IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2015] EWHC 3769 (QB)

No. HQ15D02845

Royal Courts of Justice

Friday, 11th December 2015

Before:

HIS HONOUR JUDGE MOLONEY QC

(Sitting as a Judge of the High Court)

B E T W E E N :

SAM THEEDOM

Claimant

- and -

(1) NOURISH TRAINING t/a CSP RECRUITMENT
(2) COLIN SEWELL

Defendants

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MR. W. BENNETT (instructed by Carter-Ruck) appeared on behalf of the Claimant.

MS. K. WILSON (instructed by Ward Hadaway) appeared on behalf of the Defendants.

J U D G M E N T

(As approved by the Judge)

JUDGE MOLONEY:

A Introduction and Background

1 This judgment is given following the trial of two preliminary issues in a libel action, (a) to determine the actual defamatory meaning of the words complained of and (b) to determine, pursuant to s.1(1) of the Defamation Act 2013, whether the publications of the words complained of has caused or is likely to cause serious harm to the claimant's reputation.

2 Because this trial has been confined to those two very specific issues, it is important for me to emphasise at the outset of this judgment that neither of these issues relates to the "underlying merits" of the action on either side. Such questions as whether the allegations of which the claimant complains are in fact true or fair or whether the defendants were malicious in publishing them have not yet been determined, and may never be so. It follows that nobody reading a report of this judgment should form any adverse opinion about either party on the basis of it.

3 The background to the publication of the words complained of is as follows:

(a) The claimant, Mr. Sam Theedom, was about 25 at the date of the publication of the emails complained of, which was 29th to 30th June 2014. At that time, Mr. Theedom had been working for the first defendant firm for about a year. The first defendant is a recruitment consultancy based in Leicester, where Mr. Theedom comes from. No doubt it has clients elsewhere, but a great deal of its work is in that general area of the country.

(b) The claimant began work as a trainee recruitment consultant, but soon moved into working mainly on the employers', as opposed to the employees', side of the business and, in particular, on securing new business, mainly by telephone.

(c) In early 2014, two of his fellow CSP employees, Kate Kirszak and Zoe Crutchley, left CSP for a rival firm. Shortly after Kate Kirszak left CSP, in about May 2014, she became the claimant's girlfriend. This appears to have contributed to a deterioration in the claimant's relationship with the management of CSP.

(d) On 26th June 2014, there was a meeting between the claimant and the managing director of CSP, Mr. Karl Purviss. During that meeting, the claimant was accused of leaking confidential information to Miss

Kirszak and Miss Crutchley and their employer. It is disputed whether, at that meeting, the claimant was dismissed or, on the other hand, he resigned, but it appears clear that from that date his employment with CSP came to an end.

(e) Pursuant to the confidentiality clause in his employment contract, on 27th June 2014 the claimant signed an undertaking which, among other things, listed 17 client companies with which he was not to deal for a period of six months.

(f) On 29th to 30th of June 2014, the second defendant, Mr. Colin Sewell, who is described as the management partner of CSP and appears to have been, unlike Mr. Purviss, Mr. Theedom's immediate manager, sent the emails complained of to a total of 124 different email addresses, that is to say different people, working for 102 different companies. Some companies received several emails, others only one. All of the recipients of the email were actual or potential customers of the first defendant; and some, though not all, were companies or persons with whom the claimant had had some dealings on behalf of CSP. I will deal more fully with the content of the email later in this judgment, but suffice it to say that the subject header says, "Dismissed for gross misconduct," and that the claimant is expressly named as the person who has been dismissed. (I should also note that the defendants have never published any form of correction, retraction or apology.)

(g) Having left the employment of CSP, the claimant had no difficulty in securing several job interviews in the recruitment sector and, on 21st July 2014, he began a new job of a broadly similar nature in the Leicester office of a recruitment firm called Quest. He still retains that job now, 18 months later. Over that period, his work has been confined to Quest client employers based within the county of Leicestershire.

(h) The claimant had found out about the emails almost immediately, though he did not know until disclosure in this action the precise distribution. After some discussions with CPS about the email, he contacted a firm of solicitors in October 2014, and was put in touch with his present solicitors in March 2015. Proceedings were commenced and, by consent, it was ordered, on 14th September 2015, that the present preliminary issue should be the subject of a trial and that service of a full defence should be postponed pending the hearing.

(i) Disclosure and exchange of witness statements on these issues, and specifically on the seriousness issue, have taken place, and the preliminary trial has taken place before me over part, though not all, of three court days. This is now the fourth. The claimant and Mr. Purviss gave oral evidence and were cross-examined and other evidence was given in written form. I reserved judgment, save that I had given the parties at the end of Day 2 the defamatory meaning that I proposed to find, in order to assist them with their submissions on the issue of seriousness.

B **Defamatory Meaning**

4 The 124 emails complained of are not all identical, but it is agreed that there is only one material variation, which affects only the last nine of them. The following text is, for all material purposes, that of the first 115 emails. The header indicates that it is from Colin Sewell. The subject is, "Dismissed for gross misconduct." The text is as follows:

> *"I am writing to all CSP customers and companies we have previously been in contact with to make them aware that we have had a very serious incident occur with one of our staff. Following an investigation, we have discovered that one of recruitment consultants, Sam Theedom, has been passing confidential company and customer information to his girlfriend, Kate Kirszak, who works for an agency called Maloy & Flynn, and Zoe Crutchley, who moved to Precision Recruitment two months ago, but who has now also joined Malloy & Flynn. As you may already know, Kate and Zoe are both ex-employees of CSP who left earlier this year and who, unfortunately, we have been forced to take legal action against to try to prevent them from targeting our customers and business.*
>
> *It now appears that, over the past three months, Sam has been regularly passing both women details of our business and our customers and, as a result, he has been dismissed for Gross Misconduct. He has been passing both of them details of the conversations and proposals we have been working on with our customers and has, undoubtedly, seriously undermined us. If you haven't already, you may be getting a call from one of these women in future.*
>
> *We are now considering whether to take criminal action against Sam. We are not aware whether the owners and directors of Malloy & Flynn are aware of what has been going on, but we will be contacting them to raise the matter with them.*

Kind Regards,
Colin Sewell
Managing Partner."

It goes on to give his contact details.

5 As I have said, that is the text of the first 115 emails. The difference, which affects the last nine only, is that they omit the following important sentence:

> *"We are now considering whether to take criminal action against Sam."*

It follows that the defamatory meaning of those nine emails is likely to be somewhat different from that applying to the majority version.

6 The principles by which a trial judge, sitting without a jury, should determine the defamatory meaning of words are, by now, very well established. In the case of a relatively short and straightforward publication of this kind, neither counsel suggested that any special difficulty of law arose in applying those principles. They can conveniently be summarised in the words of Sir Anthony Clarke, Master of the Rolls, at para.14 of his judgment in the case of *Jeynes v News Magazines Ltd. & Anr.* [2008] EWCA Civ. 130:

> "*(1) The governing principle is reasonableness.*
> *(2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may include in a certain amount of loose thinking, but he must be treated as a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.*
> *(3) Over-elaborate analysis is best avoided.*
> *(4) The intention of the publisher is irrelevant.*
> *(5) The article must be read as a whole, and any "bane and antidote" taken together.*
> *(6) The hypothetical reader is taken to be representative of those who would read the publication in question.*
> [(7) does not apply to a case of this kind.]
> *(8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense.""*

7 Both parties accepted that the words complained of in this case refer to the claimant and are defamatory of him, with a core meaning that he has been guilty of gross misconduct in his employment. The debate between them concerned the detail and gravity of the meaning that would be conveyed to the

mind of the hypothetical reasonable reader. The claimant contended for the following pleaded meaning:

> "The claimant has regularly been passing important confidential information concerning CSP and its customers to a competitor. He has therefore breached the confidence of CSP and its customers. This constitutes a very serious breach of his contract of employment and, therefore, he has been dismissed for gross misconduct. It is also highly likely that he has committed a criminal offence."

(Of course, the last sentence of that proposed meaning would not be applicable to the 9 "minority" emails.)

8 The defendant, on the other hand, contends that all of the emails, including those which contained the words relating to the possibility of criminal action, bear the following meaning:

> "The claimant had improperly disclosed to his employer's competitors information which was commercially important and/or confidential and/or about the first defendant's business and he had justifiably been dismissed for gross misconduct."

Essentially, the differences turn on whether, as the claimant contends, the reader would read the words quite closely and take into account the details of the allegations made, or whether, as the defendant contends, the reader would approach them more cursorily and form a broad general impression of the principal allegations made.

9 It appears to me that the key to resolving this dispute between the parties is to be found in the Master of the Rolls' sixth factor, cited above. It is necessary to take into account the characteristics of the typical reader of this particular type of publication and, I might add, the circumstances in which he is likely to read it. In the case of (for example) an item in a Sunday newspaper, of no direct relevance or concern to the typical reader, it is, of course, appropriate to interpret the words as such a person would, "sitting in his armchair," as is commonly said, and to accept that the meaning they would convey to him may well be a broad brush impression rather than anything more detailed or specific.

10 Here, however, the emails are of a different character from a newspaper article, and the readers are correspondingly different. The salient characteristics common to the readers of this email, in reference to its contents, are in my assessment as follows:

(a) The readers are all business people, reading a business email from the managing partner of a firm known to them, either as an actual provider of their staff or at least as offering them that service.

(b) Specifically, the readers are employers, reading a message from a fellow employer about the gross misconduct of an employee in his employment.

(c) Further, the readers are being told that that employee has betrayed not only his own employer's confidences, but also those of the employer's clients, that is the confidences either of the recipients themselves or people in a similar position to themselves.

(d) Finally, the readers are being told that they, themselves, may be approached by the disloyal employee's associates, to whom he has given that confidential information.

11 Whilst I accept that, in fact, not every reader will have treated the email with the same degree of seriousness, I am satisfied that the hypothetical reasonable reader of this publication, having the above characteristics, would, for the above reasons, be likely to read it with some care and to give some weight to the details. Specifically, they would be likely to take account of the allegation that the misconduct was not isolated but regular and, in the case of the majority version of the email, to note that criminal action was being considered.

12 I therefore conclude that the claimant's arguments on this point carry more weight than the defendants' and that the natural and ordinary meaning of the majority or longer version of the email is as follows:

"**(a) While employed by the defendant, CSP, the claimant has regularly supplied commercially important, confidential information about CSP's business and its customers' businesses to CSP's commercial rivals in breach of his contractual obligations to his employer.**

(b) As a result, CSP has rightly dismissed him for gross misconduct.

(c) His misconduct has been so serious that there are reasonable grounds to suspect that it also amounts to a criminal offence."

In the case of the shorter, minority, version of the email, it contains words with the meanings (a) and (b) in that formulation, but not the additional meaning (c).

C Serious Harm to Reputation

13 The starting point is s.1 of the Defamation Act 2013. It is headed "Requirement of Serious Harm" and states as follows:

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

14 This section has made a major change to the substantive law of defamation, and its practical application is still in the early stages of evolution. I have been greatly assisted, as to both law and practice, by two previous decisions of the High Court, those of Mr. Justice Bean, as he then was, in *Cooke v Mirror Group Newspapers* [2014] EWHC 2831 (QB) and Mr. Justice Warby in *Lachaux v Independent Print Limited & Ors.* [2015] EWHC 2242 (QB).

15 From those authorities and from the plain words of the section, I draw the following principles, with which I do not think either of the experienced specialist libel counsel who appear before me would much differ:

(a) In addition to satisfying all the previously existing requirements of the common law, a defamation claimant must now establish, as a substantive element of his claim, that the statement complained of has in fact caused or is likely to cause serious harm to his reputation.

(b) Under s.1(2), a body trading for profit must, in order to establish that serious harm, show actual or likely serious financial loss; but a natural person, such as the present claimant, does not have to satisfy that further requirement.

(c) Section 1 is concerned only with harm to reputation, not with the other component of defamation damages in cases involving a human claimant, namely injury to feelings; but unless serious harm to reputation can be established, injury to feelings alone, however grave, will not found a defamation claim.

(d) Section 1 requires the claimant to prove as a fact, on the balance of probabilities, that the statement complained of has caused or will probably cause serious harm to his reputation.

(e) Depending on the circumstances of the case, the claimant may be able to satisfy s.1 without calling any evidence, by relying on the inferences of serious harm to reputation properly to be drawn from the level of the defamatory meaning of the words and the nature and extent of their publication.

(f) It is open to the claimant to call evidence in support of his case on serious harm and it is open to the defendant to call evidence in rebuttal, or indeed to demonstrate positively that no serious harm has occurred or is likely to do so.

(g) It will often, though not always, be appropriate, as an exercise in effective case management, to direct that the issue of serious harm be determined as a preliminary issue, together with and immediately following the closely related issue of actual defamatory meaning.

(h) It is important to bear in mind that s.1 is essentially a threshold requirement, intended by Parliament to weed out those undeserving libel claims otherwise technically viable, but which do not involve actual serious harm to reputation or likely serious harm to reputation in the future. Once that threshold has been passed, no useful purpose is served at this early stage of the proceedings by going on to consider evidence which is really material only to the quantum of damage if liability is proved.

(i) There is an unresolved question of law under s.1 as to the date at which the likelihood of future serious harm falls to be assessed. Should it be the date of issue of the claim or the date of the s.1 hearing itself? In *Cooke*, Mr. Justice Bean favoured the first approach and in *Lachaux*, Mr. Justice Warby favoured the second. In this case, I do not consider that that question arises and I do not propose to address it. Proceedings in this case were issued more than six months after the last publication complained of and, if the requirement of existing serious harm to reputation cannot be established, then nothing in the facts of this case suggests that future harm to reputation is likely, (as opposed to the future adverse consequences of present harm to reputation).

16 Having set out the legal and procedural regime applicable to a s.1 hearing, I now turn to the specifics of the parties' cases. In this case the evidence before me has been fairly extensive. During this trial, I have heard the oral evidence of the claimant and the second defendant, each of whom was cross-examined. I have received the written witness statement of one publishee of the email as to its effect, or rather the absence of any effect upon him. And I also received

hearsay evidence in the form of emails from other recipients, as well as about 400 pages of disclosure.

17 In summary, the claimant relies on:

(a) the inferences of serious harm to his reputation to be drawn from the words complained of and the nature and extent of their publication; and
(b) evidence of specific instances which he says demonstrate directly that such serious harm has in fact occurred.

The defendant challenges those inferences and challenges that evidence. It also advances a positive case: that in fact, when one looks at the claimant's success in his new employment since the emails, it can be inferred that it is unlikely that he has suffered or will suffer any serious harm to his reputation as a result of the emails.

18 Before coming to fact-sensitive matters, I should record as a substantial point on the claimant's side of the argument the very serious defamatory meanings which I have found the words to bear, as set out above. If, in addition to those meanings, the court is persuaded, by a combination of evidence and inference, that the group to whom those words were published (and any wider group to whom the libel has percolated) included people who are likely to have business dealings with the claimant, then he will be a very long way towards making out his case.

19 The main factual areas to which the parties directed their evidence, and which I should take into account in deciding the issue of serious harm, include the following:

(a) The publishees. How many of them knew the claimant at the time of publication? How many of them were likely to come across him in his new job? To what extent were the allegations likely to percolate from the original publishees to a wider circle?

(b) Actual responses to the email. What direct evidence, as opposed to inference, is there that any of the publishees were or were not in fact influenced against the claimant by the emails?

(c) The claimant's subsequent progress. How is the claimant doing in his new job? And what inferences flow from that about the degree of harm, if any, done to him by the libels?

I shall deal with each of those three broad topics in turn.

20 The Publishees

(a) Although the emails state that they are being sent to all CSP's customers and companies CSP has previously been in touch with, in fact they were sent to a significantly smaller group of 102 companies. The basis on which this selection was made is not clearly stated in the defendants' evidence and the writer, Mr. Sewell, has not yet put in any evidence. The recipients include 16 of the 17 close clients of the claimant set out in his severance contract, to which I have referred, but also include many companies with which it appears he had, as yet, had little or no contact while at CSP. (Since the mischief alleged against him is passing information to Miss Kirszak and Miss Crutchley, it may well be that the list also includes some of their former clients, whether or not the claimant himself directly had dealings with them.)

(b) There was a dispute of fact about the extent to which the claimant's work for CSP had been confined to the "industrial" sector in their parlance, that is to say firms in the world of logistics, warehousing or food production, and the extent to which his work had crossed over into the "technical and engineering" sector. The claimant said that there was considerable overlap, because companies in one sector might require workers in the other. On his own evidence, the claimant had mainly been concerned with the industrial sector while at CSP. So, to the extent that the publishees were outside that sector, it follows that they would be less likely to have known of him at the date of the email. However, as he pointed out, he has a very unusual surname; people who did not actually know him before might remember him in future if he contacted them, and might remember that he was the person referred to in the email.

(c) An important point made by the claimant was that some 75% of the companies to whom the emails were sent are based in Leicestershire, which is where his new job for Quest is focused. The prospect that he might, in future, come into contact with a person who has read or heard of the emails and, for that reason, holds him in low regard is plainly one that has to be taken seriously.

(d) I was less persuaded by the claimant's proposition that in this case the emails are likely to have percolated more widely around the local business world than just amongst the original circle of recipients. It is, of course, a commonplace that once a defamatory allegation has been put into circulation by the primary publication, it is likely to be spread more widely by secondary repetition, "like ripples on a pond". This is a natural consequence, for which the primary publisher may be held

liable in damages. But for that to happen, there must be a medium of circulation, in the form of some zone of contact between the primary publishees and the secondary publishees to whom they repeat it. The claimant, in his evidence, referred to the world of recruitment consultants as a "gossipy" world, and no doubt he is right.But it is important to note that the emails were not sent to recruiters, they were sent to employers in a variety of different industries, who have no very obvious reason to pass the information on to other companies outside that circle. I would however accept that there is likely to be a degree of percolation within each of the recipient companies. It is noticeable that, though, as considered below, the claimant describes several encounters with people who had received the email from CSP, he has had no contact with people who had not received it but still mentioned it to him. (He was sneered at by one person from CSP, but it appears to me to be at least as likely that the information was passed on to that person within CSP as that person within CSP in fact got the information from an email recipient, so I do not regard that as a material piece of evidence.)

22 Actual Responses to the Email

(a) As has always been permitted when assessing libel damages, the parties were not confined to inferences about the reaction of the publishees to the words complained of. They were entitled to rely on direct evidence of written or oral contact with the publishees to demonstrate the actual effect, if any, of the words complained of upon the claimant's reputation.

(b) The defendants disclosed the direct responses they had received to the emails. The great majority of recipients, it appears, did not respond at all. Two or three recipients expressed general indignation at such disloyal conduct by an employee, but none referred expressly to the claimant.

(c) The claimant disclosed an email from a recipient company called Pallex, who had told him, when he approached them on behalf of Quest, that, due to unforeseen circumstances, they were not able to use Quest. Not surprisingly, the claimant put this forward as evidence of harm done to him by the emails. Subsequent correspondence between CSP and Pallex suggest that it is more likely that what Pallex was concerned about was the possibility that if they dealt with Mr. Theedom they would be abetting him in a breach of his restrictive covenant,

rather than with the issue of whether or not he was guilty of gross misconduct.

(d) The claimant also gave evidence of eight direct contacts between himself and various recipients of the email. The defendants were able to obtain a rebuttal, or at least response evidence, from three of them. I will deal first with the five in relation to which no such evidence has been obtained at this stage. The claimant described the following incidents, and I summarise them briefly:

(i) Mr. Ellis, of CID, a former client of the claimant's at CSP, told the claimant that he would not send him business because of the email.

(ii) Mr. Rice, of SREM, telephoned the claimant and read the email out loud to him. The claimant told him that the allegations were false. Subsequently, the claimant got some business from SREM, but it has since dried up.

(iii) Mr. Flay, at Impact, mentioned the email to him and said words to this effect: "If I didn't know you, I wouldn't have any dealings with you."

(iv) Mr. Naylor of Brands 2 Hands refused to reply to the claimant's calls, and eventually Mr Fourie of that firm told the claimant that Mr. Naylor did not want to deal with the claimant because of the email. The claimant took the opportunity to put his side of the story and did subsequently get some work from that firm.

(v) Mr. Scott of Gearys Bakeries produced a copy of the email and questioned the claimant about it in front of a representative of his new employer at Quest.

(e) The other three cases relied on by the claimant are those where the defendants have been able to obtain or, at any rate, put before the court, the comments of the claimant's interlocutors.

(vi) In respect of Mr. Robson of MTS, the claimant said that, like Mr. Flay, Mr. Robson said to him, "If I didn't know you already, I wouldn't deal with you." However, Mr. Robson, ten months later, told the defendants that he did not recall the claimant at all and that if he had a problem with anyone, it was with Quest and not with the claimant personally.

(vii) In respect of Mr. Maurice of Midland Metals, the claimant said that, when he telephoned him, Mr. Maurice asked him if he was the subject of the email and them became abrupt and ended the call shortly afterwards. Mr. Maurice told the defendants that he had regarded the email as an insignificant matter and that it was the claimant who had mentioned it to him, not the other way around.

(viii) In respect of Mr. Dhutia of BI, the story becomes more complicated. According to the claimant, he was told by Mr. Shingler of Quest that Mr. Dhutia had told him, Mr. Shingler, that he was unable to use Mr. Theedom because of the email. But, according to Mr. Dhutia's witness statement, the email made very little impression on him and his reason for refusing to deal with the claimant was because he did not like being approached behind CSP's back, probably in breach of covenant.

23 The defendants invited me to conclude from this that the claimant was not telling the truth about those incidents and that I should infer that he was probably not telling the truth about the other incidents either. This, it should be said, was part of a wider attack on his credibility based, for example, on his alleged exaggeration of the importance of his role within CSP. For my part, I am reluctant to make findings of credibility at this early stage of these proceedings unless it is strictly necessary for me to do so in order to reach a decision on the threshold issue raised by s.1. I am very conscious that, if this action proceeds, there will probably be a major dispute in the future over whether the claimant did betray the defendant's confidences and what did transpire at his meeting with Mr. Purviss. That is likely to provide far better opportunities for cross-checking and verification of credibility than were available to me in these short and narrowly focused proceedings.

24 My overall conclusion on this part of the evidence is, firstly, that I consider the claimant was putting forward his honest recollection of what happened in these conversations. It would have been very ill-advised of him to do otherwise in the face of the obvious likelihood of rebuttal evidence if he was wrong.

25 Secondly, I conclude that, in respect to two out of the three rebuttal incidents, I consider the claimant's version to be more persuasive than the other parties'. This is not because I doubt those witnesses' honesty, but because, as Mr. Foster and Mr. Maurice both accept, the conversations were not important to them, nor indeed was the email. Their recollection of them is limited, whereas the conversations will have been very important to the claimant. In

respect to Mr. Dhutia, I accept his version of events, that is to say that he rejected Mr. Theedom's approach, not because of the email, but because of his dislike of being approached behind CSP's back. However, this does not affect the claimant's credibility because he appears to have got his version of the conversation from Mr. Shingler, who, in turn, may well have misunderstood or reached a wrong conclusion about Mr. Dhutia's reasons for not wanting to deal with Mr. Theedom.

26 Standing back and looking at this body of evidence in terms of whether the case crosses the threshold of serious harm, it appears to me that it neither adds nor detracts very much from the inferences one would normally draw from the fact of publication in a case of this kind. A couple of recipients, it appears, told the claimant about the email, but said it did not affect them. A couple declined to do business with him. A couple mentioned it, but listened to his explanations and later did some business with him. The great majority, however, have said nothing; so the extent of harm to his reputation in their eyes remains as a matter to be inferred.

27 The Claimant's Subsequent Career Progress

(a) To my mind, this is the most formidable part of the defendants' case in rebuttal of the claimant's claims of serious harm. Notwithstanding these emails, which according to the claimant were widely circulated among influential people with whom he would wish to do business, the evidence is clear that:

(i) he got many job interviews within a short time of losing his job at CSP and of the publication of the emails;

(ii) within a month, he had secured himself a new job at Quest, of a similar level and on similar terms; and

(iii) 18 months later, he is not only still there, he is doing well and bringing in business at an increasing level, even though his work is confined to Leicestershire which may be described as the epicentre of the defamatory emails.

(b) That the claimant was able to get interviews and a job in the recruitment sector may not be very significant to the serious harm issue, bearing in mind that the email had not been sent to recruitment companies. But the fact that the claimant has since done well in a job that involves wide contact with local industry, including, it is to be inferred, many recipients of the email, is certainly a substantial factor to

be weighed in the balance on the defendants' side in deciding whether or not serious harm has been sustained. This is especially so because the libel is confined entirely to his reputation in business. Although a human claimant does not have to prove pecuniary loss, pecuniary loss will often go hand in hand with injury to reputation in business. So this has to be regarded as a strong point on the defendant's side of the issue.

28 Has the publication of these emails caused serious harm to the reputation of the claimant?

(a) Neither the Act nor the previous authorities to which I have referred provide much specific guidance in relation to what is meant by "serious" in respect of the requisite level of harm that must be done to one's reputation to entitle one to bring a defamation claim. Some guidance is gained from the judgment of Mr. Justice Warby in *Lachaux*, above, especially at paras. 29 and 50. The term 'serious' is to be given its meaning as an ordinary word in common usage in the English language. The test imposed by s.1 is more demanding than the concept of substantial injury, as defined in *Thornton v Telegraph Media Group Ltd.* [2010] EWHC 1414 (QB) and stiffer than the abuse of process test applied under *Jameel v Dow Jones & Co. Inc.* [2005] EWCA Civ 75.

(b) Each case will have to be considered in the light of its own circumstances. I consider it entirely possible that similar allegations, similarly published, might lead to different conclusions on "s.1 seriousness" in different cases. A factor of considerable importance is likely to be the circumstances of the particular claimant, since it is the seriousness of the injury to his or her reputation that has to be taken into account. Put another way, the question is not whether the case is a serious one by comparison with other libel actions that might occur; the question is whether it is a serious matter for this individual claimant, so far as the actual harm to his reputation is concerned.

(c) In this case, and perhaps in many others, an important consideration in deciding whether the words pass the threshold of seriousness is whether, assuming them to be false, they would give rise to a reasonable need for an apology or for vindication. In the case of *Cooke*, referred to above, Mr. Justice Bean viewed the making of an immediate and reasonably thorough and prominent apology as a very important factor in preventing or dispelling serious harm to reputation, even from a publication in a national newspaper. Here there has been no such apology, so the converse question arises: are these emails and

their likely effects such that serious harm to the claimant has occurred and will persist if no vindication is obtainable? Apart from compensation for injury to reputation and feelings, libel damages (and/or nowadays a published report of the court judgment under s.12 of the 2013 Act) serve the valuable function that, if the libel should crop up in future, the claimant has something important that he can point to as a vindication, as proof of his innocence. But if the circumstances of a case are not such as to call for that vindication, that may be a clear sign that the level of harm does not cross the threshold of seriousness.

29 Reviewing all the facts as I have found them and seeking to apply the principles I have set out above, my conclusions on the issues of serious harm to reputation are as follows:

(a) When, as here, one has:

(i) defamatory words of a fairly high degree of gravity;

(ii) publication to a fairly substantial audience, both in terms of number (over 100) and, more importantly, in terms of proximity and potential importance to the claimant's career;

(iii) a vulnerable claimant in the form a young man starting out in a competitive business and trying to make his way; and

(iv) an influential and *prima facie* reliable author of the words complained of

then those circumstances of themselves raise an inferential case for serious harm to reputation, so strong as to call for rebuttal.

(b) The rebuttal evidence here has established that the claimant has suffered no demonstrable financial loss and that relatively few recipients of the email are positively known to have taken adverse action against him as a result. But, as the Act specifically provides, pecuniary loss is not a requirement for a human claimant, and its absence does not rebut the inferences flowing from the libel itself. Similarly, the fact that few publishees have manifested hostility to the claimant's face is not a reliable guide to his standing in the eyes of those who remain silent.

(c) No steps have been taken to withdraw or correct the email, let alone to apologise for it, so whatever harm it originally caused is likely to have persisted.

30 I therefore conclude that the claimant has persuaded me, on the balance of probability, that the publication of these emails has caused harm to his reputation of a sufficient degree of seriousness to pass the threshold set by s.1(1) above. Beyond that bare finding I should not go, given the possibility of a future damages hearing before another judge and very likely on rather different evidence.

31 Since this is a new and evolving jurisdiction, I wish to conclude with some observations on the lessons which may be drawn from this trial about the procedure to be adopted in future defamation actions raising similar issues:

(a) The present trial has demonstrated a further escalation in the conduct of s.1 hearings. In *Cooke* there was no cross-examination on either side. In *Lachaux* there was cross-examination of the claimant. In this case, both the claimant and the second defendant have been cross-examined, and there was the prospect of calling further oral evidence to rebut the claimant's case on serious harm by reference to specific instances relied on by him. In addition, his general credibility was called into question.

(b) The parties' costs budgets show that the claimant has spent over £100,000 of costs (inclusive of VAT but not success fees and insurance) and the defendants about £70,000, in respect of this phase of the case alone.

(c) In the result, the hearing of evidence has added little or nothing to the conclusions that an experienced defamation judge would have drawn simply from reading the email and considering the agreed distribution list.

(d) The reason for this is that s.1 sets a threshold test; and the threshold is simply that there shall have been serious harm to reputation. Once that level is passed, further evidence goes to quantum only. Throughout this trial, my sense has been that that distinction was in danger of becoming blurred or lost sight of.

(e) Assuming this action now goes to a final trial, there is a likelihood that there will be a wasteful duplication of evidence and cross-examination already carried out before me and/or that the ultimate trial judge will be vexed with submissions about what has or has not been determined in the course of this phase of the trial.

(f) I have already mentioned the difficult position of a judge invited to reach a conclusion on the claimant's general credibility at this early stage of the proceedings, without being able to consider much relevant evidence one way or another on that issue, which is likely to be before the court at a later stage.

(g) For all these reasons, it appears to me that the Masters considering whether to direct trial of a preliminary issue under s.1 should exercise as much caution as they would in respect of other classes of case, and should decline to do so if the exercise is likely to involve a lengthy evidential dispute or to overlap with other factual issues arising later in the case. Unfashionable as it may appear, I consider that there is much to be said in this area for asking a judge to rule on whether the case is capable of passing the s.1 test, or on the other hand whether the defendant has any real prospect of establishing that it does not. That question could be determined without hearing any evidence, probably alongside the closely-related issue of defamatory meaning. If the court concluded that there was a live issue under s.1 to be decided, the judge would then be in a good position to direct whether it would be better dealt with as a preliminary issue or as a part of the ultimate trial. But if a routine practice develops of listing such preliminary issue trials uncritically, that is likely to increase the overall cost and delay of libel cases, which is the opposite of Parliament's clear intentions in passing s.1.

(Ruling on Costs Follows)