

Case No: HQ14D03028

Neutral Citation Number: [2015] EWHC 127 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2015

Before :

MR JUSTICE WARBY

Between :

(1) CRAIG AMES
(2) ROBERT McGEE

Claimants

- and -

(1) THE SPAMHAUS PROJECT LIMITED
(2) STEPHEN LINFORD

Defendants

Adrienne Page QC and Jacob Dean (instructed by **Carter-Ruck**) for the **Claimants**
Ian Helme (instructed by **Olswang**) for the **Defendants**

Hearing date: 12 December 2014

Judgment

Mr Justice Warby:

Introduction

1. This is a case about spam, which for present purposes is adequately defined as unwanted email sent in bulk. It can also be described as the internet version of junk mail.
2. The claimants are two entrepreneurs, one (“Mr Ames”) an Australian citizen and the other (“Mr McGee”) a citizen of the United States, who are both resident in California. Between them they set up and until about December 2013 were involved with a bulk email marketing services business, initially through a US corporation called Blackstar Media LLC, and latterly as employees of Blackstar Marketing, a subsidiary of the English company Adconion Media Group Limited, which bought Blackstar Media in April 2011.
3. The first defendant is an English company which represents the principal corporate entity of an international not-for-profit organisation called The Spamhaus Project which tracks and reports on sources of spam on the internet. The second defendant (“Mr Linford”) is the founder of The Spamhaus Project and chief executive of the first defendant. The defendants’ evidence and submissions refer generally to Spamhaus without distinguishing between the Project and the first defendant and I shall do the same.
4. The claimants’ claim, as presently put in amended particulars of claim dated 4 December 2014, concerns publications in England and Wales via the Spamhaus website between a date in December 2013 and about 31 May 2014. The claimants were both named as spammers, and for most of this period were on the first defendant’s Register of Known Spam Offenders (“the ROKSO list”) and at the top of its list of the Top 10 world’s worst spammers (“the Top 10 list”). Addresses relating to the claimants and a photograph of Mr McGee were also published. The claimants complain that the words used were libellous of them, and that the disclosure of their addresses was a misuse of private information. Mr McGee complains that the reproduction of the photograph was an infringement of copyright. The claimants claim damages and injunctions.
5. The defendants now apply for an order dismissing all of these claims on the grounds that they represent an abuse of the court’s process. Alternatively, the defendants apply for summary judgment on the grounds that the claims have no real prospect of success. The factual propositions relied on in support of these applications include, though they are not limited to, contentions that the claimants have no or no significant reputation in England and Wales, that the extent of publication within this jurisdiction was minimal or insignificant, that the claimants have neither suffered nor are likely to suffer any or any substantial or serious harm as a result of the alleged wrongs, that publication has ceased, and that there is no intention to republish.
6. By a cross-application issued two days before the hearing the claimants seek permission to re-amend their statements of case to enlarge the claim so as to complain in addition of libel by publication in the United States. The defendants take no objection to that application being determined on short notice, but invite me to dismiss it on its merits.

Publication

7. Spamhaus, which was set up in 1998, uses a variety of investigative techniques to collect data about spamming activities and to identify those it believes are responsible. This information is stored and collated in a number of databases and “blocklists”. Among the Spamhaus databases are the Spamhaus block list or “SBL” database and the ROKSO list. The SBL database contains IP addresses from which Spamhaus does not recommend the acceptance of electronic mail. The SBL database is used by ISPs to filter email content originating from those IP addresses and to terminate any services they are providing.
8. The SBL database is also used by Spamhaus as the starting point for further investigation to identify people or organisations responsible for sending spam. On the basis of such investigations the ROKSO list is drawn up and published. The Spamhaus website describes the ROKSO list in this way: “ROKSO is used by Internet Service Providers to avoiding signing up known spammers who would abuse their networks and by Law Enforcement Agencies to help target and mount prosecutions against spam and malware gangs.”
9. On the Spamhaus website the ROKSO list has its own page at www.spamhaus.org/rokso. It is an alphabetical list of around 100 alleged spammers. The page contains explanatory text which informs the reader that “The majority of the spammers on the ROKSO list operate illegally”, and that they move around to seek out ISPs with poor security or enforcement. It is said that:-

“Many of these spam operations pretend to operate ‘offshore’. Those who don’t hide behind anonymity pretend to be small ‘ISPs’ themselves, claiming to their providers that the spam is being sent out not by them but by non-existent ‘customers’. When caught, almost all use the age-old tactic of lying to each ISP long enough to buy a few days or weeks more of spamming and when terminated simply move on to the next ISP already set up and waiting.

For qualified Law Enforcement Agencies Spamhaus provides a special version of this ROKSO database which gives access to records with evidence, logs and information on illegal activities of many of these gangs, too sensitive to publish here.”

The list of names on the ROKSO page contains hyperlinks that allow the user to click through to a number of other pages which contain further information about the named individuals and organisations.

10. The Top Ten list is what its name implies, and is maintained at www.spamhaus.org/statistics/spammers with headings including “The World’s Worst Spammers”. A link to this page is provided on the main ROKSO list page. On the Top Ten list page it is said that

“Up to 80% of spam targeted at Internet users in North America and Europe is generated by a hard-core group of around 100 known professional spam gangs This TOP 10

chart of ROKSO listed spammers is based on those Spamhaus views as the highest threat, the worst of the career spammers causing the most damage on the internet currently. Spamhaus flags these gangs and individuals as a priority for Law Enforcement Agencies”.

11. It was on a date between 4 and 21 December 2013 that information about the claimants first appeared on the Spamhaus website. The ROKSO list at that time included an entry for “Mamba Hosting/Blake Corbin”. They held the position at that time of the World’s Worst Spammers. Clicking through, the user would be led to pages identifying the two claimants by name as running Mamba Hosting together with Blake Corbin, and describing Mamba Hosting as a “massive snowshoe spamming operation involving dozens of fake companies using Earth Class Mail PO boxes as an address, tens of thousands of nonsense domains registered to these fake companies.” A snowshoe operation, explains Mr Linford, is one that seeks to spread its email output across a large number of different addresses and internet domains.
12. The claimants came to know of this reference to them in late January 2014. On 31 January 2014 Mr McGee emailed Spamhaus. The evidence of Mr Ames is that this and subsequent correspondence from Mr McGee was sent on behalf of both claimants. I shall return in more detail to the correspondence. For present purposes it is enough to say that the email of 31 January said that Mr McGee and Mr Ames had been involved in business with Blake Corbin at one time but not since 2011, and that Mr McGee had a family business with two cupcake stores and Mr Ames was doing security consulting for JPMorgan.
13. In response Mr McGee was asked by Spamhaus to explain what RSR Interactive LLC and Blackstar Racing LLC were. On 4 February 2014 he explained that Blackstar Racing provided sports marketing and product promotion services in motorsports and cycling. RSR was a start-up company building a “sports action event marketing platform”, which allowed advertisers to target their content at consumers at particular times during a race when an event of a pre-selected kind occurred. This was a second attempt to do something previously tried with a company called Splitter, said Mr McGee.
14. On or around 8 February 2014 Spamhaus put the claimants on the ROKSO list and at the top of its Top Ten list. On the ROKSO list there now appeared an entry “Blackstar Media/Rob McGee/Craig Ames”. On the Top Ten list page, at number 1 on the list of “The 10 Worst Spammers” these words appeared:

“Blackstar Media/Rob McGee/Craig Ames – United States. A major league snowshoe operation, spamming for years, morphing constantly, falsified records, scads of domains.”

The claimants’ case, not disputed at this stage of the proceedings, is that “scad” is shorthand for a “scam ad” or fraudulent advertisement.

15. On the Main Info page to which the interested reader could click through to find out more about Blackstar Media and the claimants the words starting “A major league snowshoe operation ...” appeared again, and the claimants were also described in precisely the same terms as had earlier been used for Mamba Hosting/Blake Corbin

(paragraph 11 above). A list of “AKAs” appeared which included the names of Mr McGee’s cupcake business, RSR Interactive and Blackstar Marketing. At the same time as adding these words Spamhaus added to its pages two addresses for Mr Ames and one for Mr McGee, and a thumbnail of a photograph of Mr McGee which it had obtained from the internet.

16. On 14 February 2014 Mr McGee emailed Spamhaus to complain that the claimants had been “promoted” to ownership of all the companies Blake Corbin had set up over the past few months. On 19 February Mr McGee emailed Spamhaus again, but publication continued thereafter. On 15 May 2014 Carter-Ruck solicitors wrote a letter of claim on behalf of the claimants. This asserted that the claimants had substantial reputations in this jurisdiction and complained of a libellous meaning that the claimants

“run an internet business which makes use of falsified records, fake companies, scam advertising and constantly changing identities to conceal and pursue its unlawful activities, and as such they should be a priority target for law enforcement agencies”.

It was said that the publication was “plainly likely to cause serious damage to the reputation of our clients.” The letter complained also of publication of the claimants’ personal and private information in the form of their “home addresses”.

17. The claims were rejected by the defendants, but publication on the website ceased as of 31 May 2014. The pages were not, however, removed fully. The content was removed but the pages still existed so that major search engines continued for some time to index the page and to reveal snippets from the words complained of and a link to the defendants’ website indicating that there used to be an entry relating to them on the ROKSO list. The uncontradicted evidence is that the words complained of continue to this day to be accessible via an archive machine.

The claims are issued

18. Proceedings were issued on 28 July 2014. The particulars of claim allege that the claimants have substantial reputations in England and Wales and that the Spamhaus website has a substantial audience here. The particulars complain of what appeared on the ROKSO list, the Top Ten list page, and the various pages of further information on the Spamhaus website. The particulars attribute to this material the same defamatory meaning as was set out in the letter of claim. It is alleged that the publication has caused “serious damage to the claimants’ reputations”. In support of the claim for damages reliance is placed on republication of the sting of the allegations on two third party websites: a blog containing an article which reproduced the Top Ten list and described the claimants (and others on the list) as ‘cybercriminals’; and a similar article on www.aibgb.co.uk which is said to have been online for a similar period. These are alleged to have been online from March 2014 until 31 July 2014 and 13 August 2014 respectively.
19. A claim for misuse of private information is made in respect of the publication of each claimant’s “home residential address”. A claim for infringement of copyright is made on the basis that Mr McGee was the owner, by assignments of 20 May and 18

July 2014, of the copyright and all accrued causes of action in respect of the photograph reproduced by Spamhaus. Additional damages for flagrant infringement are claimed under s 97(2) of the Copyright Designs and Patents Act 1988. Injunctions to restrain repetition are sought.

20. The defendants asked for Further Information about the claimants' case that they have substantial reputations in this jurisdiction and their case on damage to reputation. On 23 September 2014 Further Information was provided. This includes details of the claimants' links to this jurisdiction. These mainly consist of business contacts, some made by Mr Ames in a period up to 2008 when he was a Vice President of JPMorganChase based in New York, but principally contacts made in the process of selling Blackstar Media to Adconion, which took place in April 2011, and in working for Blackstar Marketing since then.
21. The Further Information also sets out matters relied on to support the allegations of damage. These include the extent of publication, including its appearance in search engine searches; the gravity of the allegations; and the importance of the claimants' reputations for probity in the eyes of those who knew them already, and in the eyes of those who read the words and were potential business partners. It is said that the damage is likely to grow because of continued or further republications on the internet; and that Spamhaus' allegations "are of interest to and likely to be viewed by and circulate within not just the direct marketing and information security industry but also the wider business community."
22. In support of this and the claim for damages generally the Further Information gives details of additional republication of the sting of the words in August 2014 on three further websites: those of the Irish magazine "Business World", KBC Bank Ireland plc, and Allied Irish Bank. It is alleged that searches on the claimants' names using Google and other search engines produced defamatory snippets of the words complained of until at least 7 September 2014.

The defendants' application

23. The defendants' application was issued the day after service of the claimants' Further Information. The application to strike out the libel claims as an abuse is made pursuant to CPR 3.4 and/or the inherent jurisdiction in reliance on the principles first established in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946. The grounds stated in the application notice are that:

“(a) the claimants have no significant connection to this jurisdiction and do not have a substantial reputation to protect here, and therefore cannot establish a real and substantial tort within this jurisdiction ...

(c) the claim in libel is otherwise an abuse of process as it does not serve the legitimate purpose of protecting the claimants' reputations and/or there is no realistic 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”.

24. In the alternative the defendants seek summary judgment under CPR 24.2 on the grounds that “the claimants cannot satisfy section 1 of the Defamation Act 2013 as publication of the words complained of has not caused serious harm to the reputations of the claimants and/or is not likely to do so.”
25. The application seeks an order dismissing the misuse of private information and copyright claims as a *Jameel* abuse on grounds which mirror the terms of paragraph (c) above, or alternatively summary judgment on the grounds that the claimants have no realistic prospect of success as the acts complained of were in the public interest.
26. Although this is not specifically mentioned in the application notice, the defendants’ evidence in support of the application made much of the allegedly small scale of publication within this jurisdiction of the words complained of.

Legal principles

The Jameel jurisdiction

27. In *Jameel* a serious accusation, that two people were funding terrorists, appeared on a US website for some 4 days after which it was archived and later removed altogether. The claimant, who was from outside England and Wales, sued the US-based publisher for libel. The claim was in respect of publication in this jurisdiction only. It was later discovered that only five people here had ever accessed the website while it was live. Three of these were “in the claimant’s camp”, one being his solicitor. The defendants were able to contact the other two, neither of whom knew the claimant or could recall reading his name. The Court of Appeal held that the claim should be struck out as an abuse of process.
28. The court held that the principles relevant to an application to set aside permission to serve out of the jurisdiction were also relevant to the jurisdiction to strike out a claim as an abuse. The question of whether “a real and substantial tort had been committed within the jurisdiction” had been identified as a threshold criterion in the former context, but was also relevant to an application to strike a claim out as an abuse. Hence the wording of paragraph (a) of the defendants’ application notice. The court identified the CPR as one development which had made the court readier to strike out a libel action as an abuse, and the Human Rights Act 1998, s 6, as the source of a duty to do so where the claim represented an unwarranted interference with the Convention right under Article 10. At [55] Lord Phillips MR said that:-

“Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant’s reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.”

It is these concluding words that are the source of the first part of para (c) of the defendants' application notice.

29. Other relevant and well-known formulations of the test for striking out defamation proceedings as an abuse of process, cited with approval by the Court of Appeal in *Jameel* at [57] and *Cammish v Hughes* [2012] EWCA Civ 1655 at [56], are those of Eady J in *Schellenberg v BBC* [2000] EMLR 296. He identified the relevant questions as whether "the game was worth the candle" or whether "there is any realistic 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." The latter is the source of the wording in the second part of paragraph (c) of the defendants' application notice. At the heart of this formulation and that of the Court of Appeal in *Jameel* at [55] are the familiar notion of proportionality and the need to balance competing rights and interests.
30. To test whether the claim in *Jameel* was an abuse according to these criteria the Court of Appeal examined the extent to which continued pursuit of the action could be justified as a vehicle for obtaining vindication of the claimant's reputation, or on the grounds that an injunction to prevent repetition was required. Vindication is an important purpose of a libel action and the court accepted at [59] that vindication was the claimant's purpose. However, it held at [69] that it was not legitimate to use a claim in respect of publication here as a means of achieving wider vindication. The costs of obtaining such minimal vindication in respect of publication here as the claimant might achieve at a trial were out of all proportion to the value of such vindication. Permission to serve proceedings outside the jurisdiction would have been refused, and for the same reason the claim represented an abuse.
31. The court dealt with the injunction issue at [72]-[76]. It was common ground that the only injunction that could be sought was one prohibiting publication in this jurisdiction. The court held that where minimal publication had occurred but there was "a threat or real risk" of wider publication there might be a justification for pursuing proceedings to obtain an injunction against republication. However, the court did not see any risk that the same or similar publication would recur and found it difficult on the facts of the case to envisage how a court might formulate an injunction of value at trial.
32. The question of what threshold test must be satisfied in order to justify the grant of an injunction received further consideration by the Court of Appeal in *Citation plc v Ellis Whittam Ltd* [2013] EWCA Civ 155, where the court approved tests of good ground to fear, or good ground to infer, that unless a satisfactory undertaking was given the statements would be made again: see [18] and [30].
33. The *Jameel* jurisdiction has been exercised quite frequently in libel actions. Recent examples referred to by the parties on this application include *Subotic v Knezevic* [2013] EWHC 3011 (QB) and *Karpov v Browder* [2013] EWHC 3071 (QB), [2014] EMLR 8. The jurisdiction is however exceptional; the assessment of whether a real and substantial tort has been committed is not a "numbers game"; even publication to a single individual can be highly damaging and make a substantial and costly libel action proportionate: *Haji-Ioannou v Dixon* [2009] EWHC 178 (QB), [30]-[31] (Sharp J). A tweet published to 65 people can justify a substantial five figure award

of damages: *Cairns v Modi* [2013] 1 WLR 1015, CA. Similarly, internet publication to 550 people: *Times Newspapers Ltd v Flood* [2014] EWCA Civ 1574.

34. The *Jameel* principles are not solely applicable to claims in libel but are of general application: see *Sullivan v Bristol Film Studios Ltd* [2012] EWCA Civ 570, where a claim for infringement of copyright was dismissed. *Sullivan* also serves as a reminder, however, of why the jurisdiction is exceptional: it is a strong thing for a court to strike out a claim on proportionality grounds if it has at least arguable merit, and the court must be alive to the risk that it might unjustifiably deprive a claimant of access to justice. The claim in *Sullivan* could have been allocated to the Patents County Court had its true value been recognised in time. As Lewison LJ observed at [29] and [35] (with the agreement of Etherton and Ward LJJ):-

“29. ...The mere fact that a claim is small should not automatically result in a court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process.

... When in future a judge is confronted by an application to strike out a claim on the ground that the game is not worth the candle he or she should consider carefully whether there is a means by which the claim can be adjudicated without disproportionate expenditure.”

35. In *Jameel* at [70] and *Sullivan* at [29] two features of defamation claims were identified as making them (in Lewison LJ’s words) “to some extent ... a special case”. One was the prospect of trial by jury. That is no longer relevant in most cases, now that s 11 of the Defamation Act 2013 has amended s 69 of the Senior Courts Act 1981 so that the presumption is that libel actions, like others, will be tried without a jury. Section 69 as so amended applies to any action begun, like this one, on or after 1 January 2014. It was not submitted that I should approach this case on the basis that a trial would be with a jury.
36. The second feature identified as making defamation claims special is that such they cannot be tried in the County Court. That remains the case, save by consent. The general principles stated in *Sullivan* apply nonetheless, and CPR r 1 imposes a duty on the court to seek to deal with cases justly and at proportionate cost. Since the decisions in *Jameel* and *Sullivan*, costs budgeting procedures have been implemented to help the court perform that duty. If a libel claimant has a real prospect of establishing a tort which is real and substantial, the court should be very reluctant to conclude that it is unable to fashion any procedure by which that claim can be adjudicated in a proportionate way, and that the only remaining way of dealing justly with the case is to dismiss it.

Connections with this jurisdiction

37. A foreign claimant does not have to justify suing an English company for libel in the courts of England and Wales. The domicile of a company is the primary forum for such a claim according to Article 2 of the Judgements Regulation (Council Regulation (EC) no 44/2001), whether the claim relates to publication here, or to publication abroad, or both. None of this is controversial. The issue on this application is therefore not whether these foreign claimants should bring the pleaded claims in some other, more appropriate court, abroad, but whether they should be allowed to bring those claims at all.
38. As Ms Page QC notes in her submissions on behalf of the claimants, the wording of paragraph (a) of the defendants' application notice implies that a claimant cannot establish that he has been the victim of a real and substantial tort within the jurisdiction in the absence of a pre-existing connection to the jurisdiction, or a pre-existing reputation here. Ms Page points out that *Jameel* did not so hold and submits that this is not the law. Mr Helme accepts this on behalf of the defendants, but maintains that the extent and nature of the claimants' existing connections to and reputation in this jurisdiction are highly material to his application. I agree that these are relevant factors. However, it is necessary to beware of treating foreigners differently because they are foreigners. As Ms Page points out, that could lead to unjustified discrimination in the provision of access to justice, based on nationality.
39. The relevant law has been modified by the Defamation Act 2013, but it is convenient to consider first the common law. At common law an individual establishes a cause of action in libel by proof that the defendant published in writing or other permanent form a statement about the claimant which bore a meaning defamatory of the claimant. A defamatory meaning is one that substantially affects in an adverse manner the attitude of other people towards the claimant, or has a tendency to do so: *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985, [96]. If a statement is defamatory by this criterion, damage is presumed. The compatibility of this aspect of the common law with the Convention was confirmed by the Court of Appeal in *Jameel*.
40. Thus, the law does not require an individual who seeks to sue for libel to "surmount a preliminary hurdle ... by showing an established reputation": *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 737 at [22] (Eady J). This approach was endorsed by the Court of Appeal in *Jameel* at [28]:
- "In *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* ... Eady J expressed the view that an article defaming an identifiable individual would give rise to a cause of action even where no one reading the article had prior knowledge of the victim. While we are unaware of any authority that supports this proposition, it seems to us that it makes sound sense. There seems no reason in principle why a newspaper should not simultaneously create and besmirch an individual's reputation."
41. At common law this would amount to an actionable tort worthy of some damages, however small. It might or might not amount to a "real and substantial" tort, depending on the circumstances. Suppose a local English newspaper published an

allegation of criminal activity about someone from Wales who was completely unknown in the area but was about to arrive to set up as a solicitor in the town. The reputation thus created would be a very bad one, and the creation of such a bad reputation would be very significant to the claimant. It would be impossible to deny that a libel claim over such publication was a claim for a real and substantial tort.

42. The same applies when it comes to a claimant from overseas. In *Jameel* at [28] the Court of Appeal discussed such a case:

“To take an extreme example, imagine that an unknown American who was about to visit an English town was erroneously described in the town’s local paper as a paedophile. Manifestly the law ought to afford him a cause of action in libel.

It follows that where a statement is published to a reader that is defamatory of an identifiable individual, it will not be possible for the publisher to prove that no damage has been caused to the individual simply by showing that the reader did not know the individual.”

Although the court did not say so in terms (it was dealing here with a different issue) it would plainly have regarded this example as involving a real and substantial tort.

43. At the other end of the scale, it is possible to conceive of a very limited domestic publication about a claimant – a foreigner or a recluse - who is not only someone previously wholly unknown to any of the readers, but also someone who is never likely to encounter them or to be affected in any way by any lack of esteem in their eyes. At common law the publication of defamatory words referring to the claimant would constitute a tort. On these hypothetical facts, however, the tort would surely not be regarded as real and substantial. The creation of a bad reputation could not matter to the claimant and it is hard to see any justification for devoting any substantial resources to testing whether the publication was true or defensible in some other way. This, however, is an improbable hypothesis and cases at this or the other extreme will be rare, if indeed they ever arise. There will be many if not infinite variations between the two extremes.
44. The question of what a foreign claimant needs to establish in order to show a real and substantial tort within the jurisdiction for the purpose of the *Jameel* jurisdiction was considered by Simon J in *Karpov v Browder* [2013] EWHC 3071 (QB), [2014] EMLR 8, where the Russian claimant admitted he had no substantial reputation in this jurisdiction prior to the alleged libel. The claimant complained that a bad reputation had been created for him. Having considered *Multigroup Bulgaria* and *Jameel* Simon J arrived, at [69(2)], at the following proposition:

“A claimant may be able to show a reputation sufficient to demonstrate a real and substantial tort within the jurisdiction in cases where, although he had no reputation at the time, such reputation was created and destroyed by the publication. However such cases will usually arise where he or she has

some form of prior or imminent connection with the jurisdiction.”

45. This passage sets out a general rule and not a threshold test, and as such I see no reason to disagree with it. It reflects the obvious point that a claimant suing over a publication directed at people whose opinion cannot be a matter of any real consequence to him will find it hard to show good reason for devoting substantial resources to libel litigation. However, whether a publication in this jurisdiction which creates a bad reputation for someone who is previously unknown, or little-known, to readers amounts to a real and substantial tort will depend on all the circumstances of the particular case. The nature of the statement itself, the gravity of its meaning, and the nature and extent of its publication will always be highly relevant. The graver the allegation the easier it will be to show that the alleged tort is a real and substantial one. Also of obvious relevance will be the identity of the publishees, the nature and extent of the claimant’s existing connections here, and the claimant’s reputation amongst those who are likely to have read the statement. But it may be hard to know the extent of a person’s reputation. Moreover, the impact of defamatory statements is not often limited to the immediate publishees, or to the immediate aftermath of the publication, least of all when it comes to internet publication. A publisher is responsible for damage caused by republications which are the natural and probable or reasonably foreseeable consequence of its own publication, and it is a feature of the internet that material once published may remain accessible for a considerable time, even if removed from the original site.
46. These last points are illustrated by the facts of this case. The words complained of or their sting were republished on a number of third party sites and on Google. Although Spamhaus took down the words at the end of May 2014 they or their sting remained on third party sites for months afterwards, snippets were stored and remained available via search engines for a similar period, and the content is archived and remains accessible via the Internet Archive and Wayback. Such publications appear to me to be foreseeable consequences of publication by Spamhaus for which the defendants would in principle be responsible in fact and in law, if and to the extent that they resulted from and involved publication in this jurisdiction.
47. The above is not intended to be an exhaustive list of the factors that may be relevant to the assessment of whether there is a real and substantial tort. In short, all depends on the facts of the particular case. The court’s approach must accordingly be flexible so that, for example, connections with the jurisdiction which are planned or likely but not “imminent” could suffice. It is also important to bear in mind that in a world of globalised business and swift, easy and cheap international communications a business person can more easily build up a reputation in a foreign place without visiting it, and the creation of a bad reputation in a foreign place is more likely to be of significance. Simon J’s formulation in *Karpov v Browder* of the rule that will “usually” apply allows, as I read it, for such possibilities.

Section 1 of the Defamation Act 2013

48. The major part of the publication complained of by Mr Ames and Mr McGee took place on and after 1 January 2014 and is therefore subject to the requirements of s 1(1) of the Defamation Act 2013 which provides that:

“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.”

49. This wording does not abolish the principles discussed above. It introduces an additional requirement. The use of the word “serious” obviously distinguishes the statutory test from the common law as stated in *Thornton*. The threshold identified in *Thornton* was that the statement should “substantially” affect attitudes in an adverse way, or have a tendency to do so. The *Jameel* test also requires a tort to be “substantial”. As Bean J noted in *Cooke v MGN Ltd* [2014] EWHC 2831 (QB), [2014] EMLR 31 [37], examination of the Parliamentary history of the section shows that the word “serious” was chosen deliberately in place of the word “substantial”. It follows that the seriousness provision raises the bar over which a claimant must jump, as compared with the position established in the two cases mentioned. These points are spelled out in the Explanatory Notes to the section:-

“The section builds on the consideration given by the courts in a series of cases to the question of what is sufficient to establish that a statement is defamatory. A recent example is *Thornton v Telegraph Media Group Ltd* in which a decision of the House of Lords in *Sim v Stretch* was identified as authority for the existence of a “threshold of seriousness” in what is defamatory. There is also currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In *Jameel v Dow Jones & Co* it was established that there needs to be a real and substantial tort. The section raises the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation can be brought”.

Put another way, it is no longer enough to establish a tendency to have a substantial impact and amount to a real and substantial tort; there is now no tort unless and until “serious harm to reputation” has either been caused or “is likely to” be caused by the publication.

50. In these circumstances it seems to me that an assessment of whether a defamation claim in respect of publication on or after 1 January 2014 should be dismissed on the grounds that the actual or likely harm to reputation is too slight to justify the claim, or grounds that include this proposition, should normally start with consideration of the “serious harm” requirements in s 1. The court should ask itself whether one of those requirements is satisfied or, as appropriate, is arguably, or has a real prospect of being, satisfied. If the answer is no, then there is no tort at all and the claim will inevitably be dismissed. If the answer is yes, it may be hard to establish that the tort alleged fails the “real and substantial tort” test.
51. I accept Mr Helme’s submission that s 1 does not supersede *Jameel*. There may be defamation cases in which the pursuit, or continued pursuit, of the claim cannot be justified as a necessary and proportionate interference with freedom of expression even though the publication has caused serious harm to reputation, or such harm is likely. *Lait v Evening Standard Ltd* [2011] EWCA Civ 849, [2011] 1 WLR 2973 could be an example of such a case. *Jameel* will in any event continue to apply to other causes of action. But in a defamation case where the issues raised on an

application to dismiss include whether the publication has been harmful enough to reputation to justify the pursuit of the litigation, it risks confusion to ask first whether the tort is real and substantial and only then to look at the “serious harm” requirements. The approach should be the other way around.

52. Parliament has not defined what “serious” means, but has left it to the judges to apply what is an ordinary word in common usage: *Cooke* [39]. The factors relevant to whether serious harm has been caused or is likely will be the same in my judgment as those which come into play in assessing whether a tort is real and substantial for *Jameel* purposes, as discussed above.
53. The word “likely” in s 1 is also undefined. As is well-known, this is a word capable of various meanings. Neither party identified any Parliamentary materials which could assist as to what it means in this context. The word appears in another statutory context relevant to publication cases: s 12(3) of the Human Rights Act 1998 prohibits the court from restraining the exercise of freedom of expression before trial unless it is “satisfied that the claimant is likely to establish that publication should not be allowed”. In that context the ordinary meaning of “likely” is “more probable than not”, though a lower standard of likelihood may be required in some circumstances, as where there is a slight risk of very serious damage: *Cream Holdings v Banerjee* [2005] 1 AC 253, [22].
54. Parliament must be taken to have known this, and it may be for that reason that in *Cooke* it was common ground that serious harm will, generally, be “likely” within the meaning of s 1 only if it is more probable than not, and the defendant conceded that the lower *Cream* threshold would apply in comparable circumstances: [33]. Bean J did not expressly decide that issue. Ms Page submits that the term should be interpreted flexibly, as setting a standard of sufficient likelihood to justify continuation of the claim. I am inclined to think that Counsel in *Cooke* were right but the point has not been argued fully on this application and for reasons that appear later in this judgment I do not need to decide which approach is correct.
55. It is of course for a claimant to prove that serious harm to reputation has been or is likely to be caused. In *Cooke* at [41] Bean J declined to accept that “evidence” will be required in every case. What he meant by “evidence” is clear from his recital of the submissions made by the defendants, which included the proposition that there has to be evidence of “tangible adverse consequences”, such as adverse reactions to the publication expressed on social media, or other “visible republication or comment”: see [42] at (a), (d), (e) and (f). Bean J rejected this, accepting that serious harm can be inferred without evidence of adverse reaction from readers. This is plainly right. There may be circumstances in which one would naturally expect to see tangible evidence that a statement had caused harm to reputation, but as practitioners in this field are well aware, it is generally impractical for a claimant to seek out witnesses to say that they read the words complained of and thought the worse of the claimant. I note from *Cooke* [42](f) that the defendant’s submissions in that case did not go so far as to say that this could never be done; rather, it was submitted that the court should be “wary” of attempts to rely on inference.

Public interest

56. There is no dispute about the law relevant to this issue. A claimant in the tort of misuse of private information must prove two things: (1) that the claimant's Article 8 rights are engaged; that is, that the claimant has a reasonable expectation of privacy in relation to the information; (2) that, upon a proportionality assessment of the interference with the competing rights of privacy under Article 8 and freedom of expression under Article 10 that a decision one way or another would involve, Article 8 prevails. The second requirement has been dubbed the "ultimate balancing test" and the right approach is set out by Lord Steyn in *Re S (A Child)(Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593 [17]: neither article has precedence over the other; there must be an intense focus on the comparative importance of the specific rights at issue; the justifications for interfering with each right must be taken into account, and the proportionality test applied to each. The defendants' case of public interest is that the application of the ultimate balancing test in this case is bound to result in a judgment in their favour on the claim for misuse of the claimants' addresses.
57. It is clear law that a defence of public interest to claims for copyright infringement of copyright exists, and may prevail "in those rare cases where [the right to freedom of expression] trumps the rights conferred by the 1988 Act": *Ashdown v Telegraph Group Ltd* [2002] Ch 149, [58]. It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches, though the implications of the Human Rights Act 1998 must always be considered when an injunction is sought: *ibid* [59]. The defendants' case is that the real interest in the photograph in this case is a privacy interest, and the harm that disclosure will (allegedly) do to that interest, and that accordingly the court should approach the claim and the question of public interest by applying the ultimate balancing test.

Procedure

58. In *Jameel* itself, and in many of the subsequent decisions applying the *Jameel* abuse doctrine, the issue of abuse has been raised and determined in a summary fashion on an application such as the present, pursuant to CPR 3.4. On such an application the court should not dismiss the claim as an abuse unless it is plain that the relevant criteria are satisfied. The question is, as Eady J observed in *Mardas v New York Times Co* [2008] EWHC 3135 (QB), [2009] EMLR 8, [15] whether there has been or arguably has been a real and substantial tort committed here.
59. Where CPR 24.2 is relied on the court may not grant summary judgment unless satisfied that "(a) (i) the claimants have no real prospect of succeeding on the claim ... and (b) there is no other compelling reason why the case should be disposed of at a trial." A real prospect is one that is not fanciful: *Swain v Hillman* [2001] 1 All ER 91, 92j (Lord Woolf MR). In order to succeed on their summary judgment application in this case the defendants therefore need to satisfy me that it is fanciful to suppose the claimants might succeed at a trial in proving one or other of the serious harm requirements in s 1 and, in relation to the misuse and copyright claims, that a public interest defence as outlined above would inevitably succeed. I should not conduct a mini-trial. I shall have to bear in mind that there has been no disclosure, nor yet a Defence, and to consider whether Ms Page is right to submit that for those reasons this application is premature.

Evidence and submissions

The statement and its meaning

60. The meaning complained of by the claimants is self-evidently one that would tend to have a substantially adverse effect on the attitude of others towards them. In other words it is plainly a defamatory allegation at common law, and a serious one at that. Any reasonable businessman who read such allegations and took them seriously would avoid dealing with individuals against whom such things were said.
61. It is no part of the defendants' applications to say that the claimants cannot make good their pleaded meaning at trial, at least if one assumes the reader has viewed all the pages complained of. Mr Helme has queried whether there is any complaint of the pages individually, and whether any of them individually bears the pleaded meaning. I believe this is with a view to cutting down the potential numbers of relevant publishers. However, the defendants have not presented any more detailed analysis of this point. For their part the claimants have not sought a determination of the meaning of the offending words.
62. Having reviewed the individual pages complained of and the evidence that is available I consider it appropriate to proceed at this stage on the footing that the claimants have a real prospect of making good what I understand to be their pleaded case that over the 5 and a bit months between December 2013 and the end of May 2014 the defendants have published the allegation complained of to all those who read all the pages complained of. Even if that meaning as a whole would not be conveyed to those who only read the Top Ten list or ROKSO list, the claimants have a real prospect of establishing that a similar meaning imputing involvement in illegal spamming was conveyed to those readers. Ms Page points to the Top Ten list for the context in which the words complained of appeared, emphasising that the claimants head a list which includes a suspected fraudster (entry 4), someone (at position 5) who is alleged to have been "working with the worst cybercriminal botnet spammers", and (at 9) a Ukrainian gang "tied into distribution and billing for child, animal and incest-porn, pirated software and pharmaceuticals."

The nature of the publication

63. The purposes of the ROKSO list are identified by Mr Linford as "(i) to identify other IP addresses or domains sending out spam; (ii) to warn ISPs not to allow these individuals or companies to sign up to their networks; and (iii) to provide a deterrent effect to the person(s) responsible by naming them" on the website. The evidence makes clear that Spamhaus has gained a reputation for accuracy and reliability. The defendants' evidence describes the organisation as "one of the most widely used sources of information about known spammers worldwide ... relied on by over 2,500 ISPs", "enormously respected and influential". These matters are relevant to an assessment of the likely impact of being named. So is the evidence of Mr Ames that he knows from his own experience in the industry that Spamhaus is "well known, widely used and well respected." It is of course necessary to keep in mind that I am concerned only with publication in England and Wales but these pieces of evidence tend to support the view that readers of this website trust the information which it provides, and that being named on the ROKSO or Top Ten lists is likely to have a significant impact on the minds of readers of this specialist website.

64. Ms Page also points to evidence that Spamhaus's information has been used and relied on by official agencies including, in the UK, the Serious Organised Crime Agency, the National Crime Agency, and the OFT and, in the US, the FBI. This comes from Spamhaus's website and from its own witness statements. Mr Linford's statement exhibits plaudits from both the NCA and FBI, attesting to their confidence in the expertise and reliability of Spamhaus. I am not inclined to give these points any weight at this stage in the proceedings. The claim at present relates to publication here, so the views of the FBI are irrelevant; there is as yet no evidence that the words complained of have in fact been published to any such agency within the jurisdiction; if they have, there could well be questions of immunity from suit and those might bear on whether there had been a real and substantial tort. I confine my attention to the impact or likely impact on the claimants' reputations among others.

The extent of publication and the identities of publishers

65. The evidence as to the number of readers of the website within the jurisdiction has developed over the period since the defendants' application was issued. The evidence served on 24 September 2014 was that "the total readership of the words complained was likely to be extremely limited". The defendants said that they did not have any data from which they could determine the exact number of unique visitors to the particular URLs complained of. Instead, Ms Proudler's statement attempted estimates based on figures for overall website traffic in July 2014 which included 20,417 views of the ROKSO page and 3,424 views of the Top Ten list page. Noting that there were 110 entries on the ROKSO list it was suggested that the maximum number of visits for any particular entry on that list would be 31 and that the number of unique visitors from this jurisdiction (which would tend to be lower than the number of visits or views) "is therefore likely to be extremely limited".
66. It turned out however that the defendants did have a means of obtaining more precise data. On 9 December 2014, two clear days before the hearing of the defendants' application, Mr Linford made a further witness statement explaining that the defendants had been able to obtain and analyse webpage access information for each of the sub-pages complained of by the claimants "in order to determine precisely the total number of views and unique visitors to each URL from the UK per month." According to this assessment, the cumulative total of the monthly unique visitors from the UK in and between December 2013 and May 2014 as set out in this statement was 176. Mr Linford suggests the real figure would be lower, as a number of visitors returned over multiple months. Of the 176 unique visitors, 13 visited in December 2013, according to Mr Linford. The publications founding the misuse of private information claim were accessed 10 and 14 times.
67. Although the aim of Mr Linford's exercise was to attain precision the defendants accept that it may not be entirely accurate. The claimants' legal team have been highly critical of Mr Linford's late evidence. It shows that Ms Proudler was misled, they say, as it appears that the defendants all along had "access logs" which kept a record of the IP address from which a computer terminal has accessed its website from anywhere in the world. For that reason the court should treat the evidence with reserve. No information is given as to who carried out the exercise relied on or how it was done, and the primary material has not been disclosed. The evidence is clearly not wholly accurate, the claimants submit, as some of the addresses are "false positives", resolving to addresses in Russia, Germany or Italy. It is suggested, it seems to me

quite reasonably, that the reverse is likely to be true: some English addresses will have been missed. It is also said that in compiling their figures the defendants have treated visits from a single IP address as representing a single unique visitor whereas an institutional address is likely to be used by several people.

68. Mr Linford's evidence does not put names to the IP addresses which are listed in the print outs exhibited to his statement. The claimants' solicitors and an associate of Mr Ames have, in the short time available to them, sought to identify the names associated with those addresses. This exercise has shown that a substantial number of those addresses are attributable to ISPs. Whether that means they belong to customers of the ISPs or to the ISPs and their staff cannot be determined as yet. Other names identified from the IP addresses are a retail company, a national newspaper group, an internet entrepreneur based in Derbyshire, and Experian International Limited. Experian is one of the world's largest email advertisers. According to the evidence of the claimants' solicitor, the claimants have conducted many advertising campaigns for Experian since 2008.
69. A further point advanced by the claimants is that the defendants have not, as they acknowledge, looked at the figures for unique visitors to the ROKSO page or the Top Ten list page. The reason is said to be proportionality. The defendants suggest that those who viewed those pages but not the further click-through pages relating specifically to the claimants can be taken to be people who had no interest in what was said about the claimants. Ms Page takes the defendants' July 2014 view figures of 23,413 and their estimate that 2% of the Spamhaus website's traffic comes from this jurisdiction, and arrives at a cumulative total of 2,340 views of those pages from this jurisdiction over 5 months.

Republication

70. The defendants' figures for the number of publishees take no account of the republications complained of in the Particulars of Claim, the Further Information, and in the claimants' evidence on this application. One form of republication is via search engines. Mr Ames exhibits a Google search using "craig ames blackstar" which yielded as the third entry a snippet from the Spamhaus website including the words "ROKSO database record for spammer Blackstar Media/Rob McGee/Craig Ames". In addition there are the third party republications to which I have referred, which were not automatically generated by web crawlers but evidently resulted from a deliberate human decision to republish. Those republications are plainly of some potential significance, not least because they are evidence that publication on the Spamhaus website has had an identifiable impact of the kind said to be necessary by the defendants in *Cooke*.
71. To the five third party republications mentioned in the claimants' pleaded case the evidence of Mr Ames adds a further one: on a forum called "spamcop" which links to the Spamhaus website. A discussion using the claimants' names as "associated with distributing spam messages" was started on 4 September 2014, more than three months after the cessation of publication on the Spamhaus website, giving links to the Spamhaus site (though by this stage the claimants' names were not on that site). It is not possible to ascertain from the present evidence now how many people are likely to have viewed from within this jurisdiction these third party publications. There was some suggestion that the claimants could rely on the Internet Archive as a source of

republication, but that is not pleaded and such republication seems most unlikely to flow from publication here, as I understand the archive to be run from the USA. The matters that are pleaded and put in evidence by Mr Ames were not, however, the subject of any challenge by Mr Helme.

The claimants' connections with this jurisdiction

72. Neither claimant claims any significant personal or family connection with this country. Mr Ames has some family members here including a number of second cousins but says no more on this score. Mr McGee claims no family connections. The defendants are justified in the submission that on the evidence the only real or substantial connections are business ones. But a claimant is entitled to sue to damage to a business reputation no less than to a personal one, provided the relevant thresholds are crossed. The defendants' position is that there is in substance no evidence of harm or likely harm to business reputation.
73. There is evidence that Mr Ames had business connections with this jurisdiction in his role as a Vice President at JPMorganChase, working closely with other employees of the company based in London. He also worked with employees of three other companies who, like him, worked in the field of information security. That was over a 9 year period that ended in 2008. During that time he made three one-week visits to London, the last in 2004. These connections are therefore in large part historic, though there is continuing contact with former colleagues via LinkedIn. Mr McGee has made one visit to this country but claims no business connection with this jurisdiction other than through Blackstar Media and Adconion.
74. The claimants' case in this respect, as set out in the Further Information and the evidence of Mr Ames, is to the following effect. Blackstar Media was founded in 2008 and been built up into a successful business. There is no suggestion that it had a business presence or reputation in this jurisdiction until Adconion showed an interest in buying the business. At that point however due diligence was undertaken by employees from the London office of PwC, a number of whom travelled to the US to interview the claimants and undertake investigations into their business. The claimants had discussions with the Adconion board, several of whom are based in London.
75. The claimants rely also on an announcement in May 2011 of the acquisition of Blackstar made to all the employees of Adconion. This is not a strong piece of evidence, however, as the email making the announcement did not, however, name either claimant. Moreover it told readers that "this great news is for internal use only" and that there was a high level of confidentiality attached to the deal, which was not to be discussed "with external clients and partners at this time." The claimants are now substantial shareholders in Adconion, the total value of the sale being some US\$40m. References to the claimants in Adconion's annual return to the shareholders of the claimants are relied on. It is said that there has been contact concerning voting and stock allocations between the claimants, as shareholders, and Adconion's London based in-house Counsel. Mr Helme says, with some justification, that this is thin stuff.
76. More significant is what is said in the Further Information and Mr Ames' statement about events since the sale of Blackstar in April 2011. The claimants continued to

work for Blackstar, which involved continued contact with Adconion officers and employees based in England. This does appear on the face of it to have been full-time work at a senior level. Mr Ames says he managed the technology division and Mr McGee the daily marketing and finance. Those would appear to be significant management positions, ostensibly with some customer-facing aspect. “Since April 2011 Blackstar has, through Adconion, provided bulk email marketing services to more than a dozen UK based firms”, says the Further Information. Mr Ames says “We ran email marketing campaigns for many UK companies including Sky Sports and the solicitors, Quindell Legal Services Limited.”

77. This work evidently came to an end at the close of December 2013. After that, it appears, the claimants have concentrated on other business activities. Reliance is placed by the claimants on their involvement in a new venture, “a start-up company which we plan to launch in both the UK and the US in December 2014”. Mr Ames explains that this will be an SMS based sports marketing advertising platform for advertisers to use during live events, such as sports matches. The claimants own a UK based domain name which will be used for the company’s UK based website and they “plan on incorporating a London entity to manage the UK operations.” It turns out from the submissions of Miss Page, though it was not spelled out in the evidence, that the “start-up” is RSR Interactive, the company mentioned by Mr McGee in his email of 4 February 2014 (paragraph 13 above). The claimants maintain that they hope and intend to continue to do business here.

The likely impact of publication

78. It is a striking feature of this case that in his email correspondence of January and February 2014 Mr McGee combined his requests for removal of the claimants’ names from Spamhaus records with assertions that being named could not affect their current businesses. The key points are these:
- i) On 31 January Mr McGee said that he and Mr Ames had been involved in business with Blake Corbin at one time but not since 2011. He said “Neither one of us has anything to do with ‘Mamba Hosting’ or whatever Blake Corbin is doing now” and that “we definitely don’t own or have any part in Mamba Hosting or anything else Blake Corbin is doing.” Mr McGee said that he had a family business with two cupcake shops and Mr Ames was doing security consulting for JPMorgan.
 - ii) On 4 February Mr McGee said “You have both RSR Interactive and Splitter as part of Mamba Hosting, but they don’t have anything to do with Corbin or email and neither have either of us for three years.” He said that having the claimants’ names in Blake Corbin’s records “doesn’t matter in our business – we just don’t want to be associated with him in any way...”
 - iii) On 14 February Mr McGee alleged that Mr Corbin and two others who used to work with the claimants were disgruntled ex-staff of Blackstar, and the claimants were not co-owners with them of any businesses. He said “if we were still involved [in] that business, it would be a problem. But as I told you before you promoted us to Number One Spammers in the World, we have moved on. Cupcake buyers and motorsports clients don’t consult the Spamhaus lists.”

- iv) On 19 February Mr McGee stated that he and Mr Ames had sold Blackstar in 2011 and “We have moved on to other things and other industries that have nothing to do with that industry or your regulatory site.” Of RSR Interactive he said it had nothing to do with email “and will never interface with anyone who sends email or has ever heard of Spamhaus. The same is true of cupcake stores and Splitter Interactive. ... Your listing does not and cannot affect our current businesses and frankly I cannot afford the distraction so do what you will.”
79. Understandably, the defendants relied on these statements, both in response to the letter of claim and in their initial round of evidence in support of this application, as evidence that what they published was harmless. The claimants’ case is however that these statements were “incorrect”, as it is put in their skeleton argument. Their evidence, as already noted, is that they remained in the email marketing business until December 2013. They also maintain that the impact has in fact been serious. Mr Ames, speaking for both claimants, says that in January 2014 “many people from within the industry that we work in contacted me about the publication”, including individuals working for advertising agencies, email service providers and computer data centres. In February, people from Adconion contacted the claimants about the Spamhaus listing. It is said by Mr Ames that the allegations go “to the very core of what we do professionally” and that “nothing could be more damaging to our business and personal reputations”. The claimants point to the fact that the list of known publishees includes ISPs, and an internet entrepreneur, all of whom they suggest are or could be important to them. They express serious concern that if and when they engage in dealings which lead to due diligence being undertaken the allegations will be found in the records, as a result of the publication complained of, and damage their prospects.
80. The defendants’ present position is that it is true that Mr McGee lied in his emails about the claimants’ links with email marketing, which continued well after 2011. Indeed, the defendants go so far as to maintain that the claimants were not only engaged in the bulk email business as employees of Blackstar Marketing. Mr Linford says that contrary to what was said in Mr McGee’s emails “Spamhaus has however collated further evidence which directly links a number of the companies more recently set up by the claimants to spamming operations.”
81. The parties are at odds about whether what all agree were falsehoods were in any way justified. The defendants identify what Mr McGee said as part of a string of lies told by the claimants; I will return to this. The claimants say they quite properly chose as a tactic to give a false impression about their connection with Adconion, and about how concerned they were about the allegations against them, “in the hope that this would persuade Spamhaus to remove the allegations, and not to start making similar serious but unfounded allegations against Adconion.” The claimants maintain that this was justified by the defendants’ irresponsible approach to the making of serious allegations, and the way that they arbitrarily added businesses such as Mr McGee’s cupcake business to the ROKSO listing. Mr McGee explains that “Spamhaus is unregulated and unaccountable”. He relies on a New York Times article of 2009 exhibited by Mr Linford which records among other things that the Department of Trade and Industry was then in discussions with Spamhaus to make its blacklisting more transparent, with well-defined procedures for those who want to challenge their placement on the lists. He says Spamhaus in fact has a policy that, “once they have

described someone as a spammer they publish everything they know about them which ‘may be relevant to that individual’s spamming activities.’”

The prospect of future publication

82. The Spamhaus policy referred to by Mr McGee is set out on the Spamhaus website in these terms:-

“If you resume spamming, any new information on you submitted to ROKSO (such as a spam sample or anything even remotely connected to you) automatically makes all of your ‘dormant’ records ‘live’ again for another six months, and so on.”

83. Mr Ames, referring to third party allegations which appear to have been amongst those prompting the listing of the claimants, observes that “if, for example, Mr Corbin or the Moldovan ISP ... were to make further allegations against us then it appears according to its stated policy that Spamhaus would republish the entirety of the allegations complained of.”

84. The defendants’ initial round of evidence said nothing about the claimants’ claim for an injunction. Mr Linford’s statement in reply does not dispute the wording of the Spamhaus policy as set out above. He disputes the claimants’ characterisation of the Spamhaus position but does not explain exactly what it is. He asserts that “there is no suggestion that the [defendants] intend to republish the allegations at this time” and that “there is no intention to republish the allegations.” I asked Mr Helme about the defendants’ position on this front and he made clear that he could not limit their freedom of action and that they would not provide undertakings as the situation could change.

85. Mr Linford’s second statement makes the point that the words complained of were removed from the website in May 2014. The evidence as to why the claimants’ names were removed from the ROKSO list when they were is however puzzling. In an email of 27 May 2014 Mr Linford explained what was then the prospective removal of the claimants’ names from the ROKSO list, by stating that this would take place on 1 June in accordance with Spamhaus’s “six month policy”. However, the claimants only went on the list during mid to late December 2013, less than 6 months before 1 June 2014. Further, as already noted, Mr Linford maintains that Spamhaus has evidence of more recent spamming activity by the claimants. He refers to notifications about the claimants received by Spamhaus within the previous 6 months: in January 2014 from a US-based ISP, and in April 2014 from the Moldovan ISP mentioned above. He identifies these notifications as elements of what he calls the “overwhelming” evidence supporting the listing of the claimants on ROSKO.

86. The claimants’ concern at the risk of future publication is fuelled by their view that Spamhaus has a faulty approach to the classification of “spam”. First, it is said that Spamhaus classifies email as spam even if it is sent in the USA, lawfully by the local law. That appears to be correct, and I did not understand it to be disputed. Secondly, it is said that Spamhaus has denounced the claimants as spammers even though it has not been able to produce any evidence that the claimants engage in the sending of emails that qualify as “spam” under Spamhaus’ own definition. That definition

denotes an electronic message as “spam” if two conditions are met: “(A) the recipient’s personal identity and context are irrelevant because the message is equally applicable to many other potential recipients; and (B) the recipient has not verifiably granted deliberate, explicit, and still-revocable permission for it to be sent.” The claimants’ position is that not only have their bulk email activities at all times been lawful under US law, they have also always had the recipient’s permission; Mr Ames say “every recipient of emails sent by us on behalf of clients has given relevant ‘opt-in’ consent”. Thus, the claimants’ emails have not met the Spamhaus condition (B).

Potential defences

87. The defendants do not invite the court to reach a conclusion on the merits of their potential defences to the libel claim. Indeed, they have not spelled out what those defences would be. However, as indicated above, they have put in evidence of their own operations and how it came about that the claimants were listed. Mr Linford says the purposes of the evidence are that it is relevant to the public interest of the publications complained of, and will enable the court to take account of all the circumstances in assessing whether the claims are an abuse of the court’s process.
88. Mr Linford says that on the basis of the investigations he describes the defendants “concluded that the addition of the claimants to the ROKSO list in the circumstances complained of” was in the public interest and correct. That indicates that the intended defences would be likely to include at least a public interest defence under s 4 of the Defamation Act 2013 (and a *Reynolds* plea in respect of the publication in 2013). I take it that the evidence in support of those defences would be along the lines of the evidence contained in Mr Linford’s first statement and its exhibits. Similarly, as regards evidence in support of the “public interest” in respect of misuse of private information and copyright infringement. It seems that the defendants would also anticipate pleading a defence of truth, as Ms Proudler’s statement invites the court to take into account the potential likelihood of the defendants succeeding with a defence pursuant to sections 2 and 4 of the Defamation Act 2013.

The misuse and copyright claims

89. The defendants maintain that these are “add-ons” of no real consequence or value which were not pursued in the correspondence by Mr McGee but surfaced only when the claimants’ lawyers got involved.

“Lies”

90. Mr Helme invites me to take into account against the claimants three lies which he submits they have told.
 - i) The statements in Mr McGee’s emails that he and Mr Ames had nothing to do with the email business since 2011, when in fact they had continued involvement in the ways described in their evidence. I have described the evidential position in this respect, and the claimants’ response, above.
 - ii) The statements in Mr McGee’s emails that Messrs McGee and Ames had no connection with Mamba Hosting. These are said to be lies because Mr Ames’ evidence identifies Mamba Hosting as a trading name of a subsidiary of

Blackstar Media called Trabuco Media LLC which he says “was owned by me and Mr McGee”. Ms Page responds that it was true when the emails were sent by Mr McGee that the claimants had no connection with Mamba Hosting, because Blackstar Media and its subsidiaries had all been sold to Adconion – which is Mr Ames’ evidence - and that in any event misleading the defendants was justified for the reasons discussed above.

iii) The complaint that the addresses disclosed on the website included Mr Ames’ “home address”. The Particulars of Claim, verified by a statement of truth signed by the claimants’ solicitors, identified the published addresses as “addresses where the claimants live with their families”. This was not true of the addresses attributed to Mr Ames. The two addresses attributed to him are both former addresses of his, but he has not lived at either since February 2012. His family presently lives at one, but not he. The defendants are able to allege that this is a lie because Mr Ames’ witness statement of 27 November 2014 disclosed this information, and on 4 December 2014 the claimants amended the Particulars of Claim to correct what had originally been pleaded. Mr Ames’ response to the allegation of mendacity is given by Ms Page: that this error was not a lie but simply a mistake, voluntarily disclosed and put right.

91. The submission of Mr Helme is that I should on this application make findings that the claimants have acted dishonestly in these three respects and conclude that any vindication they might otherwise receive at trial would be “enormously reduced” accordingly. Alternatively, he submits that I should find that it is very likely that the claimants would at any trial be found dishonest and should assess now their prospects of securing valuable vindication at trial as not worth the candle.

Discussion

The libel claim

92. I have concluded that each of the claimants has a real prospect of establishing that publication of the words complained of within the jurisdiction during 2014 has caused serious harm to his reputation. The reasons for reaching that conclusion are these:-

- i) The claimants may very well establish that the website publication bore the meaning they complain of, or a similar meaning, not only to readers of the Main Info and other sub-pages on the Spamhaus site but also to anyone who read the main ROKSO list or Top Ten list pages, and to those who read the republications of the sting of the Spamhaus allegations on third party websites.
- ii) Such meanings impute unlawful conduct in the course of business and, in the case of the full pleaded meaning, seriously unlawful, deceitful conduct over a period of years. That is inherently seriously harmful to reputation, that is to say it has a tendency to cause serious harm to reputation.
- iii) The communication of that meaning is likely in every sense of the word to deter the reader from dealing with or associating with the claimants, provided the reader believes the meaning conveyed to be true.

- iv) On present evidence, what Spamhaus says about those on the ROKSO and Top Ten lists is very likely indeed to be taken as true and relied on by readers, except perhaps by those so close to and trusting of the claimants that they would know or believe the allegations to be untrue. It is common ground that Spamhaus is considered authoritative and reliable. The republications relied on by the claimants support that view. The defendants' own evidence makes clear that Spamhaus customers or readers rely and act on information provided by Spamhaus, when it comes to the claimants.
- v) It is not possible to say at this stage that there was only insubstantial publication within the jurisdiction of these seriously harmful allegations. The extent of publication within the jurisdiction for which Spamhaus is responsible has yet to be fully established. There has been no disclosure. The defendants initially gave false evidence about their ability to identify the scale of publication. Their key evidence on this issue was served only shortly before the hearing, and involved a mass of material. It is not a satisfactory basis for concluding that the maximum number of relevant readers is, as they maintain, some 176. There are legitimate questions raised about the reliability of that figure, and there is reason to believe that an exercise less rushed than this one seems to have been would identify additional publishees.
- vi) Moreover, there are those who read the claimants' names on the ROKSO or Top Ten lists but did not delve further. There may have been more than 2,300 of these. It is not fanciful to suggest that the relevant audience includes these publishees. Beyond this there are the republications complained of, made in at least some cases on apparently authoritative websites, though again the extent to which these flowed from and were made within this jurisdiction is as yet uncertain. (I leave out of account the Internet Archive).
- vii) It is not possible to say, either, that publication in this jurisdiction was clearly inconsequential. I accept Mr Helme's submission that the third parties whose adverse reactions are described in Mr Ames' statement were, as a matter of inference, abroad or Mr Ames would have said otherwise. I do not accept, however, that the fact that the claimants cannot identify people who read the words here and thought the less of them leads to the conclusion that no such people exist. Mr Helme is on firmer ground with his submission that I should be suspicious of the claimants' case and evidence about the impact of the publication on their business interests here.
- viii) I agree that seriously harmful allegations about a person may not cause "serious harm" to reputation if they are made to people whose opinion of the claimant is of no consequence to the claimant. I agree also that the claimants' conduct of the email correspondence raises real suspicions about the validity of their present case that the publication caused serious harm. However, though they are foreign, the claimants do have past and present business connections here that their evidence suggests may be substantial and material. I have in mind in particular their roles as managers within Blackstar Marketing for what I understand to be some 18 months (from April 2011 to December 2013), at a time when the company was conducting email marketing for UK businesses. This could turn out to lack significance but it is not obviously insubstantial.

- ix) As importantly, or more so, the claimants say they wish and intend to do business here in future, and are on the verge of launching a start-up business with a UK presence. Again, the claimants have questions to answer about this new venture. It may prove that this does not in fact have the significance which it presently appears it may have. But I cannot simply reject their evidence on these issues. It is not obvious at this stage that there is a bright line between the readership of the Spamhaus website and those whose opinion of the claimants could be of real significance for their business prospects. Already, the claimants are able to identify among the publishees a number of ISPs, a newspaper publishing company, and a company with which they have previously done substantial business. They attribute significance to these publishees and are not obviously wrong to do so.
- x) In my judgment, therefore, although they might fail on the issue after full disclosure and a full examination of the evidence, the claimants have a real prospect of establishing that those within the jurisdiction who read and are likely to have believed the words complained of (and the republications of their sting) include people whose opinion of the claimants is of serious consequence to them and their business prospects. Proof of that much could be sufficient to establish that serious harm to reputation has been caused, even if no such individual was called to give evidence.
93. Mr Helme is justified in submitting that the claimants have lied to the defendants about their connections with the email marketing business since 2011. The defendants concede as much. That may affect the court's approach to their evidence if this case comes to trial. I am however not prepared on this interim application to make findings of dishonesty against the claimants in the other two respects advanced by Mr Helme. His allegations are disputed and not obviously correct; they must in fairness be tested through cross-examination. Nor am I persuaded that the lies that I have accepted the claimants have told must inevitably reduce to vanishing point any vindication they could achieve at a trial. The principle on which that would be so was not explored, but those lies were not told to the court. The claimants' explanation of why they lied may be accepted at a trial. If the claimants succeed at trial they will have cleared their names of allegations far graver than duping an organisation which was continuing to publish serious allegations which, on this hypothesis, were false and made without a public interest justification.
94. Bearing in mind these conclusions, I do not consider that this claim can properly be dismissed as an abuse of the court's process. It is clear to me that, contrary to Ms Proudler's evidence, I cannot reach any reliable conclusion one way or the other about the prospects of success of defences of public interest or truth. I certainly cannot find it likely that the defendants will succeed on either. The claimants vehemently deny all that is alleged against them. Ms Page points out that the defendants' evidence does not include a single example of spam sent by the claimants; that they have put forward no evidence to support allegations that the claimants used "nonsense domains", falsified records, or scam advertising. If the claimants are able to establish that they have suffered or are likely to suffer serious harm to reputation as a result of publication in this jurisdiction, their attempt to seek vindication through these proceedings is in my judgment inherently legitimate. I do not accept that it has been shown that the time and cost required to resolve disputed issues would be out of

proportion to the value of such vindication. It should not be beyond the court's ability to manage a case of this nature in such a way as to keep costs within reasonable and proportionate bounds.

95. I have dealt with 2014 publication without reference to the second limb of s 1(1) of the 2013 Act. I do not consider that the second limb applies here. Reputational harm is caused by publication. The defendants' publication ceased more than 7 months ago. There was republication after that, as late as September. It is possible that the harm to reputation caused by what was published up to then may in future cause other forms of harm, such as lost business opportunities. But it does not seem to me likely, in any sense of the word, that there will be further re-publication in this jurisdiction flowing from publication here by Spamhaus between 1 January and 31 May 2014.
96. The limited publication in December 2013 is subject to the common law and not the 2013 Act. Looked at in isolation the claim in respect of that publication might well have fallen foul of *Jameel*, but it would be artificial to consider it separately when I have concluded that the claim in respect of publication in 2014 survives the defendants' challenges, and the evidence does not yet identify who read the words complained of when.
97. A further reason for rejecting the defendants' application is that in my judgment, the claimants have demonstrated sufficient grounds to fear that unless restrained the defendants would further publish words to the same effect as those complained of, or some similar effect. The evidence that the claimants' entries on ROKSO were "retired" under a 6 month policy is questionable. It is arguable that this was just an attempt to fend off a claim by the claimants. The defendants evidently do not accept that what they published was wrong, or wrongful. Mr Linford's statements that there is "no intention" to publish further mean no more than they expressly state; they are not equivalent to an undertaking not to repeat. The defendants have not disavowed or explained away the Spamhaus policy on which the claimants rely. That policy does appear at least arguably to involve a light trigger, which Spamhaus is willing to pull at the prompting of third parties. There is some support, in my judgment, for Ms Page's submission that the Moldovan ISP which reported the claimants to the defendants did so on the basis of its receipt of the defendants' own SBL, containing the name of the claimants' business Splitter Interactive. In other words, the report was self-generated.
98. The existing claim would only justify an injunction to restrain publication within this jurisdiction. That could justify concern about whether an injunction so limited might be useless, if the defendants were free to publish elsewhere, or impractical. However, neither submission was made by Mr Helme, and as appears below I have concluded that the claimants should be permitted to claim in respect of publication in the US as well as this jurisdiction.

Misuse and copyright

99. The defendants' approach to the issue of public interest is odd. They accept that the court cannot determine the merits of a public interest defence to the libel claim but assert that public interest would inevitably prevail in respect of the claims in misuse and copyright infringement. That is to my mind an inconsistent stance; the differences between the defences are not such as to justify that position. Indeed, the public interest arguments in respect of the misuse and copyright claims must be

parasitic on the defendants' argument in defence of the libel claim, that they have a public interest justification at common law and by statute for warning readers that the claimants are spammers highly deserving of attention by law enforcement officials. If that argument is made good then the disclosure of what is accepted to be information of a private nature might be held proportionate. Similarly, reproduction of what is accepted to be a photograph in which copyright subsists might be justified by the public interest. However, once it is accepted that the court cannot find that a public interest defence to libel would inevitably succeed, I do not consider that it can be said that the other claims must fail.

100. Those claims are clearly subsidiary to the libel claim and not of great value at best. There is much to be said for the proposition that they are makeweights. If they were all that this case was concerned with then a proper application of *Jameel* principles and the overriding objective would surely demand that the action be transferred for resolution by a small claims procedure. As it is, the central if not the only real issue as to liability in both these claims is one that overlaps with what is either the main issue, or a main issue in the libel action. It would be absurd to separate the claims. To try the issue of public interest not only in the libel context but also in respect of these other claims would add very little to the case in terms of time and cost.

Comments on Procedure

101. In my judgment it is likely in today's legal context to be preferable to address issues of serious harm or *Jameel* abuse by means of preliminary issues, with any disputes as to meaning being resolved at the same time. On an abuse or summary judgment application it may well be found, as I have found, that the case is not ripe for a final decision and the facts deserve further examination. At a trial of preliminary issues the court can decide the relevant issues once and for all. In *Ansari v Knowles* [2013] EWCA Civ 1448 the issue of whether the claim represented *Jameel* abuse was tried as a preliminary issue: see [9]. This approach is all the more appropriate in the light of the change in the law by s 1 of the 2013 Act. In *Cooke* the issue of what meaning the words bore and the question of whether the publication had caused or was likely to cause serious harm were tried together as preliminary issues. For the purposes of a preliminary issue trial disclosure can be ordered if and to the extent necessary and proportionate in the circumstances. There may be cross-examination. In *Cooke* there was none, and Bean J observed that it would have been inappropriate in that case: see [24]. It may not always be so, however, and this case may well be an example of one where cross-examination would be appropriate.
102. I would add that claims should now be pleaded in terms reflecting the wording of s 1 of the 2013 Act, making clear which limb or limbs are relied on, and should set out any facts relied on in support of an allegation of actual or likely serious harm to reputation.

The proposed Re-Amended Particulars of Claim

103. The proposed re-amendment would add allegations that the claimants have substantial reputations not only in England and Wales but also "throughout the world including in the United States"; and that the words complained of were published, not only here but also "throughout the world including in the United States"; and a new paragraph

11A, to follow the allegation of serious damage to reputation in paragraph 11, as follows:

“The claimants claim over publication of the words complained of above within England and Wales and in the United States. The Claimants will rely on the presumption that foreign law is the same as the law of England and Wales”.

104. Thus, despite the reference to worldwide reputations and publication it is clear that the proposed amendment is intended to expand the claim by complaining in addition of libel in the United States only, and not in any other jurisdiction. I do not understand the draft amendment to involve any claim for misuse of private information or copyright infringement anywhere outside England and Wales. The plea in relation to foreign law is in a form conventional in libel actions over foreign publication, to which the relevant choice of law rule remains the common law “double-actionability rule”.
105. The claimants’ application was a response to the defendants’ second round of evidence, and what it said about the scale of publication. The witness statement in support of the claimants’ application, made by Mr Tait of their solicitors, explained the amendment in this way: “Now that the defendants have chosen to state with precision their case on the extent of publication... the Claimants wish to bring a claim over the US publications to guard against the risk that the Court considers that case is sound.” The defendants do not object to this proposed claim on jurisdictional grounds. As I have already noted, there would seem to be no available basis for them to do so. Moreover, as the claimants have pointed out, according to press reports Spamhaus has in the past taken the position that a claim against it over US publication should not be brought in the US, but in the UK. Mr Helme takes three main points in opposition to the application.
106. First, Mr Helme submits the proposed claim is an abuse. He points to the delay in making complaint of US publication, and fastens on Mr Tait’s statement suggesting it shows the application is “tactical”. By this I took him to mean that it is not made in good faith with a view to obtaining vindication. That, however, is contrary to other evidence in Mr Tait’s statement which maintains that the claimants’ objectives are vindication and an injunction. There is no sufficient basis for me to reject that evidence on this interim application. Mr Helme also submitted that no injunction could be obtained to prevent UK publication, based on a claim in respect of US publication. That must be right, but the point does not arise given my conclusions above.
107. Secondly, Mr Helme submits that the claim would be bound to fail as there is no evidence of serious harm to the claimants’ reputations in the USA. I am not sure that is right, as the claimants are based in California, it is a matter of obvious inference that there has been substantial publication of the offending words in the USA, and the third parties whose adverse reactions Mr Ames describes in his witness statement are likely to have been people who read the words in the USA. In any event, it is not plain and obvious that the claimants could not establish the existence of serious harm to their reputations in the USA and it would not be right to refuse permission on those grounds.

108. Mr Helme's third point is that it is not legitimate for the claimants to plead reliance on the presumption that foreign law is the same as English law. His submission is that it is common knowledge that US libel law differs substantially from that of England and Wales, giving greater weight to freedom of speech; the claimants should plead their case of foreign law and the facts required to establish liability under that law, and adduce evidence of the foreign law. Having failed to do that they have failed to plead a proper case or to establish its validity.
109. It is true that English defamation lawyers are reasonably familiar with the First Amendment and the doctrine established in *New York Times v Sullivan* 376 US 254 under which a "public figure" must prove malice in order to succeed in a libel claim. That is not itself a doctrine of English law. It does not necessarily follow that US law must be pleaded by a claimant. The claimants' evidence anticipated Mr Helme's point by asserting, through Mr Tait, that the English law public interest defence under s 4 of the Defamation Act 2013 is close to the *Sullivan* public figure defence. That may or may not be so; that is a large topic. I prefer to rest my decision on this issue on the Court of Appeal's decision in *OPO v MLA* [2014] EWCA Civ 1277. The court there held that despite certain doubts and reservations expressed in earlier first instance authorities the "presumption" referred to in the claimants' draft amendment, that is to say the rule that in the absence of evidence to the contrary the court will presume that foreign law is the same as English law, is a rule of the domestic law of evidence which remains valid and applicable in a claim governed by foreign law. See in particular Arden LJ at [108] - [111].
110. In the circumstances the claimant does not need to adduce evidence of US law unless and until it is raised as an issue. As Ms Page submitted, if the defendants wish to plead that the claimants are public figures for the purposes of United States law, or to rely on any other provision of US law, they can do so and the claimants can plead whatever they may be advised to plead in Reply. It is clear from the claimants' evidence and submissions that they are prepared if necessary to plead a case of malice, in the form of recklessness as to the truth. I cannot tell at this stage whether such an allegation could be adequately particularised, and I have not been invited to find that it could not.
111. For these reasons I am prepared to grant permission to re-amend the Particulars of Claim to plead a claim in libel in respect of publication in the United States. The Particulars need some slight adaptation to make it crystal clear that it is this and no other foreign publication claim that is being added by re-amendment, but otherwise I consider the draft amendment to be adequately pleaded.

Conclusion

112. For the reasons given above, the defendants' application fails. The claimants' application succeeds, subject to reformulation of the draft Re-Amended Particulars of Claim to meet the point mentioned above. I will hear the parties on the appropriate directions at this stage, but say now that it is clear to me that the court should take the opportunity to give directions now, including directions to ensure that this litigation is conducted in a proportionate way in the period before a costs budget is set.