Neutral Citation Number: [2016] EWHC 665 (QB)

Case No: HQ 15 D 04437

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2016

Before :

MR JUSTICE WARBY

- -

Between :

MOHAMED ALI HARRATH	**Claimant**
- and -	
(1) STAND FOR PEACE LIMITED	
(2) SAMUEL WESTROP	**Defendants**

- -
- -

Jacob Dean (instructed by **Carter-Ruck**) for the **Claimant**
Adam Speker (instructed by **Seddons**) for the **Defendants**

Hearing date: 22 March 2016

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Approved Judgment

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

...Mark Warby.......

MR JUSTICE WARBY

Mr Justice Warby :

INTRODUCTION

1. The claimant in this libel action applies to strike out parts of the Defence. The defendants cross-apply for permission to amend the Defence. The main issues raised by the applications relate to matters on which the defendants rely, or seek to rely, in relation to the threshold issue of serious harm to reputation and the amount of any damages. The issues are whether reliance on such matters is legitimate in principle, properly pleaded, and sustainable as a matter of fact. In addition, there is a costs dispute arising from the defendants' abandonment, after the issue of the application to strike out, of two of the substantive defences originally pleaded, and the costs of the defendants' proposed amendments.

FACTUAL AND PROCEDURAL BACKGROUND

The parties

2. The claimant, Mohamed Ali Harrath, was politically active in his home country of Tunisia before coming to this country, as he says, some 21 years ago in 1995. He says that he was recognised as having refugee status in 2000 and has been granted indefinite leave to remain. These points are not as yet agreed. What is common ground however is that the claimant is the founder and CEO of the Islam Channel, a UK-based TV channel with an Islamic focus.

3. The first defendant is the organisation Stand for Peace, a limited company. It operates a website www.standforpeace.org.uk, (the Website) on which it describes itself as a "Jewish-Muslim interfaith organisation" which "provides a platform for rational discussion of the topics that drive the Muslim and Jewish community apart". It says that it aims to provide "a comprehensive list of all religious, political extremism in the United Kingdom" and to "provide a fair and well referenced account of the forces that threaten the liberty, equality, tolerance and democratic values that make Britain a free society". The second defendant, Mr Westrop, is a director of the first defendant.

The Article complained of

4. The claim arises from an article which the defendants posted on the Website on 27 October 2014, under the heading "Subway withdraws sponsorship of extremist charity fundraiser". The story was explained in the opening paragraph of the article:

> "On 31st October, the Human Relief Foundation will hold a fundraiser, "Reviving Gaza", in Manchester. The event was initially sponsored by the fast food chain, Subway, but which withdrew its support once aware of extremist links."

5. The "extremist links" were then identified. So far as relevant, these were as follows:-

> "Guest speakers are advertised as Yusuf Zahaby, Muslim Belal and Rahim Jung.
> …

> Rahim Jung is a presenter on the Islam Channel. **[A]** According to the counter-extremism Quilliam Foundation think tank, "Several presenters on the Islam Channel are…active members of Hizb ut-Tahir, a global movement which is dedicated to establishing a totalitarian state in which women and religious minorities would be systematically deprived of their basic human rights." **[B]** The Islam Channel, in addition, was found to have advertised DVDs of al-Qaeda ideologue Anwar al-Awlaki's sermons and **[C]** in 2010 was censured by Ofcom for advocating violence against women and marital rape. **[D]** Its CEO, Mohammed Ali Harrath, is a convicted terrorist."

6. The lettering has been added by me, for ease of reference later in this judgment. The underlining is also added, to indicate a hyperlink which took the interested reader to an article on The Guardian website, first published on Sunday 24 October 2010.

The Guardian article

7. The article was headed "Baroness Warsi told by David Cameron not to appear at Islamic conference." I shall refer to this as allegation **[E]**. There was a sub-headline "Conservative leader's stance exposes coalition government differences on tackling Islamist extremists." This reflected a theme of the Article, which reported that the Conservatives' coalition partners, the Liberal Democrats, were opposed to a boycott of the event.

8. The conference itself was described as "aimed at improving community relations", but it was said that "critics have pointed out" that a number of the speakers due to appear had "justified suicide attacks and promoted Al Qaida, homophobia and terrorism." The article went on in this way:-

> "The conference, which is expected to draw up to 60,000 visitors, is likely to witness clashes between moderate Muslims and extremists. One influential Muslim scholar, Tahir ul-Qadri from Pakistan, will denounce those in the audience who subscribe to terrorism as "disbelievers". Qadri, whose spokesman confirmed that he had hired a large security team after receiving death threats, expects a hostile reception from elements of the crowd. The spokesman added: "We want to bring a moderate view of Islam to a new audience, not just preach it to the converted."

9. The Islam Channel and the claimant were identified as organisers of the conference in a paragraph that was evidently the point of reference relied on for the hyperlink:

> "The conference has been organised by Britain's most popular Muslim television station, the Islam Channel, which earlier this year was accused by a Muslim thinktank, the Quilliam Foundation, of promoting extremist groups. The Quilliam report added that the channel's chief executive and principal conference organiser, Mohammed Ali Harrath, has a conviction

> in Tunisia for terrorism related offences. Harrath insists that his Tunisian organisation is a non-violent political party."

10. The defendants' Article remained on the Website until March 2016, that is, for some 14 months after first publication and some 11 months after the initial complaint.

The claim

11. Complaint was first made in April 2015. It seems the article was brought to the claimant's attention by a journalist specialising in Islamic issues. Pre-action correspondence followed, and on 26 October 2015 the present claim was issued. This was just under a year after first publication. Although the article was still on the Website it was considered necessary to issue proceedings on that date, to ensure that the claim was not barred by limitation by virtue of the "single publication rule" in s 8 of the Defamation Act 2013. The defendants had declined the claimant's suggestion of a "standstill" agreement to ensure that pre-action steps could be taken without placing the claim in that jeopardy.

12. The claimant continued to press for a negotiated solution to the claim, but the defendants insisted through their solicitors that the proceedings should be served, and that was done on 17 November 2015. The defendants declined to agree to a stay for negotiation, as proposed by the claimant, and Particulars of Claim were served on 15 December 2015. These complain of the words "Its CEO, Mohammed Ali Harrath, is a convicted terrorist." The meaning attributed to those words is that "the claimant is a terrorist."

13. As is now the practice, the Particulars of Claim set out the facts and matters relied on in support of the claimant's case that publication had caused or was likely to cause serious harm to his reputation. Among the matters pleaded in that connection is the following (at para 9.3).

> "The Claimant will invite the inference …. that the article has been read by a substantial number of readers … [and] that the readership consisted largely of those interested or involved in researching or campaigning against Islamist terrorism and extremism, in whose eyes the claimant's reputation is particularly important to him…."

14. In aggravation of damages, the Particulars of Claim complain at paragraph 11 of the way in which the defendants and their solicitors responded to the complaint. The complaint is, in essence, twofold: that the defendants forced the pursuit of the claim rather than engaging in reasonable negotiation; and that their solicitors thereafter wrote aggressive and provocative letters which have significantly aggravated the claimant's distress. These, clearly, are matters potentially relevant to injury to the claimant's feelings as opposed to harm to reputation.

The Defence

15. The Defence, filed on 18 January 2016, raised seven main issues.

(1) It was not admitted that the words complained of were published – that is, communicated to any third party - as opposed to being posted. The defendants admitted responsibility for posting the article.

(2) It was admitted that the words complained of were defamatory at common law, but averred that all or most readers would have read those words alongside those of the *Guardian* article in which case it was denied that they were defamatory; and it was denied in any event that the serious harm requirement imposed by s 1 of the Defamation Act 2013 is satisfied.

(3) It was alleged that any publication took place on an occasion protected by statutory qualified privileges for fair and accurate reports.

(4) The defendants pleaded that they would defend the words complained of as substantially true. I shall return to the detail of these last two defences.

(5) The defendants pleaded the defence of publication on a matter of public interest provided for by s 4 of the DA 2013. The pleaded case is that the subject-matter was of public interest and that "the defendants reasonably believed that publishing the statement complained of was in the public interest."

(6) It was alleged that the proceedings are an abuse of process, their purpose being to "target a Jewish-Muslim interfaith organisation … and to stop it reporting upon the claimant."

(7) Issue was taken with the claimant's case that he has suffered any substantial damage, and in paragraph 14.7 certain matters were pleaded in reduction or extinction of damages.

Statutory qualified privilege

16. Two bases were put forward for this defence. The first was that "the statement that the claimant was a terrorist or a convicted terrorist" was "a fair and accurate report of proceedings in public before a court in Tunisia" and hence privileged pursuant to s 15(1) and Sch 1 Part 1 para 2 of the Defamation Act 1996 (the 1996 Act). In support of this plea it was alleged in paragraph 10.4 of the Defence that

> "In or around June 2005 the claimant was found guilty by the Tunisian Court under [certain specified articles] of the Law No 75 of December 10, 2003 and was sentenced in his absence to a period of imprisonment for 56 years and fined for being a member of a terrorist organisation and other terrorist-related offences. He was also sentenced to an administrative control sentence of 10 years."

17. The evidence before me makes clear that this pleading was based on a blog post posted in French on a website called "reveiltunisien.org" on 15 June 2005. The post was headed "Les ravages de la loi terroriste" (The ravages of anti-terror laws) and contained the details reproduced in paragraph 10.4 of the Defence, above. The post reported that the case was due to appear before the Court of Appeal the following day,

and went on to denounce the judgment under appeal, asserting that – in the rough translation that is before the court - “This judgment sounds like the hundredth attempt by the dictatorship to incriminate its opposers, exiled in Europe…”

18. The second pleaded basis for the plea of privilege was that the statement complained of was a fair and accurate copy of, extract from, or summary of an Interpol “Red Notice” or international arrest warrant relating to the claimant, and hence protected pursuant to s 15(1) and Sch 1 Part 2 para 9(1)(b) and 9(2) of the 1996 Act, as amended by s 7(4) of the Act of 2013. There is no dispute that a “Red Notice” was issued in respect of the claimant, to which I shall come. The evidence makes clear, however, that the defendants were not in possession of a copy of that notice at the time the privilege defence was pleaded, although it had been referred to in media reports.

Truth

19. The meanings defended as true were “that the claimant is a terrorist or convicted terrorist; and/or that the claimant was convicted of a terrorist related offence in Tunisia which he disputes contending that he was engaged in non-violent politics.” In support of this plea the defendants relied on the details pleaded in paragraph 10.4 of the Defence, pleading also that the claimant denies he is a terrorist and that his involvement with the Tunisian Islamic Front is peaceful (sic).

The strike-out application

20. On 25 February 2016 the claimant issued the first of the applications now before me. It seeks an order striking out parts of the Defence on the grounds that they disclose no reasonable grounds of defence and/or raise issues on which the defendants have no real prospect of success, and there is no compelling reason why those issues should be disposed of at a trial. The grounds relied on are therefore pleading grounds, under CPR 3.4(2), and summary judgment grounds, under CPR 24.2. A witness statement of the claimant is relied on in support.

21. The claimant’s application attacks three aspects of the Defence. The first is the plea of general bad reputation in paragraph 8.4 of the Defence. This formed part of the defendants’ pleaded case in answer to the allegation of serious harm. It is alleged to infringe the rules on what may and may not be pleaded by way of general bad reputation.

22. The claim to privilege based on the Interpol Red Notice is attacked as unsustainable in fact. The claimant exhibits a copy of the Notice. As the notes on page 2 of the notice itself make clear, there are two types of Red Notice: one based on an arrest warrant and issued for a person wanted for a prosecution; and the other based on a court decision for a person wanted to serve a sentence. This Notice was of the former type, based on an arrest warrant issued by Tunisia identifying the claimant as wanted for, among other offences, “terrorism”. The Notice did not confirm guilt but instead warned that “the person should be considered innocent until proven guilty”. The claimant explains that the warrant was issued in 1992 and, after pressure from him, withdrawn by Interpol in late 2010. On this basis, it was said that the plea of privilege for a fair and accurate report was bound to fail. The claimant exhibits one of the media reports which had mentioned this Red Notice: an article by Peter Oborne

published in the New Statesman on 30 January 2012 under the heading "The terrorist who wasn't". The sub-heading of that article was "Vilified by the press and falsely branded a terror threat by Interpol, Mohamed Ali Harrath..". The claimant says, and this is not disputed, that the withdrawal of the Red Notice had been the subject of other media coverage.

23. Truth. Legal difficulties in the way of relying on a foreign conviction to prove guilt in a libel action were pointed out by the claimant's solicitors in correspondence. There are undoubtedly difficulties. They would appear to include the fact that, unlike a domestic conviction which is conclusive, a foreign conviction is not even admissible as evidence of guilt pursuant to the Civil Evidence Act 1968.

24. Be that as it may, the claimant's evidence is that the convictions apparently recorded against him in 2005 were of a category that had "all long since been the subject of an 'amnesty'". In support of that statement he exhibits the Official Gazette of Tunisia from 22 February 2011. This records a decree granting an amnesty to "every person having been subject, before 14 January 2011, of a conviction or a legal prosecution in the courts … due to … infringements" of among others "the law no 2003-75 dated 10 December 2003, supporting the international efforts of the fight against terrorism…" The claimant's evidence is that "This 'amnesty' is not simply a 'pardon' but constitutes an acknowledgment by the state that the crimes and convictions in question should never have been classified as such". He points to a provision in article 2 of the decree that those the subject of the amnesty can claim damages.

The defendants' response

25. The defendants' response included some quite substantial concessions. They prepared a draft Amended Defence, supplied to the claimant's solicitors on 8 March 2016, which reflected these. In this draft, the defences of truth and reporting privilege have been deleted in their entirety. The claimant's evidence about the Red Notice is not challenged, and accordingly that aspect of the privilege defence has been deleted, as was inevitable. Such a notice may be a "notice issued for the information of the public" within the scope of the provisions cited above, but the words complained of plainly could not qualify as a fair and accurate report of this notice.

26. As to the convictions, the evidence of Mr Westrop and the submissions of Mr Speker on behalf of both defendants make clear that the defendants accept that these have been expunged, and are no longer relied on by the defendants in support of any case of privilege or any case that the Article was true. The claimant's evidence on these matters also is unchallenged. And in the light of that, online reference to the matter has now been removed. The draft amendments also include the deletion of the assertion that the claimant has a general bad reputation, although some of the paragraph that contained that assertion is retained.

27. There are some live issues between the parties about the costs of the pleading on these issues, and its striking out or abandonment. The parties are in dispute about whose fault it is that such defences were pleaded when, as is now accepted, they were unsustainable. The majority of Mr Westrop's witness statement is devoted to a submission that the claimant is to blame or at least shares the blame so far as the defendants' reliance on the convictions is concerned. He argues that the costs involved ought to be reserved to the trial judge. I shall state my conclusions on this

and other issues relevant to costs at the end of this judgment. But first I shall address the remaining substantive issues.

ISSUES OF PLEADING AND PROOF

Application notice

28. Mr Dean has properly pointed out that there is no application notice seeking permission to amend in the form of the draft Amended Defence. Because the amendments go beyond mere concession by deletion I have required the defendants to undertake to issue an application notice as a condition of hearing their application. The issue of an application notice is necessary to protect the public finances. But the reasons for requiring an application notice to be issued are not limited to financial ones. Among the others are the need to ensure clarity as to what is sought, the need to facilitate listing and other aspects of case administration. I do not consider that the court should be too ready to hear applications which have not been formally made, just because it does not inconvenience the other party. The efficient management of the court's caseload is a consideration also. In this case, however, the undertaking having been given, I will deal with the matters of substance raised by the application.

Substantive issues

29. There are three issues. One concerns consequential amendment: whether the re-drafting of the Defence has properly carried through the logic of the abandonment of the plea of justification. The pleaded defence of public interest retains, at paragraphs 12.2 and 12.5, passages that could be read as asserting the claimant's guilt of terrorist offences. Given that the defendants are no longer maintaining the validity of the convictions, or the truth of any accusation of involvement in terrorism, any such suggestion ought to be unequivocally removed. It has been conceded by Mr Speker that both paragraphs require amendment for that purpose. Paragraph 12.5 also needs to reflect the fact that publication has now ceased. Revised wording has not been formulated as yet. Mr Speker wanted time to consider with his clients quite how the matter might be put. Subject to appropriate wording being found, such amendments would no doubt be agreed.

30. The other two issues are of greater significance. They are whether the defendants should be allowed to plead:-

(1) a case in answer to the claimant's assertion of serious harm to reputation in the form now put forward in the draft amended paragraph 8.4; and/or

(2) a case in answer to the allegation of substantial damage in the form now put forward in the draft amended paragraph 14.7.

31. It is convenient to set out the two disputed paragraphs in full, showing the draft amendments. In paragraph 8.4, I have again inserted lettering. This, where there is an overlap, reflects the lettering I have inserted in the Article and the Guardian article. In paragraph 14.7 I have numbered the pleaded points:

> "8.4 The defendants will rely upon the further matters. ~~Claimant's bad reputation as at the date of publication~~ in

support of their claim that serious harm to his reputation ~~it~~ could not be caused by the words complained of in the eyes of readers of the website. **[F]** He set up the Tunisian Islamic Front and advocated revolution in Tunisia. ~~He has been the subject of an Interpol Red Notice, the highest level of alert, as a terrorist suspect. He had been convicted in Tunisia, a friendly foreign state, of terrorist offences. He runs a television company which employs members of Hizb ut Tahrir, an extremist Islamic organisation. His channel was censured by OFCOM for advocating violence towards women and marital rape. He had been found, by an Employment Tribunal in 2008, to have wrongly dismissed a female presenter on the Islam Channel and sexually discriminated against her.~~ **[G]** He was the director of iEngage when the group was removed from the Parliamentary Secretariat for the All Party Parliamentary Group on Islamophobia because it had a *'troubling attitude to anti-semitism.'* **[E]** The Prime Minister banned Baroness Warsi from speaking at the Global Peace and Unity Conference organised by the claimant in 2008, **[H]** an event attended by banned extremists and where speakers have denied the Holocaust.

…

14.7 Further, if any question of damages arises at trial the Defendants will rely in reduction or extinction of damages ~~on so much of the Particulars of Truth as are found proved; and the Claimant's general bad reputation and~~ **[1]** the facts and matters pleaded in sub-paragraph 8.4 above; **[2]** the matters in the article which are not complained about; and **[3]** on the relevant contextual background to the publication of an article and **[4]** the fact that the Claimant had been convicted of a terrorist offence in Tunisia and **[5]** had never properly explained the position in pre-action correspondence."

32. Two general points may be made about these paragraphs:-

(1) It is appropriate for the issues of serious harm to reputation and the quantum or mitigation of damages to be dealt with separately in a pleading. They overlap but are not co-extensive. Facts relevant to the existence, extent, and gravity of any harm to reputation will fall for consideration under both heads. Facts relevant only to injury to feelings are not relevant to serious harm. They are relevant only to the quantum of any damages, if the serious harm requirement is satisfied.

(2) If cases are to be properly managed and dealt with fairly, it is important for a pleading to make clear what is relied on, and the way(s) in which it is relied on, for each of these purposes. This is particularly important given the current practice of trying "serious harm" as a preliminary issue in many cases.

33. I shall deal first with the categories of mitigation set out in paragraph 14.7, using the numbering adopted above.

Points [3] and [5]: The conduct of the parties

34. The pleaded reference to the "background context" to the publication is opaque. It is clear law that "directly relevant background context" may be admissible in mitigation (*Burstein v Times Newspapers Ltd* [2001] 1 WLR 579, CA); but caution is required in evaluating what is properly admissible under this rubric (*Turner v News Group Newspapers Ltd* [2006] 1 WLR 3469, [88] (Moses LJ)); and case management considerations must come into play (*Burstein* [40]). This means it is vital for the court and the opposite party to be told clearly what particular material is said to belong in this category. This pleading is clearly objectionable on that ground. It provides no clue to what material is said to qualify as "background context".

35. Mr Speker explains that the aim was to signal an intention to rely in mitigation of damages on such parts of the public interest defence as are found proved at trial. If that were made clear it would meet the objection I have mentioned. But it would at the same time reveal that this category of material is irrelevant. The matters relevant to the public interest defence (that the topic was of public interest and that the defendant acted reasonably), can have no bearing on the extent of any injury to the claimant's reputation. Nor, on the facts of this case, could they serve to reduce or mitigate damages for injury to feelings. Good faith would be relevant in rebuttal of an allegation of malice, but there is no such allegation. It would be relevant to show reasonable conduct in publishing, if the claimant alleged that his feelings had been hurt by unreasonable conduct in that regard. But that is not this claimant's case. His aggravated damages plea concerns post-publication conduct. The claimant must be tied to his pleaded case, but provided that is done there can be no injustice in refusing to allow this point to be pleaded.

36. Similar reasoning applies to the proposed reliance on the claimant's alleged failure properly to explain the matter of his convictions before bringing the action. Such a failure, assuming for the moment there was one, could not affect the assessment of any damages for injury to reputation or feelings in this case.

(1) As to reputation, it may be that in an extreme case a failure or a delay by a claimant in "coming clean" to a defendant about the true position could be characterised as a failure to take reasonable steps to mitigate harm to reputation. In most cases, though, it would be a matter going only to costs. In any event that is not the way the defendants put their case here, nor could it be put that way on the facts.

(2) As to feelings, the post-publication conduct of which the claimant complains in aggravation of damages does not include the defendants' delay in correcting the article, or their conduct in pleading truth (or reporting privilege) in reliance on the conviction. I record also that Mr Dean has made clear that this is not his client's case. Provided, again, that the claimant is tied to that stance, the defendants' criticisms of the claimant's own post-publication conduct are immaterial.

Point [4]: The fact of the Tunisian convictions

37. The fact that the claimant was convicted does seem to me to be something that may be pleaded in relation to the amount of any damages. It is a fact capable, if not admitted,

of proof without undue expense or difficulty, which a court might consider to have some bearing on the assessment of damages. Provided the current status of the convictions is understood and agreed, as it is, there are no sound case management reasons for excluding it. I do not say that it would in fact serve to mitigate, but that is not the test at this stage. If the defendants wish to pursue the point, I see no injustice in allowing them to argue that it should play some mitigating role.

Point [2]: Matters in the Article which are not complained about

38. Paragraph 14.7 expressly relies on such matters in mitigation of damages, but without spelling out which such matters are relied on. Mr Speker has pointed to paragraph 8.4 as a location where some of the matters stated in the article are relied upon by the defendants; but he has asserted at the same time that there was no need to plead these matters, as they are all contained in the article complained of. For that purpose he includes the *Guardian* article.

39. I cannot accept these submissions. The submission that the Article is to be treated as encompassing the *Guardian* article goes somewhat beyond what is pleaded. The argument that it is not necessary to identify the matters to be relied on is inconsistent with the approach adopted in the original pleading, and with general principles. Such an approach would represent the opposite of helping the court achieve the overriding objective.

40. These points are illustrated by review of the pleading itself. There is in practice a thoroughly confusing and confused overlap between paragraph 8.4 and paragraph 14.7[2].

(1) None of the matters presently pleaded in paragraph 8.4 appears in the defendants' Article itself. Even on Mr Speker's extended definition of what is in the Article, only one of the pleaded matters appears in it. The *Guardian* Article reports item [E], (though it does so in relation to an event in 2010, not the pleaded date of 2008); but it contains nothing corresponding to items [F] and [G]. The *Guardian* article reports criticism of speakers at the 2010 conference, but nothing matching item [H]; there is no mention of bans or of Holocaust denial.

(2) Matters that *were* asserted in the Article were previously pleaded in paragraph 8.4 in rebuttal of the allegation of serious harm: the assertions that I have labelled [A] and [C] at paragraph 5 above were repeated in the original version of 8.4. But both are deleted in the new draft amended version. Some matters that were asserted in the Article have never been pleaded in rebuttal of the serious harm allegation: the assertion that I have labelled [B] above has never been pleaded.

(3) Moreover, paragraph 14.7 appears to treat the contents of paragraph 8.4 and "matters in the article ... not complained about" as separate and distinct grounds for mitigation.

41. The failure to make clear what is to be relied on under paragraph 14.7[2] is a manifest and unacceptable defect.

42. It was not clear to the claimant, either, what form of reliance was placed on "other matters" in the Article. It became clear in the course of argument that the defendants do not seek to prove the truth of any of the other matters relied on; only the fact that they were asserted in the Article. This too should have been spelled out. The question then becomes: how could the mere fact that the Article contained assertions other than the one complained of by the claimant bear on the issue of serious harm or the issue of damages? No indication of the answer is to be found in the draft pleading.

43. The answer given in argument on these applications has been that the assessment of whether the publication of a statement has caused serious harm to reputation involves consideration of "all the relevant circumstances" (*Lachaux v Independent Print Ltd* [2016] 2 WLR 437 [58]); and that these circumstances include the existence of other allegations in the same article of which no complaint is made (*Abu v MGN* [2003] 1 WLR 2201 [15]), and the actual impact on readers' estimation of the claimant (*Lachaux* [59]). In *Abu* Eady J considered the right approach to the assessment of compensation after the acceptance of an offer of amends under the Defamation Act 1996 (a process indistinguishable in principle from the process of damages assessment: see s 3(3) of the Act). In the passage relied on by Mr Speker Eady J said this:

> "… by way of defending themselves, it is generally open to defendants to demonstrate, whether by their own evidence or by cross-examination of the claimant, that some element of damage has been caused by factors other than the libel complained of; perhaps, for example, by a different libel published by someone else, or by a damaging allegation within the defendant's own article but of which the claimant makes no complaint, and of which the truth or falsity is not therefore in issue in the action. In such circumstances it would be plainly unjust if the defendant were not allowed to require the claimant to prove that the particular element of damage to reputation, or hurt to feelings, was attributable to the specific libel which he has admitted to be untrue by virtue of making an offer of amends: see e g *Associated Newspapers Ltd v Dingle [1964] AC 371* , 396 *A–C* and *Gatley on Libel and Slander* , 9th ed (1998), pp 209–210, para 9.8."

44. Mr Speker submits that reference to the other allegations made in the Article is legitimate in order to isolate any harm caused by the allegation complained of. He argues that "if the claimant cannot prove that 'serious harm' was caused to his reputation by the words he has chosen to pick out *rather than* by other accusations in the article or the context in which the words complained of were published or the knowledge readers have of him then he should fail on the issue." The emphasis is mine.

45. In my judgment these submissions must fail on the facts of this case. The law as to what matters may properly play a part in the assessment of damages for a defamatory allegation is long-established and tolerably clear. There are defined categories, such as facts proved in partial justification, or *Burstein* context, which are recognised as legitimate bases for reducing damages. It is well-established however that the mere fact that something is mentioned in an article complained of as a libel does not make

it proper to rely on it in mitigation of damages: *Plato Films v Speidel* [1961] AC 1090, 1147 (Lord Morris). Other allegations made in the same article can play a role, but only in limited circumstances.

46. Where an issue arises as to the causation of some identifiable kind of harm, such as financial loss, or of some particular conduct towards the claimant such as avoiding him, the words of Eady J in *Abu* are clearly applicable. A defendant must be entitled to require the claimant to establish a causal link between the publication and the harm in question, and to challenge any such case by adducing evidence of its own. The case may involve consideration of competing candidates for causation. In this way, other allegations that were made in the article complained of and which could have been causative of the specific kind of harm relied on can come into play. In the more common case, where assessment of the existence and gravity of harm to reputation is a matter of inference, it has never been the case that a defendant can point to allegations that are not complained of in order to reduce the compensation payable for those that are. That approach is not supported by the authorities cited by Eady J in *Abu*, or by anything he said in that case, or by anything I said in *Lachaux.* It would be illogical.

47. The use of the words "rather than" in Mr Speker's submission illustrate the fallacy in his argument, in my judgment. This is not a case where serious harm is alleged, and competing causes have to be examined and evaluated. The claimant's case on serious harm is an inferential one, dependent primarily on the scale of publication, the nature of the allegation complained of, and the nature of the audience to which that allegation was addressed. The court may or may not draw the inference from these matters that serious harm to reputation was caused by that allegation. It would not be deterred from doing so by any conclusion it might arrive at about the gravity of any harm likely to have been caused by other allegations in the same article.

48. Mr Speker submits that in the eyes of the specialised readership to which the claimant himself refers in paragraph 9.3 of the Particulars of Claim the other allegations might have been more harmful to reputation than the allegation complained of. The submission is untenable in fact. It depends on the twin propositions that the "other allegations" involved current extremism and the allegation complained of was one of past terrorism. Nobody could read the words complained of in that way. The argument is also unsound in principle. Even if true it would lead at best to a conclusion about the relative gravity of the allegations in the article; it would not undermine the claimant's case as to the seriousness of the harm caused by the allegation complained of. The fact that the article contained other allegations will be before the trial court, which will be astute to ensure that compensation if any is awarded only for harm caused by the allegation complained of. No wider use of those other allegations would be legitimate.

Point [1] and paragraph 8.4: Matters not mentioned in the Article

49. This leaves the matters pleaded in paragraph 8.4 which were not mentioned in the defendants' Article, or in the Guardian article: matters [F], [G] and [H]. Mr Dean's objection to reliance on these matters is multi-stranded, but he has an objection of principle which rests on the "rule" in *Scott v Sampson* (1882) 8 QBD 491, that it is not permissible to rely in mitigation of damages on specific acts of misconduct other than those "charged" in the libel.

50. The argument for the defendants is that there is no bright line to be drawn between involvement in extremism and involvement in terrorism; thus, these two alleged facts are matters in the same sector of the claimant's reputation, proof of which may serve to rebut his case on serious harm. The rigid rule in *Scott v Sampson* is not to be applied in the context of the new "serious harm" test, in an era where trial by jury is no longer the norm and case management considerations should be uppermost in the court's mind.

51. The issue before me today can be resolved on two narrow and straightforward pleading grounds. First, the draft pleading fails to make sufficiently clear exactly what conduct of the claimant the defendants seek to rely on. The reader is left in the dark as to what it is about membership of the Tunisian Islamic Front that is said to bear on the issue of reputational harm, and (though this may be less important) the nature of the revolution said to have been advocated by the claimant. So far as iEngage is concerned, the pleading is a hopeless mix of third party conduct, and vague smear from an unattributed source. If the case the defendants wish to advance is that the claimant somehow condoned anti-semitism, or any similar case, then that should be pleaded, clearly and with particularity. Item [H] fails to make clear enough the basis on which the claimant is to be blamed for the attendance of banned extremists and Holocaust deniers. Secondly, the draft nowhere pleads that which Mr Speker accepts would have to be alleged to make it sustainable: that readers knew of the matters relied on. For those reasons I would, subject to what I have said at the end of paragraph 37 above, strike out what remains of paragraph 8.4 and refuse permission to make the proposed amendments.

52. That would not preclude a further application based on a revised draft. Since the issue has been fully argued and in my view any such application would be bound to fail I will give further reasons for refusing permission. Section 1 of the 2013 Act has changed the test of what is defamatory, and introduced a requirement to prove serious harm to reputation; but it has not in my judgment altered the law relating to what is or is not relevant and admissible to prove or disprove harm to reputation. Nothing I said in *Lachaux* should be read as suggesting that it has done so, and I see no other basis on which that conclusion could be reached. I am not free to depart from *Scott v Sampson*. On the basis of the arguments advanced on these applications I would not do so if I were. Nor, if the matter were one of mere case management, would I allow reliance on these matters. Although it is fair to say as a general proposition that there is no bright line between extremism and terrorism, the distinction between what it is presently sought to allege by way of extremism and an allegation of terrorism is in my judgment clear and distinct.

COSTS ISSUES

53. Mr Westrop's witness statement asks the court to reserve to the trial judge the decision on who should pay the costs of the strike-out and amendment applications. Alternatively he seeks an order for costs in the case in respect of the claimant's application and that the defendant should not have to pay the costs of any amendments to the defence.

54. I shall deal with issues as to the costs of and caused by the pleading and abandonment by amendment of the defences of statutory privilege and truth (amendments for which I naturally grant permission). However, in the light of discussion at the end of the

hearing I shall go no further than expressing my conclusions on some points of principle and some issues of conduct. The costs order that I ultimately make may depend to some extent on the outcome of other costs arguments.

55. The starting point for any costs determination must be CPR 44.2. Sub-rule (2) provides that as a rule the court should order costs to be paid by the unsuccessful party, but the court may make a different order. The court must have regard to all the circumstances, including the parties' conduct (r 44.2(4)(a)); and this involves consideration of the reasonableness of the parties' conduct before and during the proceedings: r 44.2(5).

56. The claimant is plainly the successful party so far as the pleading of statutory privilege on the basis of the Red Notice is concerned. This plea appears to have been placed on the record somewhat speculatively, without a copy of the notice itself. There does appear to have been a basis for the pleading, in the form of cuttings that suggested its existence. However, there were other media reports disclosing its withdrawal. At all events, in adopting the approach they did the defendants were, at the least, at risk as to costs. Once the Red Notice itself had been produced it was clearly apparent that this line of defence was doomed. It was rightly abandoned. No criticism is or can be made of the claimant for the way in which he dealt with this aspect of the case. It did not feature in the pre-action correspondence.

57. As to the costs of and caused by the defendants' reliance on the Tunisian conviction, the defendants' case on this issue rests on arguments about the claimant's conduct. If I had thought the trial judge would be in a materially better position to assess the merit of such arguments, I might have been persuaded of the approach urged on me by the defendants. In the light of my conclusions, however, I can see no sound basis for putting off the decision. I shall also need to consider the conduct of the defendants over this issue. Their conduct after the action was begun is relied on as an aggravating circumstance in the Particulars of Claim. But I do not think that should deter me from addressing the issue.

58. Pre-action conduct is governed by the Defamation Pre-Action Protocol (PAP). The aims of the PAP include "encourage[ing] both parties to disclose sufficient information to enable each to understand the other's case and to promote the prospect of early resolution" (para 2). To that end a claimant is required to "give a sufficient explanation to enable the defendant to appreciate why the words are inaccurate or insupportable" (3.2). A defendant who rejects a claim is required to "explain the reasons why … including a sufficient indication of any facts on which the defendant is likely to rely in support of any substantive defence" (3.4). Both parties are required to consider whether ADR would better suit the case than litigation (3.7), and this includes discussion and negotiation as well as methods involving independent third parties (3.8).

59. My review of the pre-action correspondence in this case has led me to the conclusion that both parties are open to criticism for failing to adhere to the aims, spirit and letter of the PAP. It is not quite clear how much the claimant knew of the 2005 convictions, but whatever the answer is he could have been more open about his state of knowledge than he was. The original letter before action failed to comply with para 3.2 of the PAP by explaining why the words complained of were said to be untrue. This was pointed out by the second defendant in an email which referred to "the

conviction" as having been "widely published and widely read in the international press". The email made clear that what was referred to was a decision of the Tunisian court.

60. The claimant's response unhelpfully asserted that the original letter had explained his position by asserting that the article contained "untrue" matter. The second defendant reasonably replied by reiterating his demand that the claimant explain "why you believe that the only words referring to you in the article are incorrect". It was on 16 November 2015 that the claimant first specified his position: "there is and never has been any terrorism charges or convictions brought against me in this country or in any other jurisdiction". He claimed this was clearly evident from online and other sources, but did not specify those sources. This was more than 6 months after correspondence began.

61. The defendants, on the other hand, were guilty of non-disclosures of their own. They never specified what the convictions were to which they were referring. Nor did they produce or identify any of the "international press" to which they referred, save for the link to the Guardian article. I am not conscious of any reasonable excuse for that. Moreover, the defendants declined to enter into a standstill agreement or to exchange further information, as requested by the claimant, and their solicitors insisted on 2 November 2015 that proceedings be served. Once that had been done, they continued to refuse suggestions for negotiation, including a stay.

62. My conclusion is that the pre-litigation shadow boxing reflects equally badly on both parties. But the claimant's failings at that stage were not a sufficient justification for the approach taken by the defendants after the service of proceedings, of rejecting outright any attempt to negotiate or exchange information. The main operative causes of the defendants' mistaken pleadings were their own evidently incomplete researches, the limitations of their own disclosure of the basis for their case, and their refusal to engage in alternative approaches to the resolution of this dispute.

63. The amendments to paragraph 8.4 included the deletion of the previous plea of general bad reputation, and much of the factual material that was previously relied on. That represents success for that part of the claimant's strike out application. I cannot detect in Mr Westrop's witness statement or in logic any basis on which the costs of that success ought to be paid by anyone other than the defendants.

64. If necessary, I shall hear argument on how these conclusions should be reflected in a costs order, and on the other costs issues that flow from the conclusions I have set out earlier in this judgment.