. The judge's answer was that by virtue of s 1 it cannot. The consequence would be that the claim would fail even if the publication in question was one of multiple publications by the same defendant of the same imputation which collectively did cause serious harm. The appellant's argument is, in essence, that this does not flow from the statutory wording nor is it compelled by authority or legal logic. It is said that for the purposes of deciding whether a statement (or imputation) satisfied the serious harm requirement and is accordingly defamatory, the court should look at the cumulative impact of "its publication" on the reputation of the claimant, that is to say all and any publications of the statement or imputation. I do not currently view this as fanciful.
>
> (2) Ground 2 raises the question of whether, when deciding whether any individual publication of an imputation caused serious harm to reputation the court is entitled to take account of "Slipper" damage …. The judge's answer was that it is not; the question of whether the publication of the imputation complained of caused serious reputational harm is to be answered without reference to any such onward publication. The appellant's case is that "Slipper" damage is reputational harm caused by the original publication that falls within the meaning of s 1. This argument also seems to me to have a real prospect of success.

> 3. That said, the court does not ordinarily hear appeals if the outcome would be academic so far as the parties are concerned. And I can see a good deal of force in the respondent's argument that the outcome of this case would be the same whatever the answers to these questions of law. … In all the circumstances it is appropriate to look into that issue further, with the benefit of written and oral argument from both sides.

31. I added that these observations were not intended to limit the scope of the argument that could be presented at the hearing, and that I had reached no concluded views but had set out my current thinking with a view to helping the parties shape their arguments. We have since had the benefit of skeleton arguments from each side and oral argument at a one-hour hearing.

An appeal with a real prospect of success?

32. The first question raised by the argument is what "success" means for this purpose. Mr Tomlinson for the claimant surely puts it much too broadly when he suggests that success on one or the other of grounds 1 and 2 would be enough. Appeals are against decisions and orders not reasons. So an appeal does not succeed just because the appellant persuades the appeal court that the reasoning of the court below included an error of law. It only succeeds if the error is material to the outcome of the proceeding in question.

33. In this case the relevant issues before the High Court were whether the amendment application should be granted and whether the claim should be struck out. The two are closely inter-related. Mr Price contends that the claimant could only achieve success on appeal if the outcome was an order granting permission to amend in the form of the November draft. That may be too strict a view. The claimant might be regarded as achieving success if, for instance, he persuaded us that the judge was wrong to refuse him an opportunity to make a further application for permission to amend. But appellants only "succeed" on appeal if they obtain a decision that is materially different from the one against which the appeal is brought. The first question for us is whether the claimant has a real prospect of achieving success, so defined. For the reasons that follow I do not consider the claimant has any such prospect.

The judge's decision on the facts

34. It is convenient to start with this issue. If the claimant had a real prospect of showing that the individual publications caused serious harm to his reputation then his case would be tenable even on the judge's legal analysis and the other grounds of appeal would fall away or at least be less significant.

35. Mr Tomlinson fairly points out that this case is procedurally unusual. Although the question of whether the serious harm requirement is satisfied is in one sense a threshold issue the standard approach nowadays is to decide it at trial. The early practice of trying serious harm as a preliminary issue fell into disfavour after it was deprecated by the Court of Appeal in *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1334, [2018] QB 594. In principle, a defendant can seek "reverse" summary

judgment on the issue of serious harm pursuant to CPR Part 24 but such applications risk wasting costs (see *Ames v Spamhaus Project Ltd* [2015] EWHC 1417, [2015] 1 WLR 3409) and are rare. The defendants made no such application in this case.

36. But there was no need to do so. The question of whether the claimant had a real prospect of proving that publication of the offending statements caused serious harm to his reputation arose in the context of his amendment application and, moreover, the onus was on him to show that he had such a prospect. As the judge stated at [140], a draft amended pleading must be coherent, and properly particularised, and supported by evidence which meets the "merits test". That test is the same as that applied in summary judgment applications. The approach is familiar. The essential principles were set out by Lewison J in the "reverse summary judgment" case of *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) [15] (approved by the Court of Appeal in *A C Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098). At [141]-[142] the judge identified these governing authorities, and expanded upon them by reference to a wealth of other case law. Mr Tomlinson accepts that the judge correctly identified the relevant legal principles. His argument is that the judge failed properly to apply them and, in particular, that he did not exercise the judicial self-restraint that is essential when considering what might realistically happen at a trial.

37. It remains my view that there is no merit in this ground of appeal. The judge was at pains to identify the relevant legal principles. He noted that the court must take account of the possibility that further evidence may become available by the time of trial whilst avoiding "Micawberism", that is to say, allowing a case to go to trial on the basis that "something may turn up". He cited detailed expositions of those and other relevant principles. It is plain that he sought conscientiously to apply the law he had accurately stated to the material before him. I do not think it arguable that he failed in the attempt.

38. It is worth emphasising just how unusual this case is on its facts. The difficulties of obtaining evidence about the actual defamatory impact of a publication are well-known. The judge referred (at [146]) to a series of cases in which it has been acknowledged that "*a claimant may struggle to identify, or to produce evidence from, all those to whom an article was published and in whose eyes the claimant's reputation was damaged*". Put simply, people rarely want to get involved and the more the claimant has been defamed in the eyes of a potential witness the less likely that person is to want to help. The converse question has not received the same degree of attention but, although defendants often argue that the publication complained of has not caused injury to the claimant's reputation, it is almost unheard of for defendants to adduce direct evidence from people to whom the statement was published. Here, the defendants adduced witness statements from five of the six identified publishees (the judge was satisfied that the unsigned statement of Sir Julian Lewis represented his evidence). The defendants also put in extensive written evidence going to the impact of publication on Sir David Lidington's opinion of the claimant.

39. In *Lachaux* at [79] the Court of Appeal acknowledged that there could be circumstances in which summary judgment on serious harm might, by way of exception, be contemplated:

> "One example could, for instance, perhaps be where the defendant considers that he has irrefutable evidence that the number of publishees was very limited, that there has been no grapevine percolation and that there is firm evidence that no one thought any the less of the claimant by reason of the publication. Whether such evidence is in truth unanswerable and whether such matters are best resolved on a summary judgment application or best left to trial is then for the court to determine."

40. On the defendant's case this was just such a situation. The judge, highly experienced in this field of litigation, conducted a scrupulous analysis of the available evidence, concluding that it fell short of showing a real prospect of establishing that any of the publications complained of caused serious harm and that it was fanciful to suppose that the position would improve at a trial. This was a detailed exercise but that is not of itself a basis for criticism. The main point taken on behalf of the claimant was and remains that it was wrong to conduct a paper-based analysis. The witnesses should have been called to give oral evidence which could be tested in cross-examination. The judge regarded this as Micawberism. I consider his conclusions to be unassailable.

41. The same goes for the judge's factual findings in respect of the *Slipper* claim. In that respect too this was an unusual case. As the judge observed at [222] the evidence did support "*a broad case that the Memos have circulated more widely than the original publishees*" but that was not enough; the claimant had to go further and show that he had a real prospect of establishing not only consequent harm to his reputation but also a causal link with one or more of the publications complained of in the Particulars of Claim. The judge found that he had no tenable case on either point. I find his analysis compelling, not least because of the insuperable problems on causation generated by the fact that the claimant had himself circulated some of the Memos, and the existence of subsequent media reporting about the claimant and the dispute which could not be linked to any of the publications in respect of which the claim was brought.

42. It follows that the claimant can only satisfy the serious harm requirement if he is entitled for that purpose to aggregate, in one way or another, the reputational harm that was caused or likely to be caused by the initial publication of the statements complained of.

The judge's legal analysis

43. The judge held that aggregation was impermissible as a matter of law because serious harm has to be proved "*publication by publication*". It remains my view after hearing oral argument that this reasoning was arguably mistaken. In short, it seems to me arguable that in a case where there have been multiple publications of a statement it is not necessary for the claimant to prove that each publication taken by itself caused serious harm to his reputation or was likely to do so; a statement can be defamatory within the meaning of s 1(1) and hence actionable if the overall, cumulative, or aggregate defamatory impact of the publication of that statement is serious or is likely to be serious.

44. I am not presently convinced that this analysis is inconsistent with the decision in *Banks v Cadwalladr*. As Lord Hoffmann said in *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 567 [14], "*Once a judgment has been published, its interpretation belongs to posterity and its author and those who agreed with him at the time have no better claim to be able to declare its meaning than anyone else*". But nor does the author of a judgment have any lesser claim. This is not the occasion on which to "declare the meaning" of the judgment in *Banks*. It is enough to say that for my part I doubt that *Banks* is authority for the proposition that serious harm is an element of the cause of action in the sense that the judge identified.

45. The substance of his analysis can be encapsulated in this way: no publication of a statement is defamatory unless that publication causes serious harm to the reputation of the claimant (or is likely to do so). In this formulation the focus is on the defamatory impact of a "publication" - that is, to repeat, an individual communication of the statement. My first observation is that if Parliament had intended to legislate to that effect it could have expressed itself in that way or in some similar fashion. Parliament chose instead to use language that sets a threshold for whether a "statement" is defamatory. And it did so by reference to whether serious reputational harm has been or is likely to be caused by "its publication". The question then is whether the court is to give those two words, in their context, the meaning identified by the judge.

46. In *Banks* we did not have to address that question directly. That was a case of mass publication. For the purposes of analysis this was treated as falling into two phases. That was because the defendant had a good defence to the claim in respect of publication in the first phase but none in respect of publication in the second phase. The question that arose was whether it was enough for the claimant to show that serious reputational harm had been caused (or was likely to be caused) by publication in the first phase. We answered that question in the negative, concluding that he had to prove that serious reputational harm had been or was likely to be caused by publication in the second phase, in respect of which there was no defence. This was on the basis that s 1(1) contains an exclusionary criterion the effect of which is that "*a statement is only to be regarded as defamatory if and to the extent that <u>its publication</u> causes serious harm to reputation or is likely to do so; publication that does not cause serious harm and is not likely to do so is not actionable*": [5] (I have added the emphasis). We used similar language at [46].

47. As part of our reasoning we did highlight the fact that the common law has not adopted the "single publication rule" that applies in some other jurisdictions; at common law each individual communication of a defamatory statement with a sufficiently harmful tendency gives rise to a separate cause of action: see [41]-[43]. At [42] we recognised, of course, that s 1 of the 2013 Act was intended to modify the common law. At [43] we identified the critical role of the two words "its publication". But we did not say that the effect of those words is that no individual publication is defamatory or actionable unless that publication causes serious reputational harm or is likely to do so.

48. Nobody had advanced that argument at trial or before us. On the contrary. The claimant's case was dependent on drawing an inference of serious harm from the combination of the gravity of the imputation and the extent of publication: see [31]. Those were the criteria adopted and applied by the trial judge in reaching her

decisions: see [29], [31], [33]. It was common ground throughout that "*a relevant and potentially significant factor when deciding whether publication has caused serious harm to reputation is the scale of publication or, putting it another way, the total number of publications*": [52]. The point under discussion was, in essence, what was the relevant scale or total number of publications.

49. Our decision addressed the defamatory impact of phases of publication not individual publications. We expressly rejected the notion that it followed from our legal analysis that s 1(1) "*requires proof that each individual publication caused serious reputational harm*": see [39], [49]. In allowing the claimant's appeal on ground three we adopted the approach which had been common ground between the parties. At [67] we held that an inference that internet publication in the second phase caused serious reputational harm flowed inevitably from "*the inherent gravity of the allegation and its natural tendency to cause serious reputational harm, coupled with the judge's own findings as to the scale of publication in this phase, taken at its lowest*".

50. I add, for what it is worth, that an approach to the assessment of serious harm that takes account of the extent of publication appears to be consistent with the stated intentions of the government as set out in the Explanatory Notes (at ⁋11) and by the Bill's sponsors in Parliament (see Blackstone's Guide to the Defamation Act 2013 Ch 2.C.2 esp. at ⁋2.22). The authors of Blackstone's Guide evidently adopted this interpretation: see ibid ⁋2.41.

51. All of this said, I have come to the firm conclusion that it cannot make a difference to the outcome of the present case.

The claimant's case

52. At the heart of the argument in support of the claimant's Ground One is the proposition that "*the claimant was entitled to plead his case on serious harm in the way that he did, in circumstances where the statement published was substantially the same across the publications complained of*" (emphasis in original). This is different from the argument of Mr McCormick KC below, as recorded by the judge. This was that the various publications complained of made "*the same or substantially the same allegation"*: see [19] above (here, the emphasis is mine).

53. It is necessary to distinguish between these two strands of argument. "Statement" is a defined term for the purposes of the 2013 Act. It means "*words, pictures, visual images, gestures or any other method of signifying meaning*": s 15. The "meaning" of a statement is something separate from the statement itself. As the statutory definition indicates, meaning is something "signified" by a statement. Defamation lawyers commonly speak of a meaning "conveyed by" the statement. Claimants' lawyers sometimes use the more tendentious term "allegation". The 2013 Act uses the term "imputation" which is not defined. But for present purposes all these terms can be treated as synonymous. They are all to be distinguished from the statement. These are cardinal principles of defamation law forming part of its basic architecture.

54. I think the judge was plainly right to reject the argument of Mr McCormick. Not only has the claimant never clearly pleaded any case on the lines that he advanced in argument I consider it clear that no such case could properly be pleaded. Section 1(1)

is concerned with the defamatory impact of the publication of "a statement". It would be revolutionary and in my opinion would stretch the statutory language beyond breaking point if the court were to assess whether one statement meets the statutory threshold for what is defamatory by considering collectively the impact on the claimant's reputation of (a) the publication of that statement and (b) the publication of other different statements conveying an allegation to the same effect. It would be a step further to take account of the publication of two or more different statements conveying imputations that are also different but to *similar* effect.

55. At one stage I thought the claimant's case on appeal included a reiteration of the argument I have just addressed. But the claimant has not pursued any argument to the effect that it is possible to satisfy the serious harm requirement by aggregating the injury caused by multiple publications of different defamatory statements or by two or more less harmful imputations. There has been no challenge to what I said about those matters in *Sube v News Group Newspapers Ltd* [2018] EWHC 1961 (QB), [2018] 1 WLR 5767.

56. The claimant's argument on appeal is different. And as I have indicated, in my view aggregation of reputational harm caused by separate publications is legitimate or arguably so as a matter of law where the *statement* complained of is identical, as in the typical case of simultaneous mass publication of the same newspaper article or social media post. I can see that the same might be true where some of the statements complained of differ from one another in ways that are minimal and immaterial to the meaning or imputation conveyed. In such a case it might perhaps be said that the statements are all the same or "substantially the same". That could be so in a case of multiple simultaneous publication or, arguably, in a case where the multiple publications are sequential. In such a case the claimant might be entitled to contend that the defendant published the statement complained of (or substantially the same statement) to numerous individuals and that the "statement" meets the statutory threshold because, whatever might be the position in relation to any individual instance of publication, the overall impact of "its publication" on all these different occasions is to cause serious harm to the claimant's reputation.

57. But that is not how this claimant has ever pleaded or sought to plead his case. He did not do so in the original Particulars of Claim nor did he do so in the November draft. As Mr Price submits, the central feature of the November draft is that it identifies a series of separate publications, each of them containing a separate statement with its own pleaded meanings, allegations or imputations. Indeed, this has been a feature of the pleaded claim from the outset. Paragraph 5 of the original Particulars of Claim contained a summary of the claim in the following terms, which remained unchanged in the November draft:-

> "From late December 2020 to mid-January 2021 the First Defendant published a *series of documents* to a number of influential individuals which contained *allegations* highly defamatory of the Claimant at common law and which *have* caused him and/or *are* likely to cause him serious reputational harm."

I have added the emphasis to highlight the use of the plural throughout. This is not a statement of case alleging the multiple publication of the same statement, or

statements that are substantially the same.

58. I do not think it good enough to argue, as Mr Tomlinson has, that the function of Particulars of Claim is merely to set out a concise statement of the facts not any legal analysis. The factual case that needs to be stated in Particulars of Claim for libel includes a clear identification of each "statement" complained of (the precise words of which must be set out verbatim). The Particulars of Claim must then set out, in relation to each statement, the meanings or imputations attributed to it, and the claimant's factual case in support of the proposition that "its publication" caused serious harm to the reputation of the claimant. If the claimant's case is that the publications complained of were of the same statement, or substantially the same statement, that must be made clear. I therefore conclude that the judge was plainly correct to refuse permission to amend in the form of the November draft and to strike out the original Particulars of Claim as disclosing no reasonable basis for a claim.

Another opportunity to amend?

59. An appeal on this ground would be bound to fail. The judge was not arguably wrong to refuse the claimant another chance to plead a case that serious harm to reputation was caused by any of the individual publications complained of. His first reason, that the claimant had no real prospect of pleading a tenable case, is unimpeachable and sufficiently deals with that legal basis for a claim. The judge's second reason was a discretionary one, involving an application of the overriding objective to the particular facts of a case with which the judge had become very familiar indeed. I do not believe the judge relied on irrelevant factors. He may have gone further than was strictly necessary in what he said at [240] about the claimant's intentions and other states of mind. But his decision was squarely based on objective factors and in particular the outward effects of the claimant's conduct on the consumption of the court's resources.

60. The judge exercised his discretion on the assumption that, contrary to his view, the claimant had a real prospect of formulating amended Particulars of Claim that would pass muster according to the law as stated by the judge. On that footing his decision is not open to criticism. The judge had made his views on the correct legal analysis clear from an early stage. Mr Price tells us that the judge offered to give a judgment on the issue which could be appealed, but the claimant declined to take the opportunity. The claimant thereafter had an ample opportunity to try to plead a case in conformity with the judge's stated views.

61. My own views about the legal test are different and mean that I must approach the question on a different footing. Even so, I do not think that in all the circumstances of this case it can fairly be argued that this claimant deserves a further chance. On the judge's findings, the claimant's chances of showing a factual case of serious harm must be slender at best, even if he could aggregate the harm from all the nine publications of which he now complains. His case on aggregation remains unpleaded. It is one of bare assertion at a high, theoretical level. There has still been no attempt to demonstrate its plausibility by reference to the detail of the publications complained of, in a draft amended pleading or otherwise. It seems to me that if my legal analysis is correct, the judge's reasoning has still greater force. It is not just a question of failing to plead a case that would have a real prospect of success according to the legal tests identified by the judge. The claimant has failed even now to formulate a case that would have a real prospect of success according to the more

generous legal standards which he now urges upon the court. I am unable to accept that allowing him a further opportunity to re-plead his case would be proportionate to the importance of his case, or the amount of money involved, or that it would involve the allocation of an appropriate share of the court's resources.

A discretion to refuse permission for an appeal with a real prospect of success?

62. Mr Price KC submits that we would have a discretion to refuse permission even if we were to conclude that the appeal has a real prospect of success. He pointed to the word "may" in CPR 52.6 and referred us to *Schofield v Schofield* [2010] EWCA Civ 1387 [6] and *Mainline Private Hire Ltd v Nolan* [2011] EWCA Civ 189, [2011] CTLC 146 [43]-[45]. If Underhill LJ agrees with what I have said so far it is unnecessary to consider this issue.

Another compelling reason to hear an appeal?

63. Mr Tomlinson argues that the case raises two important points of law of general importance each of which is arguable. The first concerns the application of s 1(1) to the initial publication of a statement complained of as a libel. For the reasons I have given I agree that there is an arguable point of law here. Mr Price did not seriously dispute this. It also remains my view that the judge's reasoning in relation to *Slipper* damage is arguably mistaken. It may be that *Slipper* damages remain irrecoverable unless the initial communication is actionable by common law standards. But the judge proceeded on the basis that the initial publications in this case (a) met the requirements of the common law but (b) did not satisfy the serious harm requirement. The legal question he addressed was whether, in such a situation, the threshold set by s 1(1) could be met by proof that *Slipper* republication or percolation caused serious reputational harm or was likely to do so. It seems to me that may be so. Take, for instance, a situation in which the initial publishee is in substance a neutral intermediary: someone who does not know or care about the claimant's conduct but foreseeably passes on the reputationally harmful communication to someone who takes it very seriously. I can see that in such a case it might be said of the statement complained of that "its publication" had caused serious harm. Other examples could no doubt be provided.

64. But I am not persuaded by Mr Tomlinson's submission that these points provide "another compelling reason" for the court to hear an appeal. The court's primary purpose is to resolve disputes between the parties that bring their cases before it. The arguable points of law that arise in this case are not capable of being decisive of this dispute. The first point fails on the pleadings. The second fails on the facts. Each point is of some importance in the overall scheme of defamation law but they are not going to be important in every case. Far from it. Mr Price makes a fair point when he observes that neither point has arisen for decision in the ten years that have elapsed since the 2013 Act was passed.

65. Like the judge, I also have regard to the overall procedural context and the extent to which the court's resources have already been taken up with this and related litigation between these parties. I do not think there is a need to decide those points which is so urgent and compelling as to justify putting the parties to the trouble and expense of an appeal which, on my analysis, could not affect the outcome of the case itself. The points can be resolved as and when a case arises in which they matter to the outcome.

LORD JUSTICE UNDERHILL:

66. I agree.