Neutral Citation Number: [2016] EWHC 66 (QB)

Case No: TLJ/15/0654

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2016

Before :

MR JUSTICE DINGEMANS

- -

Between :

Alvaro Sobrinho	**Claimant**
- and -	
Impresa Publishing SA	**Defendant**

- -
- -

Desmond Browne QC and Jonathan Barnes (instructed by **Gresham Legal**) for the **Claimant**
Matthew Nicklin QC and Victoria Jolliffe (instructed by **Carter-Ruck**) for the **Defendant**

Hearing dates: 7th, 8th and 9th December 2015

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE DINGEMANS

Mr Justice Dingemans:

INTRODUCTION

1. This is a libel claim brought by Alvaro Sobrinho ("Mr Sobrinho") against Impresa Publishing SA ("Impresa"), a company incorporated in Portugal which publishes the weekly Saturday Portuguese newspaper "Expresso".

2. Mr Sobrinho was born in Angola and is a citizen of both Angola and Portugal. He is ordinarily resident in the Canton of Vaud, Switzerland. He is an international banker who has operated mainly in Angola. Mr Sobrinho was employed as a banker by Banco Espirito Santo ("BES") which was, until August 2014, the second largest bank and financial institution in Portugal. BES also operated in Angola and in 2000 created a subsidiary called Banco Espirito Santo Angola ("BESA"). Mr Sobrinho was Chief Executive Officer and President of the Executive Board of BESA from 2000 until December 2012. In 2013 he became Executive Chairman of Banco Valor, another bank operating in Angola. Mr Sobrinho is also the founder and chairman of the Planet Earth Institute ("PEI"), a charity registered in England and which is based in London.

3. Expresso is a weekly newspaper which is printed in Portugal. It is described as the Portuguese equivalent of the Sunday Times or Sunday Telegraph, and is known for its probing political reporting. Expresso has a hard copy circulation of just under 90,000 in Portugal. There was a hard copy circulation of 136 in England and Wales for the relevant edition.

4. Impresa also owns and maintains websites. The content of published editions of Expresso was available on one of the websites to subscribers, leitor.expresso.pt ("the subscriber website"), but there was also provided open free access to certain articles on another website, expresso.sapo.pt ("the open website"). There were 52 digital subscriptions in the jurisdiction of England and Wales for Expresso for the subscriber website. There is data which shows the extent of the access to part of the article on the open website. The article could also be accessed through Factiva, a business information and research service, which operated a website which was available in leading institutions including the British library and some universities.

5. The libel claim is brought in respect of an article published in the 7th June 2014 edition of Expresso on the front and other pages. The article was also available on the subscription website through subscriptions from 7th June 2014, and from 9 December 2014 part of the article published on 7th June 2014 was available on the open website. Although the article was published on the front and other pages of the newspaper meaning that some of the subsequent pages could have been read on their own, and although only part of the article was published on the open website, the Claimant originally complained only of the publication of the whole of the article.

6. Mr Sobrinho became aware of the publication of the article and wanted a retraction and apology. After some pre-action correspondence in both England and Portugal in which the possibility of pursuing proceedings in more than one jurisdiction was referred to, Mr Sobrinho commenced libel proceedings in England on 4th July 2014,

saying in evidence that the response to his solicitors' correspondence had left him no option but to commence proceedings. However the Claim Form and was not endorsed with permission to serve out of the jurisdiction, and the Claim Form was therefore amended and reissued and was served with the Particulars of Claim on 14 July 2014.

7. On 15th July 2014 a criminal complaint for libel against the journalists, the photographer and officers of Impresa was lodged in Portugal.

8. In August 2014 BES collapsed and required a bail out from the central bank in Portugal. BES was later restructured into two parts, a new bank and an old part with the debts. The BES collapse threatened the Portuguese economy and caused huge public concern and anger. The collapse was extensively reported in Portugal, and was an issue of such importance that the Parliament in Portugal held a Parliamentary inquiry into the causes of the requirement for the bail out of BES. This inquiry started in October 2014.

9. On 5 September 2014 Impresa issued an application to strike out the English proceedings. So far as the proceedings in Portugal were concerned it appears that in the period up to December 2014 some of the named journalists made statements setting out their limited involvement with the articles and some of the other named parties did not make statements.

10. On 18 December 2014 Mr Sobrinho gave evidence to the inquiry in Parliament in Portugal. Mr Sobrinho's evidence was televised on 1 or 2 channels, and Mr Sobrinho thought that it might have been available on You Tube. He said that it was "*an unprecedented opportunity to put the record straight*". The evidence shows that there was extensive coverage of Mr Sobrinho's evidence by the media in Portugal. Mr Sobrinho said in evidence that the result of the coverage was that it clarified the situation to friends and institutions.

11. It appears that in Portugal the public prosecutor decided not to pursue the complaint for criminal libel made by Mr Sobrinho, meaning that the proceedings in Portugal would not be pursued to Court unless Mr Sobrinho issued civil proceedings. There is a 6 month time limit for bringing civil proceedings for compensation in Portugal following the lodging of the criminal proceedings.

12. On 9th February 2015 Mr Sobrinho issued civil proceedings in Portugal for libel, claiming damages in the sum of 500,000 euros. The extent to which those proceedings sought compensation for damages suffered in respect of the publication in England is in issue before me.

13. At the same time there was continuing media coverage of the Parliamentary inquiry and the report produced on 29 April 2015 by the inquiry. On 30 April 2015 Mr Sobrinho discontinued his civil proceedings in Portugal. He explained in his witness statement that he had discontinued the libel proceedings in Portugal because "*as a result of the public inquiry in Portugal and the coverage it received*" Mr Sobrinho felt "*that I have achieved all that I could expect to have achieved through proceedings there, perhaps more*". In evidence Mr Sobrinho said that it became clear as a result of the Parliamentary inquiry that it was the activities of other individuals which had led to the collapse of BES.

THIS HEARING

14. Impresa complain about the commencement of libel proceedings in England in respect of a circulation and distribution which they contend was "*miniscule*" when compared to the circulation and distribution in Portugal. Impresa particularly complain of the continuation of the libel proceedings in circumstances where proceedings in Portugal against Impresa in respect of the same article have been discontinued. Mr Sobrinho contends that he has a reputation in England as a philanthropist and as chairman of the Board of Trustees of PEI which he wants to vindicate, and that by discontinuing the proceedings in Portugal he was acting reasonably and properly.

15. By order dated 10th June 2015 Master McCloud ordered the trial of preliminary issues relating to: (1) the meaning of the words complained of; (2) whether section 1 of the Defamation Act 2013 ("the 2013 Act") was satisfied; and (3) whether the action should be dismissed as an abuse of process.

16. It is only fair to Mr Sobrinho to record that in the event that the action continues, the issue on liability to be determined will be whether Impresa have a defence under section 4 of the 2013 Act (publication on matter of public interest). Impresa do not seek to justify the meaning of the article.

17. Before the hearing the Claimant's legal advisers gave notice that they wished to amend the Particulars of Claim to adjust the meaning of the article which had been pleaded, and it was common ground that this amendment should be permitted subject to the issue of costs, which were reserved. I therefore granted permission to amend the Particulars of Claim to plead the full meaning contended for by the Claimant.

18. During the course of the hearing, following submissions from Mr Nicklin QC about the way in which the Claimant's case had been pleaded, the Claimant sought permission to re-amend the Particulars of Claim to rely on the publication of part of what was pleaded as the original article on the open website, and to make some re-amendments to factual matters. Although the general nature of the re-amendment was addressed in submissions, there was no written re-amendment available at the conclusion of the hearing. I therefore directed the Claimant to produce the draft re-amendment and submissions in support of that re-amendment, and I also directed the Defendant to address the proposed re-amendment in further submissions, and I will address that application to re-amend the Particulars of Claim below.

19. At the hearing I had evidence in the form of witness statements and there was cross examination of some witnesses as to fact. There was also expert evidence from Dominic Minett ("Mr Minett") and Nicholas Priest ("Mr Priest") about the proper translation of the Portuguese article. There was an agreed translation apart from one headline.

20. In the event the disputes about facts were relatively narrow, and the matters that I have set out above, and the matters which I set out below represent my findings of fact, unless I have indicated otherwise.

THE ARTICLE

21. The article was published on 7th June 2014 and has been available on the website from that date. There is an agreed English translation of the article save for one headline. The paragraph numbers were added in by the parties to enable ease of reference. The headline between paragraphs 10 and 11 of the article below "**Withdrawal from/Pillaging at BESA ("*Saque no BESA*")"** is in the format that it is because there was a dispute about the proper translation of the words. I will address that dispute below.

"1. ***BES Angola lost track of 5.7 billion***

- *Bank unaware of beneficiaries of 80% of the credit portfolio*
- *Former CEO Álvaro Sobrinho unable to clarify the situation*
- *Cash withdrawals in excess of 500 million dollars*

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BRIEFCASES ANGOLAN STYLE

2. How much money fits in a briefcase? A cool million in hundred dollar bills, tightly packed, fits in an executive's briefcase. Now imagine that you withdrew 525 million from a bank, 525 briefcases, and an HGV to carry them in. Other worldly? No, very real. It happened in Angola, at BESA, with Angolan and Portuguese managers. Where is the money? One portion was deposited into anonymous accounts, while the rest was put into accounts belonging to a director of the bank. Shocked? Then read on.

3. Everything is detailed on pages 6 and 7 of this issue. The 525 million is less than one tenth of the 5.7 billion dollars in loans granted by BESA to unknown beneficiaries. Loans without collateral, with unknown beneficiaries, sometimes granted by the chairman for his own businesses and those belonging to his family. We are talking about Álvaro Sobrinho, who says no one in the management ever said anything – and those who stay silent tacitly give their consent. This is one way to involve the other directors of BESA, such as Hélder Battaglia and Ricardo Abecassis Espirito Santo.

4. The BESA shareholders' meeting, which Expresso reports today, is astonishing. Remember that famous photograph of Ricardo Salgado alongside José Eduardo dos Santos in October? It was taken the day before the general meeting. By then, Salgado had already practically ended relations with Sobrinho. But it was Salgado who had given him executive powers.

5. Let us stop to think about the madness of all this. A man did what he wanted, BES Lisbon let him do it, and the auditors only noticed in 2011. BESA is in such a bad state that the Angolan State had to provide a sovereign guarantee for those loans, thus isolating BES from the risks.

6. Angola was a kind of black box, through which credit was given to the regime's oligarchy, benefitting unknown beneficiaries. But someone is going to lose a lot of money. The shareholders, of course. But it is likely that the Angolan state will also lose out. If so, it is a case of the Angolan oligarchy getting richer at the expense of its people.

7. And what has this got to do with the Portuguese? A lot. Especially because the Angolan bank's largest shareholder is a Portuguese bank, BES, which is itself in the midst of a succession process. This week confirmed what Expresso reported a couple of weeks ago, that the Luxembourg authorities are investigating a suspected crime of concealment of accounts. Ricardo Salgado is managing his exit, and will leave behind a striking capital increase of one billion euros in the middle of a crisis, but has only thus far survived because the Bank of

Portugal wanted him to. The same institution barred Filipe Pinhal from becoming the chairman of BCP for much less.

8. *What next? Of the four names in the papers, it is likely that the next chief executive of BES will be... no one. The Bank of Portugal wants professional management and three of the candidates come from the Espirito Santo family (Ricciardi, Ricardo Abecassis and Bernardo). They were directors of the scandal-hit ES International. One was a director of BESA (Abecassis). That only leaves Amílcar Morais Pires, who took on Sobrinho and who managed to ensure that BES avoided having to go to the state and ask for a bail-out (it was his reputation in financial markets that secured successive capital increases). But Morais Pires is close to Salgado. And he has been made an arguido (as, indeed, has Ricciardi), which does not mean he is guilty, even though the word has an accusatory ring to it.*

9. *The decision lies with the shareholders, according to the Bank of Portugal: Crédit Agricole, whose hair must be standing on end right now, and the Espirito Santo Family (yesterday an authoritative source from the Senior Council of the GES denied having already decided on Ricciardi, as had been reported). What is already clear is that a number of people are backing names, only to later get cold feet. As is the norm you might say.*
More than succession, BES needs regeneration. They became more powerful than ever but it was not to last. It always comes down to greed...

BES Angola

10. *The bank does not know who it has loaned 5.7 billion dollars to. The current management believes that 745 million ended up in the hands of Álvaro Sobrinho, chairman of the bank until 2012. The money was used for his family's business and part of it was used in Portugal, to fund the "Sol" newspaper.*

Withdrawal from/Pillaging at BESA ("Saque no BESA")

11. *Loans granted on a discretionary basis without guarantees, unknown beneficiaries of loans, credit files that simply do not exist, cash withdrawals of hundreds of millions of dollars, approval of loans only by the chief executive to companies to which he is connected. Shady conduct for a bank manager by any measure. And all done under the nose of Banco Espirito Santo, majority shareholder of Banco Espirito Santo Angola (BESA).*

12. *For the 5.7 billion dollars of credit granted by BESA, a figure that represents 80% of its total portfolio, there is not enough information on who beneficiaries were or for what purpose the money was used. There is very little physical collateral, and what there is has not been evaluated. The lack of information affects all loans, and in some cases it is impossible to know who actually received the money. This unusual situation was explained by Rui Guerra, the new CEO of BESA, who replaced Sobrinho in December 2012, to shareholders at two meetings that took place in Angola in 2013. The annual general meeting convened on 3rd October but the meeting was postponed until the 21st of the same month to allow the previous management to gather the necessary information. On 2nd October, Ricardo Salgado had been officially received by the President of Angola, José Eduardo dos Santos, where they had discussed matters relating to BESA.*

13. *With just a single item on the agenda – the analysis of aspects of BESA's loan portfolio – all BESA shareholders gathered at the headquarters of the bank, represented by Ricardo Salgado (BES), General Leopoldino Fragoso do Nascimento (Geni), General Manuel Hélder Vieira Dias "Kopelipa" (Portmill) and Álvaro Sobrinho, individual shareholder.*

14. *According to investigations carried out by Expresso, in October Rui Guerra told shareholders that the purpose of the meeting was to allow its management to have access to information relevant to BESA's credit portfolio that could not be found in the bank's archives, and which could only be provided by the previous management under Álvaro Sobrinho.*

15. *Before those present, Guerra referred in particular to a group of five companies rated as "identified management customers", which directly or indirectly received money from BESA amounting to 1624 million dollars. The five companies, Socidesa-Sociedade de Desenvolvimento de Angola, Govest Empreendimentos, Saimo, Vaningo and Cross Fund, were classified by the CEO of BESA "as unknown companies or companies without any apparent financial capacity to benefit from these amounts" according to documents seen by Expresso.*

16. *Rui Guerra's team managed to determine that part of this money was not used for any productive activity, but was distributed as follows: 196 million dollars for international transfers, 192 million for domestic transfers, and 525 million withdrawn from the bank in cash and deposited in other bank accounts. Following the money trail, Rui Guerra told shareholders attending the meeting that it was found that these transfers and cash transactions totalling around 882 million ended up in 10 companies (see diagram). Furthermore, he stated that another company, Pineview Overseas, owner of the "Sol" newspaper and linked to Álvaro Sobrinho, received 36.98 million dollars.*

17. *When he finished this part of his presentation, Rui Guerra said he had details and evidence of all of these transactions and that Álvaro Sobrinho and members of his family had been the main beneficiaries of these transactions, he then asked the former CEO of BESA to justify them. According to investigations carried out by Expresso, it was found that, of these transfers, no less than at least 182 million dollars went to accounts linked directly to Álvaro Sobrinho, whether to accounts in his name or to Grunberg, a company based in the British Virgin Islands, owner of Grunberg Portugal, whose sole director is Emanuel Madaleno, brother of Álvaro Sobrinho, and to Pineview Overseas. However, Expresso could not ascertain who all the beneficiaries were for the companies mentioned in the attached diagram.*

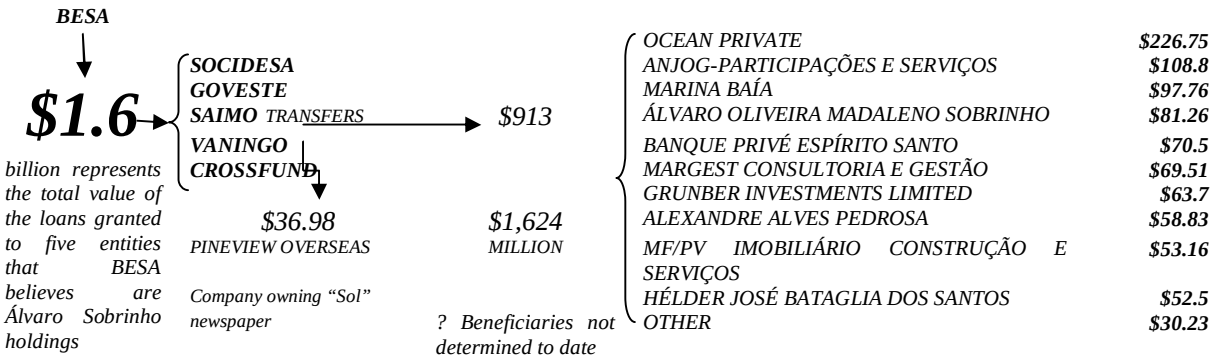
18. *During the meeting, Rui Guerra also mentioned over 4100 million dollars granted in loans granted to various groups of customers for which there is also no information regarding the real beneficiaries. When questioned by Expresso about these credits, Rui Guerra did not respond.*

The Torres Sky case

19. *The five companies mentioned by Rui Guerra benefited from funding of almost 840 million dollars to buy Torres Sky from ESCOM, a company originally founded by the Espirito Santo family for non-financial activities link to the diamond and real estate industries. According to BESA's own internal investigation, only 360 million were used for this purpose. At least 402 million dollars were siphoned off, and nobody knows where this money ended up. At the time, the chief executive and shareholder of ESCOM also executive director of BESA, Hélder Bataglia. And Bataglia was one of the beneficiaries of transfers detected by Rui Guerra's team worth 52.5 million dollars. As of the time of going to press, we were unable to contact Hélder Bataglia.*

20. *Rui Guerra informed the shareholders at the meeting on the 21st that he had also found that "other companies" that received loans from BESA transferred an additional 343 million dollars to those five companies. Just the total sums involved in this case amount to 745*

million. The need to discover the shareholders and beneficiaries of these companies was emphasised,



so that the bank could minimise credit risks and ascertain the likelihood of recovering the loans.

Álvaro Sobrinho's defence

21. *In light of these accusations, Álvaro Sobrinho told the meeting of 21st October that he could not respond because at the meeting of 3rd October he had not been provided him with many details, and therefore did not have the information with him. He did identify certain shareholders at the companies, but he did not say whether these were the financial beneficiaries of the loans. He undertook to provide that information.*

22. *Contacted by Expresso, Álvaro Sobrinho declined to answer any questions, making a statement in which he claims that he always acted in accordance with practices prevailing at the bank and in conjunction with the board of directors of BESA (see box).*

23. *Expresso knows that during the meeting Sobrinho stated that the lack of control over how borrowed funds were used is a long-standing shortcoming in the management of BESA, very common in Africa, and that he has always reported all information to the board of directors of BESA, and the majority of the directors were appointed by BES. He also said in his defence that BESA always provided detailed information to BES, particularly regarding significant risks, as well as to the National Bank of Angola, and that the auditors, KPMG, never raised any questions or reservations in relation to the accounts. In late 2011, Sobrinho sent Portugal details of the loans to be presented to the troika for the audit of Portuguese banks, which included the loans being questioned. He also noted that the bank was inspected by the National Bank of Angola, which resulted in a letter being sent to BESA on 23rd November 2011 warning of an excessive concentration of loans among some clients.*

24. *BESA did not have a formal credit committee. The proposals were made by the commercial departments followed by analysis by the risk department and ending with approval by the executive board or by two directors. However, the former CEO recalled, at the meeting, that he was often left to manage BESA when other directors were absent and that the bank needed to continue to operate, as a result of which he alone had to sign off many lending operations.*

25. *Ricardo Abecassis, Ricardo Salgado's cousin, was a member of this management team but left in late 2012.*

How the loans were allocated

26. Expresso knows that Rui Guerra stated at the meeting that a significant number of previous loans were approved directly and solely by Álvaro Sobrinho. He alone approved at least five credit operations amounting to 365 million dollars, and the previous person in charge of credit operations, João Moita, was solely responsible for approving nine transactions totalling 502 million dollars. Finally, he also states that he found that there are six more lending operations totalling 648 million dollars "for which there are no contracts or approvals for the respective loans".

27. At this point it became clear at the meeting that the lack of information at BESA affects the entire bank, rendering it impossible for the current management to know the status of each credit application.

28. Given these facts, Ricardo Salgado recalled at the meeting that Álvaro Sobrinho had pledged to help recover the debts in question. In turn, General Leopoldino Fragoso do Nascimento, on behalf of the shareholder Geni, asked Sobrinho to provide all the missing information, particularly in relation to the five clients mentioned by Guerra. He also stated that he was not there to judge, but he wanted answers regarding BESA's credit portfolio, answers that the former CEO "had not provided to his satisfaction". In turn, General Manuel Hélder Vieira Dias "Kopelipa", representing Portmill, said on 21st October that "it was important to clarify the loan process, as well as to understand Álvaro Sobrinho's actions". He further stated that it was essential to know whether or not the borrowers have the ability to pay. And also how João Moita could have approved loans alone.

29. At this point, Ricardo Salgado said that the procedures explained by Sobrinho do not comply with international standards, or with the practices of the BES Group, referring to the financing for the acquisition of Torres Sky as "a complex situation".

30. BESA SHAREHOLDER STRUCTURE

- *Banco Espirito Santo 55.71%*
- *Portmill 24%*
- *Grupo Geni 18.99%*
- *Álvaro Sobrinho 1.3%*

31. BOARD OF DIRECTORS UNTIL THE END OF 2012

- *Ricardo Abecassis Espirito Santo (chairman)*
- *Álvaro Sobrinho (deputy chairman and CEO)*
- *Hélder Bataglia (executive director)*
- *Ilídio Santos (executive director)*
- *José Van-Dúnem (executive director)*
- *Zandre Finda (voting member)*
- *Rui Guerra (voting member)*

32. He further stated that KPMG had had reservations regarding the BESA accounts for a long time, as there was no clear picture of the operations performed. For Salgado, "there was no systematic and comprehensive process" to provide information regarding the credit portfolio to BES, specifically for the purpose of regulating big risks. He ended by saying that "the procedures were not in the least prudent" and it was essential to recover part of the loan, which could only take place with the help of Sobrinho.

33. Faced with these accusations, Sobrinho eventually acknowledged that he had made mistakes, but that no board of directors had ever questioned him, and that "when someone is not

questioned, he tends to think he's doing okay". Until 2010, the auditor KPMG never found any problems and the board always praised his work. Initial concerns emerged in 2011/2012.

Solution for the shareholders

34. *According to the investigation carried out by Expresso, it was Ricardo Salgado who suggested that Álvaro Sobrinho should put in writing all relevant information regarding the loans concerned and write a proposal of a solution for this credit portfolio addressed to the shareholders. If they were in agreement, BES would be too. He also said at the meeting that if any direct or indirect beneficiaries with links to BES were found among the credits, BES would assume any liability for the default. All agreed.*

35. *When Ricardo Salgado, Rui Guerra and Álvaro Sobrinho were asked about whether the latter had actually done what was asked of him at the General Meeting, silence was the unanimous response.*

WITH ISABEL VICENTE and MICAEL PEREIRA
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Angolan government protects BES

Guarantee of 5 billion dollars given by the National Bank of Angola will be used to limit the impact on Portugal

36. *It was to protect the Banco Espírito Santo Angola (BESA) from potential losses from non-recovery of loans referred to in the investigation carried out by Expresso that the National Bank of Angola granted, in late 2013, a guarantee of up to 5 billion dollars. This instrument is also guaranteed by the Angolan government itself through the Ministry of Finance and covers the potential default of loans. In October, the sum in question amounted to 5.7 billion dollars. It proved impossible to determine whether this amount increased or decreased, despite efforts made in conjunction with the management of BES and BESA. Rui Guerra, current CEO of the Angolan bank, had not answered any of the questions or calls made as of the time of going to press. However, Expresso knows that until last Thursday, and according to a source close to the process, the guarantee was sufficient to cover the difficulties that BESA is facing. The same source guarantees that, in all probability, the Angolan government guarantee will have to be used in order to protect Banco Espirito Santo from the direct impact on its profits and capital. This situation has been closely monitored by regulators in both countries, who have joined forces to solve the problem in order to avoid systemic risks in the financial sectors of Portugal and Angola. However, the terms of the guarantee, which has a duration of 18 months (renewable), are not known, with financial market sources admitting that if it is used, it may be converted into BESA share capital. In other words, the Angolan state would be the main shareholder, diluting the position of the remaining shareholders in a bank whose capital does not amount to 700 million dollars.*

What Banco Espírito Santo says

37. *Confronted by Expresso about operations and the situation described, BES clarified that:*

"BESA is an independent bank incorporated under Angolan law, with autonomous management, subject to the rules of supervision of the Angolan state, including respective banking secrecy. The issues should therefore be addressed to BES Angola. Notwithstanding the aforementioned, it should be noted that the BES Group was audited in its entirety by KPMG with its consolidated accounts (2013), which includes

its interest in BES Angola. As is known, these accounts were audited without any reservations.

38. *Moreover, considering the importance of BESA to the Angolan economy, on 31st December 2013 the Angolan state granted BESA a sovereign guarantee, independent and payable on demand of the beneficiary, to a total amount of up to 4.2 billion euros. The Angolan State established this guarantee as a way of protecting the bank from any delays and defaults in settlement of the assets, covering loans and interest".*

Álvaro Sobrinho's response

39. *The former CEO of BESA was questioned by Expresso regarding the beneficiaries of the loans and the information now published. In response, he stated the following:*

"I was CEO of Banco Espirito Santo Angola (BESA) until the end of 2012. In my ten years as chairman, we achieved record growth and international recognition as one of the leading institutions in Angola, focusing on due diligence and customer service. During this time as CEO I worked in conjunction with the entire Board of Directors, establishing a strict set of internal policies and procedures to regulate all financial transactions, including loans and lines of credit. Every year we were audited by a multinational and all accounts were published.

40. *I am not going to comment on the nature or content of any recent meeting held after my departure as CEO, including that held in October 2013, almost a year after I ceased my executive role. While I temporarily remained as chairman of BESA, I did not have any executive position or authority over the issues being put to me. I recommend you send your questions to the current management. Furthermore, if you want information regarding the specific companies you mention, or the Espirito Santo family, I suggest you contact each of them respectively for further clarification.*
I remain proud of my legacy at BESA and I support its continued growth as one of the best banks in Africa."

41. What the Angolan shareholders say

General Leopoldino do Nascimento asked Sobrinho to provide all the missing information.

General Kopelipa said it was important to realise how Álvaro Sobrinho had acted.

ON BES ANGOLA

42. *Ever wondered what it is like to withdraw more than 500 million dollars in cash from a bank? Even though it was not all at the same time, the money trail shows that it ended up in the hands of 10 entities and/or individuals. A rich list, a rich list, with little virtue.*

43. *In the initial pages of the first book, the investigation carried out by Expresso reveals a world that few imagined possible. And that is only the beginning. How is it possible that in the twenty-first century a bank can grant loans of almost 6 billion dollars without knowing exactly who was in receipt of those loans? There were no guarantees, no records, there was only money – stacks of it. With a value representing 80% of the credit portfolio of Banco Espirito Santo Angola (BESA) in October 2013.*

44. In this story there are no innocent parties. Only guilty ones. The businessman Álvaro Sobrinho is the face of these operations. He signed off and benefited directly or indirectly from many of those loans. But the blame cannot be attributed to him alone. Álvaro Sobrinho had a board of directors that has joint responsibility for what happened. Directors were appointed mostly by the owner of BESA, Banco Espírito Santo. And there were more shareholders, important figures in Angola, there were auditors, KPMG and a regulator, the National Bank of Angola. In summary of what happened, they all failed in their efforts. It is about which one of them damages their reputations the least. But in many cases, we are not talking only about incompetence.

The Angolan state gave an arm and a leg to save BESA. We just need to know what was given in return for this guarantee

45. This is a matter for the Angolan authorities to settle. If there was mal-intent or fraud, that is an Angolan problem. Let us look at the impact on Portugal. BES is protected; the Angolan state gave an arm and a leg to save BESA. The guarantee of the Bank of Angola, endorsed by the Angolan Ministry of Finance, is sufficient and protects BES in Portugal from any impact. We just need to know what was given in return for this guarantee. There is no such thing as a free lunch, even in Angola. The departure of the Espirito Santo family from Angola appears imminent. Without praise, only disgrace.

46. The Bank of Portugal has no jurisdiction over BESA, but it should draw conclusions about the performance of all involved in the case, whether managers or shareholders. And sooner or later this will have repercussions.

47. And, lastly, what impression does this Portuguese bank leave in Angola? While BESA is Angolan, its owner is Portuguese. The management was chosen by Portuguese shareholders. Is this the image we want associated with Portuguese business in Angola?

48. Angola and Angolans deserve more respect. Because, in the end, Angolan taxpayers will be paying for the guarantee given to BESA. Angola is its very own BPN. And, unfortunately, this bears the indelible mark of Portugal's name."

PRINCIPLES TO BE APPLIED WHEN DETERMINING MEANING

22. When deciding the meaning of words, a judge is providing written reasons for his conclusion as to the meaning to be attributed to the words sued upon. A Judge should not fall into the trap of conducting an over-elaborate analysis of the various passages relied on by the respective protagonists. The meaning is to be determined from the viewpoint of the layman, not by the techniques of a lawyer, see *Waterson v Lloyd* [2013] EWCA Civ 136; [2013] EMLR 17 at paragraph 53. The exercise has been described as one of ascertaining the broad impression made on the hypothetical reader by the words taken as a whole. The natural and ordinary meaning of words includes what the reasonable man will infer from the words, see Gatley on Libel and Slander, 12th Edition, at 3.18. It was common ground that the Court is entitled to reach its own conclusions on meaning, and is not required to adopt meanings advanced by either party.

23. The applicable principles were summarised by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at paragraph 14:

"The legal principles relevant to meaning … may be summarised in this way: (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 indulge in a certain amount of loose thinking but he must be treated as being 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)… the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation …' …. (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.'"

24. Specific reference was made in the submissions to *Charleston v News Group Newspapers* [1995] 2 AC 65. *Charleston* provides that the meaning of the article was to be taken from the article as a whole, and that it is not permissible to take a headline in isolation from the text of an article. It also reaffirmed the principle that although different readers may understand the article to mean different things, the meaning understood by the hypothetical reasonable reader is the single meaning from the article for the purposes of libel, see *Charleston* at 71G.

25. The submissions before me raised issues about whether the articles meant that Mr Sobrinho had misappropriated funds and whether he had done so fraudulently. This engages what is sometimes referred to as a *Chase* level meaning, which comes from *Chase v News Group Newspapers* [2003] EMLR 11 at paragraphs 45 and 46. A *Chase* level 1 meaning is to the effect that the person has committed a wrongful act. A *Chase* level 2 meaning is that there are "reasonable grounds to suspect" that the person committed a wrongful act, and *Chase* level 3 meaning is that there are "reasonable grounds to investigate" whether the person committed a wrongful act.

CORRECT TRANSLATION AND MEANING OF THE ARTICLE

26. The Claimant contended that the meaning of the article was "*that during his tenure as the Chief Executive Officer of BESA the Claimant: (1) failed so incompetently and catastrophically in his governance of BESA, by granting without proper authority and in the absence of any appropriate internal regulation, protocol or record-keeping, loans to the tune of US$5.7 billion to unknown beneficiaries without collateral, that the Angolan state has had to provide a sovereign guarantee to isolate BESA's parent, Banco Espirito Santo (BES), from the risks arising; and (2) misappropriated many multiple millions of dollars from funds held by the bank, in the form of granting suspect loans and pillaging hundreds of millions of dollars in cash withdrawals, against the bank's interests and for the benefit of himself, his family and many companies under his or their control <u>and there are reasonable grounds to suspect that he did so fraudulently</u>.*" As identified above, the last underlined part was added by amendment during the proceedings.

27. The Defendant contended that the meaning of the article was "*(1) the Claimant as Chief Executive Officer of BESA with the other directors of the bank failed incompetently in the governance of BESA, by allowing BESA to grant loans of some US$5.7 billion without proper compliance with internal regulations or procedures, without any or any adequate record-keeping, and without adequate collateral, thereby leaving the bank (a) with 80 % of its loan portfolio at risk of being irrecoverable and with the obvious risk that funds had been misappropriated; and (b) requiring a sovereign guarantee from the Angolan state; and (2) that the Claimant's approval of loans to accounts and/or entities connected with himself and his family, required investigation to establish their legitimacy*".

28. As appears from a comparison of the respective suggested meanings, there is much common ground. Both parties accept the meaning in sub-paragraph 1 that Mr Sobrinho failed incompetently by allowing BESA to grant loans of US$5.7 billion without proper records or collateral so that a guarantee was required from the Angolan state. Although there is not much between the respective versions I prefer the Defendant's sub-paragraph 1 to that of the Claimant because the Defendant's meaning engages with the wording in the article about the extent of the loans which are irrecoverable.

29. There is a dispute between the parties in relation to the meaning in sub-paragraph 2 about whether the article suggests that there are reasonable grounds to suspect that Mr Sobrinho acted fraudulently. In this respect I have to address the translation of the headline "*Saque no BESA*". The respective contentions for this headline were "*Pillaging at BESA*" or "*Withdrawal from BESA*" (emphasis added), although Mr Browne QC pointed out that in an original translation supplied by the Defendant the headline had been translated as "*Plunder from BESA*", which it is fair to note is much closer in meaning to "*pillaging at BESA"* than "*withdrawal from BESA"*.

30. Mr Minett and Mr Priest produced a joint statement in which they agreed that the word "*saque*" does not translate perfectly into English, and contains what they described as a "*double entendre*". Withdrawal would be translated as "*levantamento*", and in the context of the article "*saque*" implied illegality. As there was a joint statement it had not been envisaged that the experts would give oral evidence. I asked whether the experts had intended to mean civil or criminal illegality. In the event the parties agreed a short further note confirming that "*pillage*" was one of many correct translations of "*saque*", and that "*withdrawal does not provide an adequate translation of "saque" and a proper translation depends on context, which is from an article which implies illegality. The nature of the illegality depends on context but may include the criminal as in "pillaging""*. The issue of whether the article suggests that there are reasonable grounds to suspect fraud and the issue about the correct translation of the headline raise matters which overlap, because both issues depend on the meaning of the article which provides the context for the headline.

31. In my judgment the correct translation of "*saque*" in the context of this headline in this article is "*pillaging*". I make this finding because it is now common ground that "*withdrawal*" is not an adequate translation and "*saque*" implies some kind of illegality depending on context. The relevant context for this headline is the article, which has the meaning referred to below.

32. In this article in my judgment the article means that there are reasonable grounds to suspect that Mr Sobrinho granted suspect loans for the benefit of himself, his family and many companies under his control fraudulently. This was my impression when reading the article as a whole. I have also noted in respect of this meaning: the words "*shady conduct for a bank manager*" are used when referring to "*unknown beneficiaries of loans,*

credit files that simply do not exist, cash withdrawals of hundreds of millions of dollars, approval of loans only the chief executive to companies to which he is connected" in paragraph 11 of the article; the references to Mr Sobrinho receiving US$182 million dollars in accounts directly linked to him in paragraph 17 of the article; the statements that "*there are no innocent parties. Only guilty ones*" and "*But in many cases we are not talking only about incompetence*" in paragraph 44 of the article; and the words that if there was "*mal-intent or fraud*" that was an Angolan problem in paragraph 45 of the article. I should record that I did not consider that the references in paragraphs 8 and 9 of the article relied on by the Claimant provided assistance in determining this meaning. This is because those passages were directed to other named persons. The fact that other parts of the article referred to Mr Sobrinho being a possible part of the solution because he could assist in identifying the beneficiaries of the loans, a point relied on by the Defendant, does not alter my conclusion on meaning. This is because knowledge of the beneficiaries of the loans is consistent both with the existence and absence of reasonable grounds to suspect fraud.

33. In these circumstances I determine that the article has the following meaning (being the Defendant's meaning for sub-paragraph 1 and the Claimant's meaning for sub-paragraph 2).

"(1) the Claimant as Chief Executive Officer of BESA with the other directors of the bank failed incompetently in the governance of BESA, by allowing BESA to grant loans of some US$5.7 billion without proper compliance with internal regulations or procedures, without any or any adequate record-keeping, and without adequate collateral, thereby leaving the bank (a) with 80 % of its loan portfolio at risk of being irrecoverable and with the obvious risk that funds had been misappropriated; and (b) requiring a sovereign guarantee from the Angolan state;

and (2) misappropriated many multiple millions of dollars from funds held by the bank, in the form of granting suspect loans and pillaging hundreds of millions of dollars in cash withdrawals, against the bank's interests and for the benefit of himself, his family and many companies under his or their control and there are reasonable grounds to suspect that he did so fraudulently."

LEGAL BASIS FOR BRINGING CLAIM IN ENGLAND AND WALES

34. It might have been thought that the most appropriate place to bring these proceedings would have been Portugal given: the language of the article; the fact that the overwhelming majority of the readership was based in Portugal; and given the subject matter of the article. However as Impresa is incorporated, and therefore domiciled, in Portugal, the provisions of section 9 of the Defamation Act 2013 ("the 2013 Act") do not apply. Section 9 of the 2013 Act prevents the Court hearing a claim involving a foreign Defendant "*unless the Court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring the action in respect of the statement*".

35. Although reference was made in written submissions to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ("the Brussels Convention"), it became common ground at the hearing that the proceedings against Impresa are governed by the provisions of Council Regulation EC No. 1215/2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters ("the Judgments Regulation").

36. The general rule in article 4 of the Judgments Regulation is that persons should be sued in the courts of the Member State in which they are domiciled, and Impresa is domiciled in Portugal. However article 7 of the Judgments Regulation provides that: "*A person domiciled in a Member State may be sued in another Member State … (2) in matters relating to tort … in the court for the place where the harmful event occurred or may occur*". This provision mirrors the provision in article 5(3) of the Brussels Convention which was considered by the European Court of Justice and the House of Lords in *Shevill v Presse Alliance SA* (C-68/93) and [1995] 2 AC 18. The effect of the decisions in *Shevill* was that a person complaining of an article could bring proceedings in the courts of the state of the publisher's domicile but also, if the article had been published in England and Wales, in the courts in England and Wales. However damages could only be awarded for the harm suffered within the jurisdiction. The Claimant is entitled to and does rely on article 7 of the Judgments Regulation to bring the proceedings in England and Wales.

37. Issues have been raised about the extent to which Mr Sobrinho claimed damages in the English proceedings for the worldwide publication, and the extent to which Mr Sobrinho claimed damages for the publication and harm done to his reputation in England in the Portuguese civil proceedings.

38. Articles 29 and 30 of the Judgments Regulation provide:

"29(1) … where proceedings involving the same cause of action and between the same parties are brought in the Courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. …

(3) where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

30(1) where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

(2) where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

(3) for the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

39. It might be noted that in the Particulars of Claim complaint was made of the ongoing worldwide publication at paragraph 7, although it is also fair to record that in paragraph 3 of the Particulars of Claim reference was also made to publication "*in this jurisdiction*". Mr Browne QC submitted that the reference to the worldwide publication was relied on only as a matter of aggravation of damages.

40. In the Portuguese civil proceedings at paragraph 16 (page 8 of 66) there was reference to Mr Sobrinho being chairman of PEI with headquarters in London, and there were references (at pages 49 and 50 of 66) to Mauricio Fernandes ("Mr Fernandes"), Kelly

Taylor ("Ms Taylor"), Telma Fernandes ("Ms Fernandes") and Jeremy Knight ("Mr Knight") being witnesses from England who have given evidence (either in person or through witness statements) before me. Their evidence is relevant to Mr Sobrinho's reputation in England and damage suffered by Mr Sobrinho in England, which should not have formed part of the proceedings in Portugal. Mr Browne QC relied on the proxy given by Mr Sobrinho to his lawyers which he said did not encompass damage in England, but the proxy was sufficient for the lawyers to act in proceedings in Portugal, and in those proceedings there was reference to witnesses relevant to damage in England.

41. As Mr Browne QC pointed out England and Wales was the jurisdiction first seised in respect of the claim for damage suffered in England and Wales. However in my judgment the reliance in the English proceedings on the worldwide publication in proceedings in England and Wales was not permissible under the provisions of article 7 of the Judgments Regulation and the decision in *Shevill*. This is because Mr Sobrinho was only entitled to bring proceeding in England and Wales for the damage caused to him from the publication in England and Wales. The remedy in respect of this matter would have been to strike out that part of the Particulars of Claim.

42. Further, having commenced proceedings in England and Wales for damage caused by the publication in England, Mr Sobrinho was not entitled to rely on the publication in England or the damage to his reputation in England in the civil proceedings in Portugal, because that duplicated the English proceedings. However the effect of the discontinuation of the Portuguese proceedings has been to leave Mr Sobrinho only with the English proceedings, and it is not necessary to consider further the issues of "*the same cause of action*" or "*related actions*".

LEGAL ISSUES RELATING TO SERIOUS HARM

43. An issue argued in *Shevill* was whether the laws of England and Wales should determine where the harmful event occurred, or whether harmful event should have an autonomous European meaning. It might be noted that *Shevill* was decided before the 2013 Act came into force, and the new requirement introduced by the 2013 Act to show "*serious harm*".

44. Section 1 of the 2013 Act is headed "*Requirement of Serious Harm*" and provides:

> *"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."*

45. This section made a substantial change to the law of defamation. There are a number of previous decisions on section 1 which provide assistance including *Cooke v Mirror Group Newspapers* [2014] EWHC 2831 (QB), *Lachaux v Independent Print Limited & Ors.* [2015] EWHC 2242 (QB) and *Theedom v Nourish Training* [2015] EWHC 3769 (QB).

46. There are now a number of uncontroversial propositions that can be stated about section 1 of the 2013 Act. So far as is relevant to this case these are first, a claimant must now establish in addition to the requirements of the common law relating to defamatory statements, that the statement complained of has in fact caused or is likely to cause serious harm to his reputation. "*Serious*" is an ordinary word in common usage. 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 the claimant's reputation. It should be noted that unless serious harm to reputation can be established an injury to feelings alone, however grave, will not be sufficient.

47. Secondly 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 to demonstrate that no serious harm has occurred or is likely to do so. However a Court determining the issue of serious harm is, as in all cases, entitled to draw inferences based on the admitted evidence. Mass media publications of very serious defamatory allegations are likely to render the need for evidence of serious harm unnecessary. This does not mean that the issue of serious harm is a "*numbers game*". Reported cases have shown that very serious harm to a reputation can be caused by the publication of a defamatory statement to one person.

48. Thirdly there are obvious difficulties in getting witnesses to say that they read the words and thought badly of the claimant, compare *Ames v The Spamhouse Project* [2015] EWHC 127 (QB) at paragraph 55. This is because the claimant will have an understandable desire not to spread the contents of the article complained of by asking persons if they have read it and what they think of the claimant, and because persons who think badly of the claimant are not likely to co-operate in providing evidence.

49. Fourthly, where there are publications about the same subject matter which are not the subject of complaint (because of limitation issues or because of jurisdictional issues) there can be difficult points of causation which arise, see *Tesla Motors v BBC* [2013] EWCA (Civ) 152 and *Karpov v Browder and others* [2013] EMLR 3071 (QB); [2014] EMLR 8. The decision of the House of Lords in *Associated Newspapers v Dingle* [1964] AC 371 does not prevent these difficulties. That decision was not a decision on causation. The decision in *Dingle* prevents a defendant from relying in mitigation of damages for libel on the fact that the same or similar defamatory material has been published in other newspapers about the same claimant. *Dingle* does not address the issue of whether a publication has caused serious harm.

50. Fifthly, as Bingham LJ stated in *Slipper v BBC* [1991] QB 283 at 300, the law would part company with the realities of life if it held that the damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity "*to percolate through underground channels and contaminate hidden springs*" through what has sometimes been called "*the grapevine effect*". However it must also be noted that Bingham LJ continued and said "*Usually, in fairness to a defendant, such effects must be discounted or ignored for lack of proof*" before going on to deal with further publications which had been proved to be natural, provable and perhaps even intentional results of the publication sued upon.

51. There is an unresolved question as to the date at which the likelihood of future serious harm falls to be assessed, namely whether it is at the date of issue of the proceedings or at the date of the hearing considering the issue.

LEGAL PRINCIPLES ON *JAMEEL* APPLICATION

52. It is established that in order to deal with cases justly, proportionately and to maintain a proper balance between the Convention right to freedom of expression and the protection of other rights, the Court is required to stop as an abuse of process defamation proceedings which serve no legitimate purpose, see *Jameel v Dow Jones* [2005] EWCA Civ 75; [2005] QB 946 at paragraph 55. The test proposed in that case and accepted by the Court was whether "*a real and substantial tort*" had been committed in the jurisdiction, see paragraph 50 of *Jameel.*

53. The test has been expressed in a number of different ways, namely whether "*the game is worth the candle*", see paragraph 69 of *Jameel*, or whether there is any prospect of a trial yielding "*any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources"*, see *Schellenberg v BBC* [2000] EMLR 296.

54. Vindication is an important point of defamation proceedings, and vindication, and consequential injunctions, may eliminate or reduce the risk of republication, see *McLaughlin v London Borough of Lambeth* [2010] EWHC 2726 (QB); [2011] EMLR 8 at paragraph 112. This is particularly so if the Defendant is continuing to publish the allegations in this jurisdiction, see *Jameel* at paragraph 74 and *Mengi v Hermitage* [2012] EHWC 3445 (QB) at paragraph 52.

55. However, at least so far as in a case such as this, which relates only to publication in this jurisdiction, vindication must relate to the Claimant's reputation in this jurisdiction, and "*it is not legitimate for the Claimant to seek to justify the pursuit of these proceedings by praying in aid the effect that they may have in vindicating him in relation to the wider publication"*, see *Jameel* at paragraph 66.

56. It needs to be remembered that dismissing an action for an abuse of process is a draconian power vested in the Court which should only be exercised in an exceptional case, see *Haji-Ioannou v Dixon and others* [2009] EWHC 178 (QB) at paragraph 30. Applications of this type are not a "numbers game" so far as evidence about publication is concerned, anymore than decisions about serious harm are a numbers game.

57. The fact that costs are likely to be high does not mean that an action should be struck out as an abuse, *Haji-Ioannou* at paragraph 43. This is particularly so given the increased power available to Courts to control the expenditure of disproportionate costs.

58. Applications to dismiss proceedings as an abuse of process help to ensure that actions which do not serve any legitimate purpose are not pursued and that there is not disproportionate and unnecessary interference with freedom of expression, see *Karpov v Browder and others.*

EVIDENCE AND FINDINGS RELATING TO SERIOUS HARM AND ABUSE OF PROCESS

59. I heard oral evidence on behalf of the Claimant from: Mr Sobrinho; Mr Knight, the policy and communications director at PEI; Antonio Farcadas ("Mr Farcadas") who receives printed copies of Expresso each week; Mr Fernandes, the Chief Executive Officer of PEI. There were agreed witness statements on behalf of the Claimant from: Smeetesh Kakkad ("Mr Kakkad") a solicitor and partner in the solicitor firms representing Mr Sobrinho; Ms Taylor, finance and administration director at PEI and Mr Fernandes' wife; Ms Fernandes, marketing and Africa relations director at PEI and Mr Fernandes' sister; and Timothy Aldiss ("Mr Aldiss").

60. There were agreed witness statements from Pedro Soares ("Mr Soares") head of digital products and services at the Impresa Group owned company which provides digital services to Impresa Group companies; Tiago Simao ("Mr Simao") head of software development at the same company as Mr Soares; Isabel Duarte ("Ms Duarte") a lawyer practising in Portugal; and Francisco Balsemao ("Mr Balsemao") Chief Operating Officer for the holding company which owns Impresa. There were also witness statements from Claire Gill ("Ms Gill") a partner in the solicitors firm representing Impresa. Ms Gill's statements were before me as hearsay statements, which I could give such weight to as I thought fit. In the event much of the evidence about the circulation and distribution of the articles became common ground.

61. Some of the witnesses giving evidence on behalf of Mr Sobrinho shared their interpretation of the meaning of the article. It is common ground that such evidence is inadmissible and I have ignored it.

Mr Sobrinho's reputation in the jurisdiction of England and Wales

62. Although Mr Sobrinho is reasonably proficient in English he gave evidence through a Portuguese interpreter, so as to ensure that he had a full understanding of the questions being asked. This was a perfectly proper approach to take, although there were some minor difficulties at the start of his evidence when Mr Sobrinho answered questions before they had been translated.

63. There is no legal requirement to show a reputation in the jurisdiction of England and Wales predating the relevant publication, but Mr Sobrinho adduced evidence which I accept showing that he has been involved with the Duke of Edinburgh's International Award programme and the Vaccine Alliance. As noted above he is the Chairman of the Board of Trustees of PEI. He had retained a media relations consultant in the United Kingdom to raise the profile of Banco Valor in the United Kingdom, and had as a result met senior figures from UK businesses at a lunch on 19 September 2013. Valor Investments Limited has been incorporated, but it has not traded.

64. Mr Sobrinho is also a director and shareholder in Cluff Geothermal Limited, which specialises in deep geothermal exploration. Fellow board members include professors of engineering, academics and Earl Percy and Peter Dixon-Clarke ("Mr Dixon-Clarke") a finance director, and he is involved in Hotspur Drilling Limited with Earl Percy and Mr Dixon-Clarke. The evidence suggests that these companies may exploit future opportunities rather than having an active current trading position.

65. In his evidence Mr Sobrinho confirmed that he was currently domiciled in Switzerland, where he had his fiscal residence. He had homes in Switzerland, Portugal and Angola but he travelled to all parts of the world. His daughter is currently studying for a Masters Degree at Imperial College London, which means that he and his wife have spent more time in London. He regularly visited London in relation to the PEI. He thought that he would visit London monthly, staying for a week on average.

66. The evidence also showed that Mr Sobrinho had been introduced in glowing terms at various events in London. It is right to record that references to Mr Sobrinho at such events pre-dated and post-dated the publications on 7th June 2014.

Circulation and readership

67. It was pleaded in the Particulars of Claim that "*the said newspaper and website have an enormous circulation and readership, including in this jurisdiction in Portuguese by readers in particular whose nationality or language that is or others who maintain an interest in Portuguese and other affairs as reported on by Expresso"*. It was also pleaded that readers might read the website in English using Google translate or a similar service.

68. In fact the evidence before me did not demonstrate an "*enormous circulation and readership*" of Expresso in England and Wales. In total there was a hard copy circulation of 136 in England and Wales for the relevant edition. This was made up of 127 individual sales and 9 print subscribers, one of which was the British Library. In addition to the hard copy publication there were 52 digital subscriptions in the jurisdiction of England and Wales for Expresso for the subscriber website, made up of 45 digital subscribers (although one subscriber had two subscriptions) and 7 one off purchasers.

69. As noted above the edition could also be accessed through Factiva, a business information and research service, which operated a website which was available in leading institutions including the British Library and some universities. The evidence shows that in the period from 7th June 2014 to 5th May 2015 the inside article was accessed 39 times by 9 users, the front page article was accessed 18 times by 6 users, the economic section of the article was accessed 19 times by 5 users, and the part of the article on page 4 was accessed 18 times by 6 users.

70. Mr Sobrinho relied on the publication of the article to 6 named persons being Mr Knight, Mr Farcadas, Mr Fernandes, Ms Taylor, Ms Fernandes and Mr Aldiss. Mr Knight read part of the front page and then got a web translation; Mr Farcadas got 3 print copies and read the article, and he also showed the article to other potential customers who he was trying to persuade not to bank with BES but to bank with Santander Totta (it appears that most of those skimmed part of the article but did not read the whole of it); Mr Fernandes read a copy, although he did not appear to have noticed that part of the article reporting Mr Sobrinho's response; Ms Taylor read a translation; Ms Fernandes received a briefing about the article; and Mr Aldiss was sent a translation.

71. In these circumstances Mr Knight, Mr Taylor and Ms Fernandes do not appear to have read the article but an internet translation, the details of which are not before me.

It does not appear that Ms Fernandes read the article. It does not appear that most of those to whom Mr Farcadas provided the copy of the newspaper read the whole article. There was not therefore a publication of the article, as pleaded which included all of the pages, to those readers. Issues about which reader had read which part of the article would not normally make much difference, but in a case where the circulation of the article was limited, these technical points made by Mr Nicklin QC about who read what have become more significant.

72. The Google Analytics data for the subscription website showed that in the period between 7th June 2014 and 30th June 2014 there were 13 unique page views for the inside article, 4 unique page views for the Economic section of the article, and 8 unique page views for the part of the article on page 4. This meant that, given the whole of the article was the subject of the complaint, there were only 4 readers who could have read the whole of the article, which is just under 8 per cent of those who accessed the article. For the period from 7th June 2014 to 20th February 2015 there were no results for readers reading the whole of the article.

73. The readership of the hard copy newspaper is likely to be some 3 times the number of hard copies. As noted above there were 136 hard copies. 3 times 136 gives 408 readers. However if it is assumed that a similar number of readers of the hard copy as readers of the subscription website read the whole article, which in my judgment is a reasonable assumption, only 8 per cent of the 408 readers would have read the whole of the article. 8 per cent of 408 readers is 33 readers.

74. As noted above the edition could also be accessed through Factiva, a business information and research service, which operated a website which was available in leading institutions including the British Library and some universities. The evidence shows that in the period from 7th June 2014 to 5th May 2015 the inside article was accessed 39 times by 9 users, the front page article was accessed 18 times by 6 users, the economic section of the article was accessed 19 times by 5 users, and the part of the article on page 4 was accessed 18 times by 6 users. Assuming that each access was by a separate individual from a user station, and that each individual who had accessed page 4 had read the other pages, which is a generous assumption to make in favour of the Claimant, that that would add a maximum of 18 readers for the whole of the article.

75. This would give a total readership for the article of 4 readers for the subscription website, 33 readers for the print edition, and 18 readers for the Factiva website, being a total of 55 readers. It is fair to note that investigations carried out on behalf of Mr Sobrinho show that print and digital subscribers include managers and analysts at banks and financial institutions, including Mr Farcadas and Board Alternate Directors for Portugal for EBRD. However given these numbers Mr Sobrinho is not able to rely on any inference which might be drawn as to the publication of very serious allegations by a newspaper with a large circulation in this jurisdiction.

The evidence relating to the publication on the open website and the application to re-amend the Particulars of Claim

76. It was in the light of the matters set out above, which had been highlighted during the Defendant's closing submissions, that Mr Browne QC made his application to re-amend the Particulars of Claim to rely on the publication of part of the article on the

open website. The evidence shows that part of the article (which appear to be parts of the article between paragraphs 11 and 48 of the article as set out above) were published on the open website from 9th December 2014 to 25th February 2015, when there were 156 page views in the United Kingdom as a whole, of that part of the article which was available to all on the expresso.sapo.pt website. In the period from 25th February 2015 to 6th May 2015 there were 59 page views.

77. The application to re-amend was resisted on the basis that the single publication rule, introduced by section 8 of the 2013 Act, meant that the claim was statute barred. Section 8 applies if a person published a statement to the public and "*subsequently publishes … that statement or a statement which is substantially the same*". Mr Browne QC contended that the publication of part of the article had the same meaning as the whole of the article. If that is right then the republication is the publication of a statement which is substantially the same.

78. Section 8 then provides "*any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication*". This means that the cause of action in respect of the publication on 9th December 2014 accrued on 7th June 2014 and that on 9th December 2015, when the application to re-amend was made, the claim was statute barred.

79. The Claimant then referred to the provisions of CPR 17.4 which applies where a party applies to amend his statement of case and a period of limitation under the Limitation Act 1980 has expired. CPR 17.4(2) provides that a Court may allow an amendment whose effect will be to add or substitute a new claim, "*but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission to amend has already claimed a remedy in these proceedings*".

80. I propose to take account of the proposed amendment in considering the evidence of serious harm and abuse of process, before making a final decision on whether to grant permission to amend. The net effect of this is that there are potentially 215 more readers of part of the article, but this evidence still does not justify the drawing of an inference of serious harm from the fact of publication alone.

Evidence about the effect of publication of the article in England and Wales

81. The most relevant evidence about harm came from Mr Sobrinho, Mr Farcadas and Ms Fernandes. Mr Sobrinho's evidence was important in the sense that it did not show any apparent harm, about which Mr Sobrinho was aware from the publication of the article in England and Wales. Mr Sobrinho was obviously (and in circumstances where it is not proposed by Impresa to justify the article, justifiably) upset by the article, but his injury to feelings are not something that count as serious harm for the purposes of section 1 of the 2013 Act. There was no evidence from Mr Sobrinho similar to that pleaded in the proceedings in Portugal (at page 54 of 66), of persons ringing him up having read the article, questioning him and making derogatory comments about him being an outcast dishonest banker who had embezzled funds. All of this suggests that any serious harm suffered by Mr Sobrinho occurred in Portugal as a result of the publication in Portugal, and not in England and Wales as a result of the publication in England and Wales.

82. Mr Farcadas said that on Portugal Day, which is on 10th June and which was just after the publication on 7th June, he attended an event at the Portuguese Embassy in London and an event in Manchester, and he said that the story was a major topic of conversation, as it was at an event in Watford in early July. Mr Farcadas said that the Claimant's name had come up on Portugal Day. He said that the story was known in the area of London around Vauxhall and Stockwell known as Little Portugal and the Anglo-Portuguese commercial community. Mr Farcadas said he would not have allowed Mr Sobrinho to become a customer of Santander Totta after the article.

83. In evidence Mr Farcadas said that when Sporting Lisbon had proposed to purchase an expensive player, there had been discussions about how Sporting Lisbon might have been able to afford the expense, given that the shareholders included Mr Sobrinho.

84. I should record that, when giving evidence, it was plain that Mr Farcadas considered Impresa to have acted badly by publishing the article, and he was keen to emphasise this by sharing his (inadmissible) view of the meaning of the article and emphasising the potential effects of the article. I should record that Mr Farcadas gave evidence about the publication of other Portuguese media in England and Wales on which the Defendant placed much reliance.

85. However although it was possible to link the discussions about Mr Sobrinho and the article on Portugal Day and in Watford to the publication in England and Wales, there was no evidence that there was actual harm to Mr Sobrinho. Mr Farcadas was only able to say in evidence "*I recall the Expresso story was a major topic of conversation and the Claimant's name came up frequently*" and in relation to the Watford event "*the Expresso story was much talked about*".

86. In my judgment it was not possible to establish a link between what Mr Farcadas reported about comments relating to Mr Sobrinho and Sporting Lisbon to the article. The collapse of BES was very substantial news in Portugal, and the evidence shows that the matter was extensively covered by the media. It was not possible to show that Mr Sobrinho was known about because of that, rather than because of the article.

87. Ms Fernandes said that after publication of the article she was questioned about the allegations made against Mr Sobrinho, and on some occasions she was even abused because of her and PEI's relationship with him. This sort of evidence comes much closer to the type of evidence pleaded in the Portuguese proceedings. Ms Fernandes also said that some supporters of PEI Africa Breakfast Club meetings stopped attending, and Ms Fernandes listed companies such as BP, PWC, and KPMG and said that Mr Sobrinho was not put forward to promote PEI. However, as Mr Nicklin QC pointed out, there was no evidence from any of those companies about why they had ceased to have contact with PEI. There is nothing to show that any individuals at these companies were readers of the article, and indeed none of those companies appear to have been identified as recipients of the print edition or subscribers on the subscription website. It is just as possible that such companies were concerned about the implications of BES's collapse in Portugal, and the evidence shows that Mr Sobrinho's links with BES were well known.

88. It is right to record that Mr Fernandes was immediately concerned on reading the coverage, and it was he who reported the coverage to Mr Sobrinho, and he was reassured by Mr Sobrinho's angry and upset response. He briefed PEI staff about the

story to prepare them for the fall-out. Mr Knight was "quite shocked" at the allegations. He spoke to Mr Fernandes and had a friend verify his translation of the article. Mr Knight was concerned for PEI, and his own future with PEI. Ms Taylor was very troubled by the allegations, until she received assurances from Mr Sobrinho that the allegations were not true. Mr Aldiss felt obliged to raise questions with Mr Sobrinho and PEI, and even after reassurances he felt quite unsettled. He was also aware of web pages which had referred to the article.

The vindication of Mr Sobrinho's reputation in Portugal

89. Another very important part of Mr Sobrinho's evidence was that he had managed to obtain a vindication of his reputation in Portugal. The evidence from Ms Duarte showed that if there had been a trial in Portugal in civil proceedings for libel, there would have been a determination about the truth of the article. That would have provided a clear opportunity for vindication of Mr Sobrinho's reputation (to the extent that it was required), which would not be the case in the English proceedings.

90. As noted above Mr Sobrinho said that "*as a result of the public inquiry in Portugal and the coverage it received*" he felt "*that I have achieved all that I could expect to have achieved through proceedings there, perhaps more*". Mr Sobrinho also said, in his second witness statement, that he believed that the difficulties that he faced in bringing the claim in Portugal "*would far outweigh the time, effort and expense that*" he would have to invest to pursue the claim. Mr Sobrinho said that he had concerns about the fairness of Court proceedings in Portugal, but there was no evidence before me to justify those concerns, and I note that Mr Sobrinho overcame any concerns and issued proceedings in Portugal.

91. Some of Mr Sobrinho's evidence about why he had discontinued the Portuguese proceedings was not clear, particularly when he responded to the suggestion in cross examination that he had discontinued because there was favourable publicity by saying that that was Mr Nicklin QC's conclusion and not his. However it was clear that Mr Sobrinho felt that the coverage by the Portuguese media of the Parliamentary inquiry in general, and his evidence in particular, meant that the record had been put straight, and his reputation had been restored. Mr Sobrinho said that he had been reassured that that was the effect by comments from persons who had contacted him after he had given evidence.

92. I formed the impression that Mr Sobrinho discontinued the civil proceedings in Portugal for a number of reasons all of which overlapped, but which could be best expressed by the way he had put it in his original statement, namely that he had achieved all that he could have hoped to, and perhaps more, by his evidence in the Parliamentary inquiry and the coverage of his evidence in the Portuguese media. The continuation of the civil proceedings in Portugal was no longer worth the time, effort and money from Mr Sobrinho's point of view.

The vindication of Mr Sobrinho's reputation in England and Wales

93. Although Mr Sobrinho's view was that his evidence to the Parliamentary inquiry received "*very little, if any, coverage*" in this jurisdiction, the evidence shows that the Portuguese newspapers, television and radio coverage were available in England, in the same way that the Expresso article had been available in England. This was the

effect of the evidence given by Mr Farcadas and I accept it. The media coverage included: mainstream national newspapers being "Diario de Noticias", "Publico", "Jornal de Noticias" and "Correio de Manha"; specialist business and financial daily newspapers being "Diario Economico", "Journal de Negocios"; and weekly publications "Expresso", "Sol" and "Semanario Economico". It also included: 3 main Portuguese television broadcasters being "Radio Televisao Portuguesa", "Sociedad Indepedente de Comunicacao" and "Televisao Independente"; and 4 national radio stations being "TSF Radio Jornal", "Radio Renascenca", "Radio Comercial" and "Radio Difusao Portuguesa – Antena 1". The newspapers and radio stations were available online in England and Wales. Print copies of some of the newspapers were stocked by specialist vendors in London. Portuguese television channels were obtained through subscription by satellite in London.

94. This meant that if Mr Sobrinho's reputation had been restored in Portugal by the media coverage, then it was also restored in England and Wales. Mr Sobrinho's view was that just because he had achieved all that he could have hoped to have achieved in Portugal, perhaps more, from the coverage of his evidence to the Parliamentary inquiry in the media, did not mean that the same point applied in England and Wales. However I could not understand any good reason for his view. In my judgment Mr Sobrinho was unable to explain why vindication of his reputation in Portugal from the media coverage of the Parliamentary inquiry and his evidence, which had been sufficient to cause him to discontinue proceedings in Portugal, had not been sufficient to satisfy him in England and Wales. This is in circumstances where the media which had been available in Portugal to those who had read the article was available to those who would have read the article in England and Wales.

No serious harm and *Jameel* abuse of process

95. In my judgment the publication in England and Wales of the article and that part of the article which had been published on the open website has not caused serious harm to Mr Sobrinho's reputation in England and Wales, and, as at December 2015 and January 2016, is not likely to do so.

96. Although the publication of an article which had the meaning set out in paragraph 33 by a reputable newspaper such as Expresso above might be thought to be likely to cause serious harm to a banker and philanthropist in Mr Sobrinho's position, the evidence before me does not justify a finding that serious harm was caused. It may be that the very limited extent of the publication in England and Wales avoided serious harm being caused to Mr Sobrinho's reputation. It may be that because the text of the article set out Mr Sobrinho's defence the detrimental effect of the meaning of the article might have been lessened. It may be that because Mr Sobrinho had an established and good reputation in England and Wales no one believed the article so far as it concerned Mr Sobrinho. It may be that serious harm was avoided because the story was overtaken by the collapse of BES, the Parliamentary inquiry in Portugal into that collapse, and because Mr Sobrinho was able to give evidence which allowed him to put the matter straight. At the end of the day I am unable to identify, on the evidence, why no serious harm was caused to Mr Sobrinho's reputation, but there was none.

97. Further the evidence shows that Mr Sobrinho is not likely to suffer serious harm to his reputation from the publication of the article. This is because Mr Sobrinho has, to

date, suffered no serious harm, and because the evidence shows that Mr Sobrinho was able to put the record straight in his evidence to the Parliamentary inquiry in Portugal, and because his evidence was covered by the Portuguese media which is available in London. The evidence establishes that that coverage in the Portuguese media is available in England and Wales to about the same extent that the publication of the article was available in England and Wales. This means that if (as is common ground) there was no need to pursue proceedings in Portugal because Mr Sobrinho's reputation had been restored, the same applies in England and Wales.

98. It is in these circumstances that I can also conclude that the pursuit of the current proceedings is "*not worth the candle*" and is a *Jameel* abuse of process. This is because Mr Sobrinho's reputation had been so effectively restored by the reporting of his and other evidence to the Parliamentary inquiry in Portugal that it was no longer worth the time, effort and expense of pursuing proceedings in Portugal, and because coverage by the Portuguese media is available in England and Wales to about the same extent that the publication of the article was available in England and Wales.

No permission to amend

99. In the light of these findings I refuse permission to re-amend the Particulars of Claim. The publication of part of the article on the open website has not caused serious harm to Mr Sobrinho's reputation, and the pursuit of proceedings in respect of that publication would be a *Jameel* abuse of process for the reasons given above. In these circumstances it is not necessary to determine the issues of limitation raised by the re-amendment, but it is only fair to note that Ms Gill, the solicitor for the Defendant, had reported that the Defendant had blocked access to the publication in the jurisdiction so that there was no ongoing publication, and the assurance was repeated in a letter dated 8th December 2014, just before the publication on the open website on 9th December 2014. It is also right to record that Mr Balsemao apologised for this occurrence in his witness statement.

Conclusion

100. For the detailed reasons given above: the article has the meaning set out in paragraph 33 above; Mr Sobrinho has not suffered serious harm from the publication of the article, and he is not likely to do so; and it is a *Jameel* abuse of process to pursue the proceedings, because, as a result of the vindication of Mr Sobrinho's reputation following his evidence to the Parliamentary inquiry, the pursuit of these proceedings is not worth the time, effort and expense in pursuing them.