IN THE COURT OF APPEAL **Appeal No: _____**

ON APPEAL FROM

THE HIGH COURT OF JUSTICE **Case No: KB-2021-001248**

KING'S BENCH DIVISION

MEDIA & COMMUNICATIONS LIST

The Hon. Mrs Justice Collins Rice DBE CB

Liability Judgment [2024] EWHC 146 (KB)

Remedies Judgment [2024] EWHC 956 (KB)

BETWEEN

LAURENCE FOX

Appellant
(Defendant / Counterclaimant)

-and-

(1) SIMON BLAKE

(2) COLIN SEYMOUR

(3) NICOLA THORP

Respondents
(Claimants / Defendants to Counterclaim)

APPELLANT'S SKELETON ARGUMENT SEEKING PERMISSION TO APPEAL

References (currently to trial bundles, to be updated) are in the form: **[Bundle/Tab/Page]**
The parties are referred to by their initial role in the litigation: D, C1, C2 and C3
Paragraphs are given as **[L§xx]** *for Liability Judgment &* **[R§xx]** *for Remedies Judgment*

Recommended Reading*:** ***(1-and-a-half days)

Skeleton Argument for Permission to Appeal
Cs' & D's Statements of Case
Witness Statements for Trial
D's Skeleton Argument for Trial
Annexes 1 and 2 to D's Trial Skeleton Argument
Joint Chronology (partially agreed)
D's Closing Submissions for Trial
Liability Judgment
D's Skeleton Argument for Remedies Hearing
Remedies Judgment

A. INTRODUCTION

1. The Twitter spat was four years ago, and took place within a matter of hours. Three individuals, all with large Twitter followings (C1, C2, and C3), called D '*a racist'* – each in their own way – because D had Tweeted that Sainsbury's supermarket having '*safe spaces*' reserved for only its black employees was "racial segregation and discrimination" (he was correct: see s.13(5) Equality Act 2010) and had called for a boycott of Sainsbury's. So the first defamatory attack was by the Cs. D regarded what they said as baseless and unfair. He responded to each of them with a tweet using the word 'paedophile', so as to deny the charge of racism. Within an hour, he had clarified his position about mutually '*baseless'* claims, and by the next morning had deleted his Tweets. He also later apologised.

2. Cs brought claims in defamation; D defended them and counterclaimed for their '*racist'* Tweets. In his defence, D claimed his remarks were obviously rhetorical, denied 'serious harm' to any of them and relied on defences of Qualified Privilege (Reply to Attack) and Equitable Set-off. C3's claim was dismissed by the Court of Appeal; the claims of C1 and C2 proceeded to trial, alongside all three counterclaims.

3. The Judge at trial, in the Liability Judgment [2024] EWHC 146 (KB), determined that:

   3.1 In the claims:

   (a) C1 and C2 had established 'serious harm' to their reputations;

   (b) D's defence of qualified privilege (reply to attack) failed.

   3.2 In the counterclaims

   (a) D was unable to establish a causative link between Cs' publications and the very serious harm to his reputation;

   (b) There was no need to, and indeed that it would be wrong to, resolve the Truth defence (C3) or Honest Opinion defences (C1 and C2).

4. The Judge's subsequent Remedies Judgment [2024] EWHC 956 (KB) awarded each of C1 and C2 the sum of £90,000 in damages and imposed a final injunction upon D, but refused to make an order under s.12 of the Defamation Act 2013 (**"DA2013"**).

5. The Grounds of Appeal are appended to D's Appellant's Notice. With the greatest respect to the learned Judge, the overarching theme of this appeal is that in almost every respect, the Judge's decisions were vitiated by errors of law or approach, were wrong and/or subject to procedural irregularities causing unfairness. The learned Judge:

   (1) misdirected herself (or, even if the Judge correctly recited the applicable principle, failed to follow it in the approach that was then adopted) in respect of well-established principles of law;

   (2) failed to fulfil the most important role of a trial judge: identifying the parties' respective cases, analysing the evidence and making primary findings of fact, particularly on critical issues – purporting to justify the absence or paucity of relevant findings by saying *"…it is not desirable for me to make detailed findings of fact on each and every point raised"*) **[L§63]**;

   (3) failed to address, let alone determine, key submissions by D which were necessary to the resolution of the issues and to the giving of proper reasons for a judicial determination of those issues;

   (4) made findings as to such particular facts as *were* identified in the judgment either without a proper foundation in admissible evidence that was before the court, or based on (or betraying) an outright mistake of fact; and

   (5) reached conclusions which were themselves vitiated by the above and, in any event, plainly wrong and/or based on an incorrect (or sometimes inconsistent) application of legal principles.

6. As the Court of Appeal held in *Harb v Aziz* [2016] EWCA Civ 556, at [39]:

> *"Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of*

challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases."

7. In failing properly to identify, analyse and resolve the issues, and explain how they had been so resolved, the learned Judge's approach was procedurally unfair. In particular, failing to engage with D's case in answer to C1 and C2's claims to have suffered *'serious harm'* to their reputations, was procedurally unfair, as explained below.

8. This appeal arises in the context of a highly contested area of public life and public discourse, involving important principles of free speech and the law of defamation.

9. Against that background, the proposed appeal satisfies both limbs of the test on permission for first appeals in CPR r.52.6(1)(a) and (b), having both a real prospect of success and there being *"some other compelling reason for the appeal to be heard"*. 'Real prospect of success' in permission to appeal, like in summary judgment, means 'not fanciful': see Peter Jackson LJ in *R (A Child)* [2019] EWCA Civ 895 at [29]-[31].

10. For those reasons, D seeks permission to appeal the Liability Judgment and the Remedies Judgment, on the grounds set out in the Grounds of Appeal, which are addressed in more detail below.

GROUNDS OF APPEAL
IN THE COUNTERCLAIMS

B. SERIOUS HARM TO MR FOX'S REPUTATION

Ground 1: Dismissal of D's case on Serious Harm to his General Reputation

11. There is no doubt, and is no dispute, that in the days and weeks following publication of Cs' Tweets, D acquired a general bad reputation as 'a racist' and that his reputation by that point in time had suffered serious harm. The entire focus of the Liability Judgment on the Counterclaim **[L§110- 158**] is whether that 'serious harm' to D's reputation as 'a racist' was ***caused*** by Cs' tweets. The Judge subjected D's case on causation of serious harm to fierce scrutiny (particularly when compared to the approach to the impressionistic approach to C1's and C2's cases) and then, plainly wrongly, concluded that Cs' tweets had not caused such serious harm. That conclusion was vitiated by errors of law and approach and was, in any event, plainly wrong.

12. The basic facts on causation of serious harm in the Counterclaims are somewhat stark:

12.1 The statements by Cs meant, were held to mean and were understood to mean that D was "*a racist*" at *Chase* Level 1. C3's tweet specifically sought to deter third-parties from employing or giving a platform to D in the future.

12.2 Although the Judge neglected to make any findings of fact about the scale of Cs' publication, Cs' own undisputed Twitter Analytics (summarised in Annex 2 to D's Skeleton Argument for Trial) confirmed that the number of Impressions of their respective Tweets sued upon in the counterclaims were 739,000 (C1), 451,000 (C2), and 766,000 (C3) respectively.

12.3 All Cs intimated that they would defend the claims as true and/or as their honest opinion. At trial, C1 and C2 ran a defence of Honest Opinion under s.3 DA2013 and C3 ran a defence of Truth under s.2 DA2013. They all testified at trial, and made eye-catching submissions through counsel, that D was "a racist".

13. There are three parts to D's case on causation, in respect of all of which the Judge erred:

(1) the general harm to his reputation, such that a significant proportion of the population now consider he can legitimately be called '*a racist*'; and

two inter-related specific forms of harm flowing from (and evidencing) that general serious harm to D's reputation, being:

(2) the decision of D's acting agent, Sue Latimer, to terminate his contract; and

(3) the drying up of offers of acting work from the entertainment industry generally.

Ground 1A: Impermissible finding of General Bad Reputation

14. The Judge erred in relying on specific incidents where D had made public statements to conclude that he had a general bad reputation, and implicitly that he deserved to have a bad reputation, so that his claim failed on causation. This was both wrong and unfair.

15. A libel claimant (or, here, D as counterclaimant) enjoys a rebuttable presumption of a good reputation at the time of publication. To rebut the presumption, libel defendants (here, Cs as defendants to the counterclaims) must plead and prove that the claimant has a bad reputation in the community-at-large.

16. General bad reputation, which is confined to the relevant sector of a claimant's life, can only be proven by evidence called from someone who knows or knows of the claimant

and can speak to his general reputation at the time of publication: that is, his general bad reputation in the community as a whole.

17. The Claimants called no one to give that evidence.

18. It is forbidden to seek to prove the specific libel in issue, under the cover of a general bad reputation plea, because to do so trespasses on the exclusive domain of a Truth defence and would subvert the well-defined and important principles which are specifically applicable to proving Truth − see Lord Denning in ***Dingle v Associated Newspapers*** [1964] AC 371 at p.412, as follows:

> *"Nor can the report of a particular incident, even if it be notorious, be brought up against the plaintiff. If it refers to the same matter as the libel, it tends to prove a justification and is therefore not admissible in mitigation of damages but only in support of a plea of justification. If it refers to something different from the libel, it cannot be admitted because it is specific misconduct which it is not considered fair that you should bring up against him."*

19. It is therefore illegitimate to seek to prove general bad reputation by proving specific incidents which occurred prior to the time of publication, let alone by proving specific incidents which occurred *after* publication. The Judge did both.

20. Cs pleaded D's *"general reputation as a racist"* at §33.4 of their Reply & Defence to Counterclaim. This allegation was denied. In any event, as noted above, Cs did not call any evidence of general bad reputation, nor any non-party witnesses at all. Indeed, on the Judge's approach (i.e. D's notoriety on such matters) it is particularly striking that not a single person was called to support Cs' pleaded case in any respect. Accordingly, there was no evidence at all before the Court which was capable of rebutting the presumption of good reputation.

21. The Judge did not analyse the plea of general bad reputation at all.

22. Instead of applying the presumption and established principles as to general bad reputation, the learned Judge decided to look at specific incidents where D had made public statements (see **[L§143-144], [L§147-157]**). She determined that D's reputation had already been so impacted, and implicitly suggesting that this was deservedly so given his own pronouncements, as for his case on serious harm to fail on causation: see **[L§157]** which begins: *"Choices about the exercise of your free speech rights have*

reputational consequences in real life, because they cause other people to form or change an opinion about you.". This paragraph is a clear finding that D's reputation had been damaged by specific incidents prior to the publication of Cs' tweets.

23. This approach is wrong in principle:

23.1 First, it breaches the rule about how general bad reputation can be proven;

23.2 Second, the question of whether a claimant *deserves* his good reputation or not *may* arise on mitigation of damages in appropriate circumstances (***Wright v McCormack*** [2024] EWCA Civ 892) but has no role in assessment of causation of 'serious harm' because of the presumption of good reputation which applies.

24. All the specific incidents were taken from C3's Truth defence, and because C3's tweet carried a *Chase* Level 1 meaning (i.e. a meaning of guilt, not of grounds for suspicion or investigation) it could be defended by reference to Particulars of Truth post-dating publication. Therefore, not only did the Judge err in finding bad reputation on the basis of specific incidents, but some of the specific incidents relied upon by the Judge in a ruling on causation were incidents at **[L§153]** that post-dated Cs' publication.

25. Despite the fact that the Judge expressly refused to resolve the Truth Defence (see **Ground 4**), stating that it did not properly fall to her to resolve it **[L§168**], this section of the judgment is in effect a part-finding adverse to D on the issue of Truth, but under the cover of dealing with causation of serious harm.

26. These findings – essentially as to D's conduct, based on an unresolved Truth defence – had no proper place in an analysis of the issue of serious harm or its causation. There was no proper analysis of the reputational impact of any of them, or when they had occurred. These incidents post-dated the publication of the racism Tweets by months or years. Neither was there any attempt to engage with D's actual positive case, or the evidence he gave, in relation to any of these incidents. In one critical respect, the 'pint of milk' allegation discussed in **Ground 4** below, the Judge's finding was perverse.

Ground 1B: Failure to apply the Rule in *Dingle*

27. As a related point, a defendant may not seek tarnish the claimant's reputation and avoid liability by relying on prior statements by other people to the same effect as the libel: the rule in *Dingle*, taken from ***Dingle v Associated Newspapers*** [1964] AC 371. In ***Lachaux v Independent Print Ltd*** [2020] AC 612, the Supreme Court held that the rule

applies equally when a court is determining whether the claimant has suffered serious harm to his or her reputation. The only exception to the rule in ***Dingle*** arises if the claimant relies on a specific event as proving serious harm, in which case the defendant is permitted to rely on previous publications as being causative of that particular event.

28. The Judge plainly disregarded this rule. In **[L§145]**, referring to the pre-publication period, she states as follows (emphasis added):

> *"A substantial body of people had been responding to Mr Fox's interventions ever since Question Time by calling him a racist (his followership on Twitter nearly tripled overnight). He had been challenged as a racist on Twitter in response to at least fifteen intervening episodes. … The inherent probability in these circumstances that it was the particular Tweets sued on here* ***that changed anyone's minds or affected Mr Fox's career*** *must be vanishingly small".*

29. Parenthetically, there was absolutely no evidence that "a substantial body of people had been … calling him a racist" in the months between Question Time and Cs' tweets. But even if that finding had been available, the highlighted word "or" in this passage make clear that the Judge was relying on these alleged previous publications of the allegation of racism as undermining D's case on serious harm to his reputation **generally**, and not merely as disproving **specific** harm to his career. This was a very clear breach of the rule in ***Dingle***.

30. The *"fifteen intervening episodes"* the Judge refers to in **[L§145**] can only have been the 15 Tweets pleaded in the Cs' Defence to Counterclaim at paragraph 28.3, denying causation of serious harm because *"D had been described publicly as a racist before the date of publication of Cs' tweets. For example…"*. In his Reply to the Defence to Counterclaim at paragraph 6, D averred that it was impermissible for Cs to rely on this material pursuant to the rule in *Dingle* and that the pleading of them was demurrable. As a result, the 15 Tweets were expressly excluded from the agreed trial bundles by D.

31. However, at 13:41 on Monday 27 November 2023 – on the fourth day of trial, and after all Cs had concluded their evidence – Cs presented D and the Court with a new 4th tab in their Unagreed Bundle J, being images of the 15 Tweets pleaded at paragraph 28.3 of their Defence to Counterclaim **[J/4/pp.52-67]**. Cs did not seek a ruling that the material in the bundle was admissible, or seek to prove any of the documents in it, and the Judge did not rule that it was admissible evidence.

32. Notwithstanding that the 15 Tweets were neither admissible nor admitted into evidence Cs again attempted to rely upon them in the Joint Chronology that the Judge asked the parties to provide towards the end of the trial (filed, with partial agreement on 30 November 2023, the final day of trial). D refused to allow reference to this material in the Joint Chronology at entry number 20, noting in it in bold red font that the material was contrary to the rule in ***Dingle.***

33. Despite this history, the Judge referred to the 15 Tweets in **[L§145]** as if this were material properly before the Court and in evidence, without even mentioning its contentious nature.

34. When D raised the breach of the ***Dingle*** rule his application to the Judge for permission to appeal in the lower court, the Judge mysteriously responded that the rule had not been drawn to her attention: *"The rule in **Dingle** was not cited or argued before me in relation to either liability or damages. It is a frequent source of error in submissions, and these proposed grounds are an illustration of that.*" The Judge was simply wrong about that. D's submissions had in fact raised the rule in ***Dingle*** specifically in relation to the same 15 Tweets in (a) D's Reply at §6; (b) in D's trial skeleton argument at §111.2(a); and (c) in entry number 20 in the Joint Chronology. The rule in ***Dingle*** was also cited 8 times more generally in §§105-115 of D's trial skeleton (5 pages of submissions), and again more generally in D's written Closing Submissions at §172.

Ground 1C: Wrongly relying on the nature of the allegation as an opinion

35. The Judge rightly noted at **[L§114]** that the allegation that someone is a racist is *"deeply derogatory",* suggesting *"an outlook, and a practice, which is at odds with the values and normal – and at least potentially the laws – on which an egalitarian democracy like ours is based"*, and that this was *"a particularly grave allegation"* against an aspirant for political service. However, the Judge effectively set those considerations aside or overrode them, wrongly holding that the fact that the racism Tweets were statements of opinion may *"substantially restrict [their] impact"*.

36. There is no authority for the proposition that a statement of opinion is inherently less defamatory or less likely to cause serious harm to reputation than a statement presented as factual. Indeed, the only authority is to the contrary: see Nicklin J in *Morgan v Associated Newspapers* [2018] EWHC 1725 (QB) at [17]-[31].

37. As Parliament has recognised, the fundamental and essential premise of legislating for a defence of Honest Opinion is that statements of opinion can be defamatory and cause serious harm to the subject's reputation[1]. In the present case, Nicklin J at the TPI had found that the *Chase* Level 1 meanings of 'a racist' were all defamatory at common law and that all were statements of opinion. The Judge held that merely being a statement of opinion (presumably even a bare comment, as in the case of C3) *"may substantially affect its impact"* **[L§115]**.

38. The Judge therefore went on to find, wrongly, at **[L§118]** that the gravity of the allegations was diminished because they were *"opinions offered in the context of a lively contest of ideas which Mr Fox had himself stimulated, some might think provocatively so, about what constitutes being racist".* There is no authority for the proposition that the defamatory impact of a statement is softened by its inclusion in *"a lively contest of ideas"*. Even if this was the correct approach, the Judge did not apply the same reasoning to the impact of D's paedophile tweets in the claims, despite the fact that they were part of the very same lively contest. The contrasting approach to that in the claims is stark.

39. In a libel action, the precise words of the statement itself might well affect the gravity of the allegation and its potential to do harm, but the Judge never considered the harm caused on the basis of the precise wording of Cs' tweets. Apart from quoting them at **[L§36]**, at no point in her reasoning did the Judge consider the <u>actual</u> words complained of in each of the Tweets sued on, preferring at all points and for all purposes to refer simply to the Single Meanings and effectively to treat all the Cs' tweets collectively.

40. Had the learned Judge considered the words of the racism Tweets and the status of Cs (on the issues in question), she would have been bound to note that while C3's Tweet called for D's total professional cancellation because he was "*unequivocally, publicly and undeniably*" a racist and C1's and C2's Tweets were in abusive terms; "*racist twat*"; "*So cringe. Total snowflake behaviour*". There was nothing tentative or discursive about any of these statements that would diminish their inherent potential to cause harm. Indeed, any fair consideration of these matters would have been to the contrary.

---

[1] In the last major jury trial in defamation, defended on the basis of both justification and fair comment, Frankie Boyle won £50,400 in damages in October 2012 over an allegation of being a 'racist comedian' published in the *Daily Mirror*. That would come to almost £70,000 in today's money.

Ground 2: Wrongly finding that specific harm to reputation, which sounded in adverse impact on D's career, was not caused by the racism Tweets

41. The Second Ground of Appeal is that the Judge's finding that Cs' Tweets did not cause serious harm was not a decision available to her on the facts. The two inter-related forms of specific harm were (a) being dropped by his agent (**Ground 2A)**; and (b) a reduction in offers of acting work (whether or not through his agent) (**Ground 2B**).

42. A decision on serious harm is an evaluative one, and is in some respects akin to the exercise of a discretion: ***Banks v Cadwalladr*** [2023] EWCA Civ 219; [2023] KB 524 at [66]. However, whereas there may be multiple correct answers available to a judge under the exercise of a true discretion, there can be only one right answer to an evaluative question that reflects a balancing of Convention Rights. If the Judge's conclusion was 'wrong' by reasons of some "*identifiable flaw in the judge's treatment*", such as "*a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion*": ***Re Sprintroom Ltd*** [2019] EWCA Civ 932, [2019] BCC 1031 at [76], it must be overturned.

43. The Judge's evaluative decisions as to the lack of serious harm being caused by Cs' tweets in the Counterclaims are vitiated by errors of approach, including:

43.1 considering the issues speculatively by inventing counterfactuals as to why D's agent *might* have dropped him;

43.2 failing to consider causation by way of material contribution (which was the primary basis for D's case on causation: see D's Trial Skeleton Argument at §§96-110 and D's Closing Submissions at §§172-177. There was no consideration of these submissions by the Judge whatsoever, notwithstanding her self-direction at **[L§51]** citing Nicklin J in *Amersi v Leslie* [2023] EWHC 1368 (KB) at [157] that the general rules of causation in tort must be applied); and/or

43.3 in reaching a finding which was plainly wrong, in that findings were directly contrary to the evidence before the Court. That evidence was:

(a) contemporaneous documentation about D being dropped by his agent over '*racism'* (**Ground 2A**);

(b) written and oral evidence from D's assistant about the content of the call between D and his agent (**Ground 2A**); and

(c) unchallenged documentary evidence that D experienced a decline in the quality and quantity of professional engagements in the period after Cs' tweets (**Ground 2B**).

44. Ground 2A and 2B share the common theme of challenging findings that were unavailable on the evidence, but do not rise and fall together. As the Judge recognised at **[L§121]**, D did not need to prove that his agent (Ms Latimer) dropped him because of C's Tweets; but Ms Latimer's decision to do so is an apt example of D's change in reputation and standing and can only speak to damage to his reputation.

Ground 2A: Decision of D's agent to drop him

45. The Judge concluded she did *"not have a sufficient evidential basis for considering the Tweets sued on more probably than not causative of Ms Latimer's decision… It is not inherently more probable than some or all of the many alternatives"* **[L§139]**.

46. The *legal* error here is obvious: the Judge failed to apply the "basic tort rules of causation" (as she had directed herself at **[L§52]**) which do not require the isolation of the inherently most probable single cause, but rather require an analysis of whether the wrongdoing materially contributed to the harm.

47. But even absent this legal error, this decision was not open to the Judge on the facts either. The evidence only pointed in one direction, and the *"many alternatives"* the Judge preferred were entirely theoretical.

48. The only contemporaneous documentary evidence all supported D's case that Ms Latimer dropped D due to Cs' Tweets. D relied on the following disclosed records from 12 November 2020 (the day of the final phone call between D and Ms Latimer):

(1) D's Tweet: *"I want to thank my acting agent who let me go on the phone just now for reaffirming exactly why I am doing what I'm doing. Still waiting for a single example of anything I've ever said or done that could ever be deemed racist. …"* [**D/46/178**].

(2) D's message to Ms Latimer: *"I have never once said or done anything racist. In fact quite the opposite. …"* [**G/1/2**].

(3) D's messages to several contacts that he *"got dropped by my acting agent for being 'racist' this evening"* [**F/6/153**], [**F/7/154**], [**F/9/156**], [**F/11/158**],

[**F/13/160**], [**F/14/161**]; and *"Thinking about how to make positive my serious anger about being dropped by my agent for racism"* [**F/5/151**].

49. The Judge rejected D's case because: *"This evidence … suggests the reason Ms Latimer let him go was to do with 'racism', but does not make any visible connection with the Tweets complained of. Indeed, it could be read as an indication that he understood he was dropped for 'being racist' …":* at **[L§131];** see also **[L§138].** But there was no evidence whatsoever, not even a pleaded allegation in C3's Truth Defence, of D 'being racist' between the Sainsbury's boycott tweet (which *decried* 'racial segregation') on 4 October and Ms Latimer dropping him on 20 November 2020.

50. The other alternative suggested in **[L§131]** is that Ms Latimer might have dropped him *"…for generally 'being called a racist', rather than having been so described by anyone in particular"* (emphasis original). But the 15 tweets pleaded by Cs' (which were inadmissible under the rule in ***Dingle***, even if admissible on specific forms of harm) all preceded Ms Latimer's final offer of work to D on 2 October 2020, and the flood of tweets accusing D of racism that followed from Cs' incredibly wide-spread, high-profile tweets after 4 October 2020 are part of the serious harm which proved D's case, not material which confounded it.

51. The link between references to "racism" in the documentary evidence and Cs' Tweets was established by evidence from D himself and from D's ex-assistant Stephanie Kowalski. Ms Kowalski specifically recalled that on the phone call, Ms Latimer used the words *"allegations of racism"* and that they were *"recent"* [**T/4/16.11-20**]. She attested that Ms Latimer mentioned *"things that was being said about Laurence on Twitter and in the papers"* [**T/4/24.15**] and that people in her office mentioned *"that Laurence had been spoken about and there was a bit of bad press and such"* [**T/4/33.6**]. Ms Kowalski understood this to mean Cs' allegations of racism [**T/4/17.9**] and the Twitter storm [**C/4/26.3**]. She deduced this *"because that was what was going on, on Twitter, it was logical to make the assumption that that's what she was referring to, because that was the thing that was happening at the time"* [**T/4/18.24**].

52. The judge wrongly characterised this as "*recollections of general bad press, at the time and cumulatively*", and fell into error by dismissing this evidence at **[L§125]**:

    52.1 Any recollection of bad press "*at the time*" must necessarily have been of press about Cs' Tweets (and D's response). This press republished and repeated the

allegations in the Cs' Tweets, including by quoting and screenshotting them: see *The Mirror* [**D/30/71**]; *MailOnline* [**D/31/80**] [**D/33/95**] [**D/37/120**] [**D/41/145**]; *Yahoo* [**D/34/108**]; *Entertainment Daily* [**D/35/111**]; *Third Sector* [**D/36/117**]; *Irish Mirror* [**D/39/137**]; *London Evening Standard* [**D/42/163**]. Cs did not rely on other bad press "*at the time*": the next media article in the Joint Chronology was on 13 November 2020, which reported that D had been dropped by Ms Latimer [**H/23/402**].

52.2 The reliance on bad press "*cumulatively*" goes nowhere. Any media coverage adverse to D before publication of Cs Tweets did not cause Ms Latimer to drop D: their relationship continued, and she continued to offer him roles.

53. Two further pieces of evidence supported D's case on causation:

53.1 D's oral evidence that Ms Latimer referred to *"Formal allegations of racism made against me by someone in showbiz, it was making the girls in the office feel very uncomfortable…"* [**T/5/219.1**]. He also said: *"Sue … asked me whether it would be a good idea to spend some time off the books, as the girls in her office were talking about Tweets accusing me of being a racist. … she finally admitted that the Claimants' Tweets were a reputational risk for the agency and that they would have a large impact on her ability to find work for me."* [**B/4/63**].

53.2 The body of documentary evidence which confirmed the positive and supportive relationship between D and Ms Latimer prior to Cs' Tweets, in a period when D was already gaining attention on political/race issues. Both D and Ms Latimer demonstrably wanted their professional relationship to continue. After *Question Time* in January 2020, Ms Latimer wrote to D: "*I'm so sorry. The whole response has been ridiculous. Let me know if there is anything I can do*" [**H/58/1076**]. D thanked her for "*being calm and non-judgmental*"; and she wrote: "*I'm here if you want to talk but otherwise on the lookout for our next real gig!*" [**F/126/348**]. D's email to Ms Latimer on 30 September 2020 continues this theme. The Judge reproduced this email at **[L§127]** and drew inferences from it which were inimical to D's case on causation. However, she failed to acknowledge the following matters:

(a) The email demonstrates a close relationship between D and Ms Latimer, with D writing to her on warm terms.

(b) Despite his job with Reclaim, D wanted to be an actor and stated his goal was to "*walk back onto a film set, head held high and proud …*".

(c) D was "*encouraging [Ms Latimer] not to give up on me. Rather than saying she has given up on me*" [**T/5/93.9**]. This played out: Ms Latimer remained D's agent after this email, and three days later on 2 October 2020 she sent D a high-quality opportunity [**F/186/345**]. Given that this was the last ever role that Ms Latimer offered to D (despite there still being industry interest in D in the US: **[F/148/387], [F/149/388]**), the coincidence in timing of Cs' 4 October 2020 Tweets is striking.

54. Rather than determine serious harm on the sound basis of the documentary and witness evidence above, the Judge preferred to engage in an academic exercise of brainstorming counterfactuals. At **[L§132]**, she correctly recognised that: "*It is not my job to speculate further about Ms Latimer's views of Mr Fox, it is his job to persuade me of them*". However, she then fell foul of her own direction.

54.1 First, she held (without evidence) that business people "*generally proceed*" by taking a "*considered business decision, reached on a commercial and multifactorial basis, and taking the long view*": **[L§132].** It should have been equally evident to the judge that business people sometimes react quickly to events or crises, prioritising the short-term.

54.2 Second, the Judge speculated a series of "*alternative explanations*" for Ms Latimer's decision without any evidence, proposing no less than eight theories about what Ms Latimer "*might*" have been thinking in **[L§133-137].** The substance of these theories was also objectionable and ignored available evidence. By way of example:

(1) The judge pondered that *"Ms Latimer might have concluded … that Mr Fox had taken the initiative to declare himself fundamentally out of tune with the values of the profession, a declaration she could foresee might have consequences…":* at **[L§134].** By way of evidence, the Judge sought to rely on press articles. However, she:

(a) Failed to refer to D's responsive evidence that the "*formal warning*" about the impact of his actions on his career (mentioned in *The Daily Telegraph*) likely came from one of his ex-agents, and he did not remember Ms Latimer giving this warning [**T/5/115/1**]; and

(b) Failed to acknowledge that despite the reference in the *Spectator* article to the "*unhappy*" consequences for his agent, D continued to receive offers for acting work from Ms Latimer.

(2) The judge also mused that Ms Latimer *"might simply have concluded that his having taken on a full-time political job and the responsibilities due to a salaried role said something about his priorities and availability …":* at **[L§137].** She omitted that on 12 October 2020, D told Ms Latimer that he was keeping himself *"primed for anything that is a big step forward acting wise"* [**H/70/1099**].

55. In rejecting D's case on Ms Latimer's reasoning, the judge objected that: *"I was given no basis for understanding that Ms Thorp's opinion was or was likely to have been particularly influential in this matter":* at **[L§139].** However, this could plainly be inferred from: (1) the vehemence of Ms Thorp's specific appeal to readers not to employ or give work or even provide a platform to D; (2) the likely characteristics of her followers, given that she was a celebrity actress who had been on Coronation Street; (3) the sheer scale of publication by C3 demonstrating her reach, and the likelihood of her celebrity making this prominently reported in the mainstream media; and (4) the structure of her Tweet as a bare comment (without quote-Tweeting any context about Sainsburys), so as to may have inside information to give good reason for calling D a racist. If any more evidence was needed, D attested that: C3's Tweet was: *"… the first time somebody in my business had turned around and Tweeted in show-business, which is a very small family: 'This actor is a racist. Anyone who hires him does so knowing he's a racist and therefore supports racism.'"* **[T/5/186.21**]. The judge did not refer to any of these matters in **[L§139]**.

Ground 2B: Drop-off in D's professional engagements

56. The judge concluded that D did not discharge his burden of demonstrating serious harm (at **[L§158]**) without referring to, let alone analysing, D's detailed documentary case on the decline in his professional engagements. Annex 1 to D's Trial Skeleton Argument provided a chronological summary offers for acting/reality television roles and invitations to events from 2019 and 2022. This was produced from over 1,000 documents on serious harm disclosed by D, and includes references to 117 underlying documents. The CA is in as good a position as the Judge to evaluate this evidence, in circumstances where it was not challenged at trial.

57. Annex 1 supports D's evidence that after *Question Time*, he continued to receive good quality offers for acting roles "*right up until Nicola Thorp's Tweet*" [**T/5/18.14**]. It demonstrates and quantifies that:

(1) D received 52 offers in 2019, averaging one per week.

(2) Between 1 January 2020 and *Question Time* on 16 January 2020, D received a further four opportunities, continuing the average of one per week.

(3) Between *Question Time* and the UK announcing COVID lockdown on 23 March 2020 (a 10-week period), D received a further seven offers, marking only a marginal deduction from his 2019 rate. These included offers of an extremely high calibre, such as an audition for *Succession* [**F/128/351**].

(4) Between the start of COVID lockdown and 4 October 2020, D received five offers, including the high calibre *Cartoon Play* on 2 October 2020 [**F/146/385**]. This was a deduction in the rate of offers, but D gave evidence about the very significant impact of COVID on production [**T/5/52.5**].

(5) Between 4 October 2020 and 12 November 2020, D did not receive <u>any</u> further offers for roles through Ms Latimer. He received two significant offers from his former US agency (including a Disney Plus series [**F/149/388**]), but gave evidence that "*I'm not sure [the allegations] made as big news in America as it did here, and bearing in mind I was in Lewis for all of those years…*" [**T/5/232.4**]. The small number of offers he did receive[2] were often of a low calibre: such as a low-paying audio-book series [**F/170/450**] or films being made by independents or (it would appear) amateurs.

58. Through this comprehensive documentary case, D discharged his evidential burden ("*the duty of passing the judge*" or "*burden of adducing evidence*").[3] Cs did not challenge this data in any meaningful sense in either written or oral closings.

---

[2] Two further offers were inadvertently not included in Annex 1, but were before the judge: (1) the Film 'NEWEARTH' (23 November 2021) [**H/74/1108**]; and (2) the Film 'My Son Hunter', released in September 2022 [**H/41/635**]. This was a one-off crowd-funded job, and "*in no way compared to the quality and scale of work, or the amount of income, that [D] was receiving prior to October 2020*" [**B/4/66**].

[3] *Phipson on Evidence* (20th Ed) [6-02].

59. The Judge did not refer to or analyse this data, or refer to Annex 1 at all, despite her pledge to consider the case D had asked her to decide: at **[L§113]**. She did so without any explanation (for example, she did not suggest that the Annex was not reliable).

60. The Judge did accept at **[L§151]** that D "*effectively stopped working as an actor*". However, she wrongly attributed this to a shopping-list of other factors:

(1) First, the Judge relied on *"the public and showbusiness response to Question Time and to Mr Fox's intervening interventions on racism"* **[L§150]**. She referred to "fifteen intervening episodes" where D had been challenged as a racist and concluded that *"the inherent probability … that it was the particular Tweets sued on here that changed anyone's mind or affected Mr Fox's career must be vanishingly small":* [**L§145**]. As set out above, these *"fifteen intervening episodes"* were Tweets that were not properly in evidence. But even if they had been, the finding was not open to her on the evidence: each of these fifteen "episodes" preceded D's email to Ms Latimer on 30 September 2020 where he reinforced his commitment to acting, and her offer for Cartoon Play on 2 October 2020. The Judge also placed excessive weight on these "intervening episodes", in circumstances where: (1) Cs did not adduce any evidence of the reach of the Twitter users who called D racist on these occasions, and how this compared to the very large audience of Cs Tweets (on which D made lengthy submissions at trial); and (2) the documentary evidence demonstrated that these earlier allegations did not impact D's acting career, as he continued to receive substantial and high-quality offers after *Question Time*.

(2) Second, the Judge relied on D's "*own deliberate and advised dialling down of his acting career* **[L§150]**. However, it does not follow that if D turned down roles, especially low-quality ones, this would lead to a reduction of offers.

(3) Third, the Judge relied on "*the impact of the pandemic*" **[L§150]**. However, the downturn in D's acting opportunities continued into 2022, when the impact of the pandemic had dissipated.

(4) Fourth, the Judge relied on D's "*emergence as the leader of Reclaim*" **[L§150].** The Judge did not make clear how this is said to have impacted his acting career. D told Ms Latimer that he was still interested in acting roles.

(5) Finally, the Judge relied on *"Mr Fox's own contributions to the Sainsbury's exchanges"* **[L§147].** She found at **[L§149]** that *"the eye-catching if*

complicated call to boycott Sainsbury's and the making of the paedophile allegations … had far greater impact than the contents of the Tweets themselves". This was not a conclusion open to the Judge on the documentary evidence, which pointed to Ms Latimer dropping D specifically because of "racism". There was no evidence suggesting that D's call to boycott Sainsbury's had been causative of the loss of his acting career or Ms Latimer's decision. (The Judge may have been influenced by her own positive view of the Sainsbury's announcement, as set out in **[L§117],** where she asserts on the basis of no evidence whatsoever that: *"A substantial body of opinion at the time thought that having an online forum where employees of colour could discuss their reactions to the issues of the day … was positively anti-racist."*. Neither was there any evidence indicating that the sudden failure of his career or Ms Latimer's decision had been caused by the making of the paedophile allegations.

C. HONEST OPINION & TRUTH DEFENCES

Ground 3: Failure to determine the defences of Honest Opinion and Truth

61. The Judge's decision not to determine, or even make proper findings, in relation to the pleas of Honest Opinion and Truth was plainly wrong and a procedural irregularity which was unfair to D, particularly given the substantive treatment of those issues in the trial itself and in the Liability Judgment.

62. The parties were agreed that those defences should be determined, even in the alternative. As noted in the Liability Judgment at **[L§168]**, Cs asked the Judge to resolve these issues. D also made clear in closing that the resolution of the issue of Truth was important to him. The Judge not only decided not to do so, but stated that these matters did not properly fall to her to resolve. The decision was deeply unfair and prejudicial to D, for two reasons.

(1) First, it is deeply unjust to a party in litigation to face a trial in which a very seriously defamatory allegation is repeatedly put to him and made about him, under the protection of absolute privilege, for that allegation to be repeatedly and widely reported, and, yet, for the truth of that charge not to be resolved by the Court.

(2) Secondly, should D's appeal on the issue of serious harm in the Counterclaims succeed, a full retrial of the Counterclaims at least (if not the Claims) will be

required. D was cross-examined for more than 2 full days at the trial, a process that was gruelling. It is deeply unjust that, were his appeal to succeed, he would need to undergo that ordeal again. Furthermore, the Judge's decision also now inevitably leads to the understandable (even if misplaced) apprehension on the part of D that the prospects of a successful appeal might be reduced by the appeal court's reluctance to order a full retrial.

63. The Judge's point in **[L§162]** that a defendant (in this case, Cs) is not entitled to be asked by the justice system to explain themselves when the serious harm threshold is not met has no bearing on the facts of this case, in which (a) the defences of Truth and Honest Opinion had been fully tried; and (b) Cs themselves expressly asked the Court to resolve these issues. The Judge's consideration of the interests of Cs in this paragraph is in stark contrast to her failure to consider the impact of her decision on D.

64. The Judge's point in **[L§164]** that it was undesirable for the Court to resolve the defence of Truth because that would entail the Court wading into difficult assessments of contemporary cultural standards has still less merit.

65. Early in this litigation, D applied for this case to be tried by a jury on the basis that it would be difficult for a judge sitting along to make an assessment of the culturally controversial issue of the meaning of the word "racist". That application was refused by Mr Justice Nicklin [2022] EWHC 1124 (QB), with the Judge rejecting D's submission that the controversial nature of the issue was more suitable for resolution by a jury: "*Nor is such controversy a justification for abdicating responsibility for what may prove to be controversial decisions to juries, who may themselves not escape public criticism*" (at [75]). Having earlier been refused his preferred mode of trial on the basis that the trial judge would ***not*** shy away from the controversial issues arising in this case, D has now received an adverse judgment in which the trial judge has expressly done exactly that, at great personal cost to him.

66. The sole Particular of Truth upon which the Judge openly expressed a view was the issue of the "pint of milk", where her conclusion was perverse:

66.1 C3's defence of Truth pleaded at paragraph 32.5 that *"In March/April 2021, D incorporated into his Twitter handle a glass of milk emoji, a symbol widely adopted by White Supremacists in the USA."*;

66.2 D's Reply at paragraph 19.5 admitted the emoji had been incorporated in late March 2021 but that *"the incorporation was not in any way a symbol of support for White Supremacists in the United States, whose views the Defendant finds abhorrent, but rather a reference to the speech of Charles Walker MP (Conservative, Broxbourne) in the House of Commons at 2:32pm on Thursday, 25 March 2021, during a debate on the Coronavirus regulations. The speech revolved around how he was going to carry around a pint of milk on his person as a general expression of protest and defiance during Covid lockdowns."* (because going to get a pint of milk was one of the few permitted reasons for leaving a residence during lock-down);

66.3 D's evidence (First Witness Statement at §§33-35) exhibited the Hansard extract of the speech by Charles Walker MP on that date, a link to the video of the speech, and a press photograph of D and Richard Tice (leader of the Reform Party) from 25 March 2021 holding a bottles of milk in Parliament Square in support of Mr Walker MP and his firm stance against Covid lockdowns.

66.4 Cs' case in cross-examination was limited to putting to D the fact that a month later, the *Metro* newspaper said the symbol could suggest support for white supremacism in the United States and D did not immediately delete the emoji. There was no evidence except the say-so of the *Metro* article as to whether a pint of milk is *actually* a symbol of white supremacism in the United States, nor is this a matter upon which the Judge was entitled to take judicial notice.

66.5 In the face of this unchallenged evidence, the Judge found at **[L§153]** that the *"incorporation of a picture of a pint of milk into his Twitter profile (a symbol with some recognised connections to white supremacism) for which I was given no convincing explanation…"*. By this finding, the Judge was implying that D's use of this emoji was indeed indicative of him being a white supremacist, in circumstances where she purported not to be determining the Truth defence at all. This is as perverse as it is unfair.

GROUNDS OF APPEAL
IN THE CLAIMS

D. SERIOUS HARM TO THE FIRST & SECOND CLAIMANTS' REPUTATIONS

67. The grounds of appeal **Ground 4** contends that the Judge erred in her reliance on the Single Meaning (as determined at the TPI, with very little admissible context) to found a purely inferential case on 'serious harm'. **Ground 5** explains why the Judge's evaluation was perverse on its facts on the basis of the admissible evidence before the Court at trial. **Ground 6** concerns the Judge's rejection of the Qualified Privilege (Reply to Attack) defence. **Ground 7** challenges the quantum of damages – £90,000 each – awarded to C1 and C2.

Ground 4: Incorrect approach to Serious Harm based on the Single Meaning

68. The Judge erred in her elevation of the Single Meaning into a major factor in the assessment of serious harm to reputation. In circumstances where there was such a great difference between the context admissible for determination at the TPI (and on appeal) and the *actual* context in which publishees encountered D's tweets, the inference that many or any readers would have *actually* understood D's tweets in the Single Meaning was weak. But the Judge appears to have assumed that the Single Meaning in the eyes of the notional ordinary reasonable reader could stand automatically as a proxy of what publishees *actually understood*.

69. This almost-entirely inferential case on serious harm, breezily predicated almost entirely on the Single Meaning and scale of publication, was particularly surprising given the Judge's (correct) reference to relevant principles at **[L§50-53]** and her forensic (albeit flawed) assessment of serious harm in the counterclaims.

70. The governing interpretation of '*serious harm*' under s.1(1) Defamation Act 2013 is the Supreme Court's seminal decision in *Lachaux v Independent Print Limited* [2020] AC 612, in which the Supreme Court held that serious harm to reputation is a question about *actual effects* of publication, not the *tendency* of words to injure.

71. In *Lachaux*, the Supreme Court was faced with two alternatives interpretations of the statutory provisions: either s.1(1) raised the *Thornton* threshold but was still fundamentally a question of the objective inherent tendency of words to cause harm (as the Court of Appeal had held); or s.1(1) was a more radical development, whereby

Parliament required a claimant to prove s/he had actually suffered actual harm to reputation (as Warby J had determined at first instance). The Supreme Court unanimously agreed with Warby J: serious harm to reputation is a question about *actual effects* of publication, not the *tendency* of words to injure.

72. In the most critical paragraph of Lord Sumption's judgment in *Lachaux*, he says:

> *"The Court of Appeal's analysis not only gives little or no effect to the language of section 1. It is to my mind internally contradictory. Davis LJ, who delivered the only reasoned judgment, accepted the submission on behalf of Mr Lachaux that the seriousness of the harm caused to the claimant's reputation by the publication depended on the inherent tendency of the words. But he appears to have thought (paras 70-73) that where this was "serious", the result was to set up an inference of fact, which it was open to the defendant to rebut by evidence. As Ms Page accepted, this will not do.* ***The common law rule was that damage to reputation was presumed, not proved, and that the presumption was irrebuttable. If the common law rule survives, then there is no scope for evidence of the actual impact of the publication. That is the main reason why in my opinion it cannot survive.*** *Davis LJ has, with respect, accepted the legal analysis advanced on behalf of Mr Lachaux, while attaching to it the consequences of the legal analysis advanced on behalf of the newspapers. In my opinion, Warby J's analysis of the law was coherent and correct, for substantially the reasons which he gave."*

73. It is not permissible to set up the Single Meaning and its inherent gravity as a rebuttable presumption against the defendant, for the defendant then to disprove. The legal and evidential burden remains on the claimant, who must prove that the actual impact of the words and that they *actually* caused serious harm to reputation because they were *actually understood* in that meaning and (for an allegation at *Chase Level 1*, as in this case) *actually believed*.

74. If no publishee *actually understood* the words in the Single Meaning (i.e. a complete reverse innuendo) there could be no liability. Similarly, even if every publishee actually understood the words complained of in the Single Meaning, if none of them *actually believed* the allegation, no serious harm could arise or be inferred.

75. In very many libel cases, the Single Meaning stands effectively unopposed as the meaning in which readers understood the words: the Single Meaning is a common-ground *proxy* for the actual meaning(s) readers took from the words. A safe inference

can often be drawn from the Single Meaning that a large proportion of readers *actually* understood the words as the law imputes to the ordinary reasonable reader; or at least it is not usually worth a defendant contesting as much. But it is the *actual* meaning(s) which may be inferred from the Single Meaning, not the Single Meaning itself, which governs serious harm.

76. The distinction is of central importance in this case, because Nicklin J had taken a restrictive view to admissible context on the TPI on meaning. Accordingly, the Single Meaning (which necessarily governs whether the words are defamatory at common law, whether fact or opinion, and the viability of a Truth defence) was determined in a context in which not a single publishee actually read the words complained of.

77. D's case at trial was that almost every reader (if not all of them) read the Tweets in some context which **in fact** meant that no-one actually *understood* and *believed* them as a *Chase Level 1* allegation of fact. The various confounding facts making up that context, which had been inadmissible at the TPI on Meaning, would include:

(a) seeing D's Tweets to *other* Cs calling them 'paedophiles', which would have made abundantly clear that he was using the term rhetorically (as he intended) and particularly, seeing D's Tweets to C3, which the CA has found bore a rhetorical meaning in its natural and ordinary sense;

(b) D's disavowal of any meaning of fact (and explanation of the rhetorical device) <u>within the hour</u>, the deletion of the Tweets the following morning, and his apologies within hours and days;

(c) Seeing myriad Tweets calling for D to be sued for libel (due to falsity);

(d) seeing D's Tweets (or screenshots) <u>only</u> because they had been shared by Cs themselves (which, although the Judge did not record this important evidential point, was the *majority* of the publication of the defamatory statement and continued to be published by Cs up to the trial itself)

(e) Cs' own comments, denials and responses on Twitter;

(f) the realisation (if anyone did in fact Google) that people with Cs' names had relevant convictions, which would suggest D had mistaken their identities;

(g) reading the media coverage of the spat, <u>all</u> including reference to D's Tweets to <u>all</u> Cs, making clear that he was making a rhetorical denial.

78. To that end, it was a critical point of D's case as to the proper approach to serious harm that it is 'ambulatory' (i.e. harm from the Single Meaning can initially be very serious, but then entirely displaced, confounded or vitiated by the time it falls to be determined by the Court). Thus, the time at which serious harm fell to be assessed mattered, more acutely on the facts of the present case than in others. There is some dispute in the authorities as to the time at which 'serious harm' falls to be determined, being either at:

    (a) the time of issue of the claim form, per Bean J in *Cooke* (6 months after publication, on 1 April 2021); or

    (b) the time of trial, per Warby J in *Lachaux* (more than 3 years after publication).

79. Unfortunately, the Judge failed entirely to determine this point, or to indicate at all *at what point in time* she was assessing serious harm (D's case being that there was no arguable case on serious harm after a day or so post-publication), or what proportion of the readership could have read the Tweets only in the context admissible at the TPI (i.e. none of the publishees). There is a complete lack of engagement with the 'ambulatory' nature of serious harm, or the confounding facts that D pleaded and argued would have affected how all readers understood the Tweets upon which he was sued.

80. But even if there was a reader who briefly understood the individual Tweet sued upon in its Single Meaning, they would have to have both:

    (a) *believed* it to be true, in order to have affected C1/C2's reputation; and

    (b) *sustained* that belief in spite of all of the confounding information received subsequently (which, if assessed at time of trial, would include the judgments of Nicklin J and the Court of Appeal).

81. C3's witness statement testified that – in spite of knowing she was being falsely accused by D herself – she did immediately believe D's allegation in respect of C1 and C2,. Yet first message to C2 was just hours later and began *"Sending love to you after that outburst from the racist prick"*. If her evidence as to her mistaken belief was honest, then even someone who believed the allegations upon first reader knew within hours that they were rhetorical. There was no evidence whatsoever that a single non-party had believed in any way that C1 or C2 were 'paedophiles', and even C3's evidence is supportive of D's case and not of Cs'.

82. D's primary case is that the Single Meaning, properly understood, has no role in 'serious harm' other than where an inference can be properly drawn that the actual meaning understood by readers was the same as the Single Meaning. That will often be the case in respect of a newspaper article or broadcast. Where the context makes little difference to the meaning, the Single Meaning is a decent proxy for what readers would have *actually* understood. But that is not this case.

83. D's secondary case on this **Ground 4** is that, even if and insofar as the Single Meaning does govern for the purposes of drawing an inference of serious harm, then the serious harm has to be from the Single Meaning and not some different or lesser meaning. Here the Single Meaning was that 'paedophile' was a *Chase* Level 1 allegation of fact. Yet given that no-one believed this to be the case, the Judge at **[L§83]** said:

> *"I observe in this connection that, contrary to some of the submissions made to me on this point, it is not necessary for the claimants to establish the probability of readers being immutably convinced of the truth of an allegation. That is not how reputation works. Serious reputational harm can be caused by a change of view some considerable way short of that. It is often the insidious creation of a 'bad odour', together with the difficulty of establishing a negative, that does the most reputational harm. That is particularly apposite to an allegation of paedophilia. But the test does require that people's minds were probably changed because of these Tweets, and to a degree meriting the description of serious harm."*

84. If the Single Meaning (with its 'gravity' and 'inherent seriousness') is to be used to found a purely-inferential case of serious harm, then it has to be because the reader believed that Single Meaning, not some other meaning or some lower *Chase* Level. The Judge appears to have meant by her 'bad odour' comments that although no-one may have believed C's were 'paedophiles' at *Chase* Level 1, but (although there was no evidence on this) some readers might perhaps have believed there was some grounds for investigation at *Chase* Level 3 (or perhaps some lower level of suspicion).

85. But there are critical problems with this approach (not least its inconsistency with the very notion of a Single Meaning applying in defamation):

(1) Although not pertinent on an allegation such as this, as a matter of principle something that is defamatory at common law at *Chase* Level 1 will not <u>necessarily</u> be so at *Chase* Level 3 or lower;

(2) A defendant might be able to *justify* a lower *Chase* Level, but would be precluded from doing so once the Single Meaning has been determined at a TPI

(see *Bokhova v Associated Newspapers* [2019] 2 WLR 232), and so this approach – allowing serious harm on the basis of belief in a meaning less than the Single Meaning – permits a claimant to succeed on serious harm in respect of an allegation that a defendant is not permitted to defend as true, which is intrinsically unfair.

86. The Judge was wrong to infer that the actual meaning was automatically the same as the Single Meaning, in spite of the confounding facts. But alternatively, if she had been correct that the Single Meaning governed 'serious harm', she could not then infer serious harm caused only by a different, lesser actual meaning than the Single Meaning.

Ground 5: Errors in determining Serious Harm in the Claims

87. The learned Judge further fell into error in her approach to determining whether C1 and C2 had proved that they had suffered serious harm to their reputations by failing to analyse their pleaded cases and the evidence adduced in support of them, as tested at trial, properly or at all. In consequence, the learned Judge reached a conclusion that was plainly wrong on the basis of the admissible evidence before the Court at trial.

88. The Judge at **[L§63]** stated:

> *"Mr Green KC, Leading Counsel for Mr Fox, mounted a root and branch attack on the claimants' cases on serious harm: he, and Mr Fox's wider legal team, took a meticulous and comprehensive approach to analysing the detail of the relevant pleadings and evidence on this issue, and I have considered each point, and the overall critique, in full and with care."*

89. However, *how* the learned Judge considered each point and what she made of each aspect of the submissions remains a complete mystery. On proper analysis, C1 and C2 failed to make good their pleaded cases on serious harm on the evidence.

Common pleading to C1 & C2

90. Both C1 and C2 had suffered unpleasant trolling on the day in question and for a day or two thereafter. The was a real issue as to whether any of the online trolling reflected any harm to reputation, less still any that persisted beyond a couple of days. Cs relied on *Monroe v Hopkins* [2017] 4 WLR 68 for the proposition that online abuse could evidence harm to reputation. But *Monroe v Hopkins*, where the allegation was of support for vandalising war memorials, was a case of mistaken identity by Katie Hopkins. The

allegation was *true* of someone (journalist Laurie Penny), but false *in respect of Jack Monroe*. Therefore the online abuse of Jack Monroe was evidence that *her* reputation (i.e. not Laurie Penny's) had been harmed. There was no issue in that case as to whether the individuals posting the abuse were merely trolls. By contrast, in the present case, the allegation was not true of anyone and the trolling of Cs (by those whose language clearly indicated their insincerity) was not a proper basis to draw any inference that the allegation had been *believed* of Cs even by those who were trolling them.

91. The narrative in the mainstream press, who published D's tweets to all Cs alongside Cs' attacks on D, settled very favourably towards C1 and C2 and against D. None of the press re-publication of the allegations, reaching millions, bore the Single Meaning at all.

92. Beyond the generalities pleaded at 15.1 to 15.3 of the Amended Particulars of Claim ('**APoC**'), C1 and C2 pleaded some specific matters.

93. Paragraph 15.4 of the APoC made generalised allegations about the scale of publication, and specifically pleaded re-tweets and likes. However, the Judge made no proper assessment of the scale of publication by D as compared to the much greater publication by Cs themselves, despite being expressly invited to do so by D (see Annex 2 to D's Skeleton Argument for Trial). This was particularly important given that D deleted his own Tweet but C1 and C2's own re-publication of D's Tweets (which could not count towards serious harm, or indeed damages for harm to reputation) remained in circulation: in C1's case, remaining online until after the Remedies Hearing.

94. Paragraph 15.6 APoC referred to internet searches carried out by C3, but on the evidence, if any other publishee did the same would have revealed that the people involved were, in fact, not C1 and C2 (cf. **[L§77], [L§89]**). Carrying out the Google searches in question could only have confounded, not confirmed, allegations against Cs.

C1's pleaded case

95. Other than unpleasant trolling on Twitter on the evening in question, the real world consequences relied upon by C1, boiled down to the following important contentions:

(1) "*C1 felt compelled to tweet that the allegation was untrue and to remove Stonewall and MHFAE from his Twitter biography, to prevent those organisations from reputational damage by association with the (false) defamatory allegation against him."* (§15.10(a) APoC). In fact:

(a) D's lawyers found that Stonewall had promptly issued a statement of support. This had not been disclosed by C1. The statement praised C1's allyship in standing up to D on matters of racism. Stonewall clearly saw no reputational damage in their association with C1 and regarded standing up to D as a badge of honour. Yet at **[L§88]** the Judge took Stonewall's assessment that a statement of support was *needed* as evidence of serious harm to C1's reputation. In so doing, there was no evidence as to Stonewall's views on the harm to C1's reputation, and even if there had been, it would have been inadmissible opinion evidence; and

(b) Mental Health First Aid England ('**MHFAE**') had also supported C1 due to his strong allyship. Indeed, when (after two disclosure orders by Nicklin J) a MHFAE email was disclosed shortly before trial, it was revealed that that the word *"paedophile"* was not even mentioned and that their concern was C1 using the abusive term *"twat"* online, in breach of their social media guidelines.

(2) *"C1 saw statements on Twitter by individuals saying they would not use the services of MHFAE because of the association with C1.*" (§15.10(a) APoC). No evidence was adduced to support this contention. There were however tweets copying MHFAE and its Chair critical of C1 for his apparent bullying of D.

(3) *"C1 has also felt compelled to disclose the circumstances of D's allegation against him on Twitter when applying for new trusteeship positions."* (§15.10(b) APoC). In fact, the crucial role at an NHS Trust for which C1 then applied as a trustee, he successfully obtained: beyond the absence of any practical harm to his reputation, the natural inference is that standing up to D had burnished (rather than tarnished) his diversity credentials.

96. Overall, the Judge simply did not address the fact that had any of those organisations (perhaps particularly the NHS Trust, to which he applied) had even a scintilla of concern that there was any truth in the allegation, they would not have done what they did. This was important to assessing the impact of an allegation at *Chase* Level 1. Gaining the NHS trustee role did not even feature in the Liability Judgment.

97. C1's case that there was any significant adverse real world impact *on his reputation* failed at trial on the facts in so far as it was able to be tested and was therefore, overall,

simply not a credible basis upon which to find that he had suffered serious harm. Indeed, the opposite seemed to be the case.

C2's pleaded case

98. The only real-world consequence pleaded by C2 was the trolling referred to above. The plea that he *might* have been confused with another drag performer if publishees Googled their similar stage names, was a self-defeating plea. The other performer was convicted in Cardiff in 1999, some 20 years before C2 (a celebrity Canadian performer on RuPaul's Drag Race UK) came to prominence in 2019. There was no evidence that anyone had been confused or misled. C2 pleaded no professional consequences at all.

99. At the eleventh hour, C2's solicitors added a large quantity of new and unheralded documents to the bundle (added to Trial Bundle E without the agreement of D's lawyers) seeking to bolster C2's serious harm case. The material related to a period about 2 years later, during which C2 (and other drag queens) were involved in Drag Queen Story Hour, which was very controversial – both in the UK and even more so in the US – where there had been violent protests.

100. In addition, although undisclosed by C2 and his solicitors, C2 had performed at a children's adventure park, in the afternoon, which had led to criticism online and in the press. At the trial, Cs' counsel objected to a video of that performance being shown to the Court. After a brief response by counsel for D, the Judge permitted the video to be shown as it went to causation – D contending that fallout from this performance (or indeed, Drag Queen Story Hour) had nothing whatsoever to do with D's Tweets many months earlier, over which gap there was no evidence of any adverse treatment at all.

101. When the video was shown, the Court saw C2 (in drag) grinding an angle-grinder power tool on a metal plate fixed over his genitals, so that sparks flew off it.

102. A further video showed C2 appearing on the Jeremy Vine show, on television, and laying the abuse that he was receiving not at D's door, but at the door of those who opposed his later activities:

> *"If you have a look at the comments I have received on Twitter over the last day, it's people calling me a 'groomer', a 'paedophile', a 'nonce', all because I think children being exposed to people being gender non-conforming is not a terrifying or terrible thing."*

103. In an article for BBC3, C2 wrote in the same vein:

> *'Drag queens who have come to the defence of storytelling events have also received abuse online. "Once you dip your toe into that world," says Crystal [ie. C2], "you get called a groomer or a paedo online constantly."*

104. C2 also confirmed in evidence that the other drag queens doing Drag Queen Story Hour had suffered the same abuse as he had. (D had obviously never Tweeted about any of them). There was also no evidence of any link between D and those later Tweets, which (although this is not made clear in the Judgment) C2 explicitly accepted in cross-examination that causation of these later tweets by D's publication could not be established.

105. The fact that D has no idea what the Judge made of all the confounding evidence is both unfair and unsatisfactory. The unfairness is compounded by what the Judge ***did*** say about it at **[L§102]:**

> *"Mr Seymour became embroiled a couple of years subsequently in wider public debates about the suitability of drag entertainment for children in general, about drag artists reading stories to children, about drag shows for mothers and babies, and about his own 'family friendly' performances in particular.* ***To the extent that any of this caused additional harm to his reputation, then that does not of course establish that serious harm was not caused by the original tweets****. I can see that* ***a question arises about whether this should properly be regarded as a 'flaring up' of the original harm or a wholly independent new cause****, but that is an issue going to quantum of compensation for consideration at the remedies stage rather than going to the serious harm threshold test."* (emphasis added):

106. That treatment totally side-stepped the fact that C2 had attempted to bolster a hopeless case on serious harm, with no pleaded real-world impact, by introducing unagreed and inadmissible documentary evidence of a new and unpleaded contention of later harm – all of which came crashing down in cross-examination. That was not a fair way to decided whether the case which C2 had tried to advance on serious harm was made out.

107. D's Closing Submissions had set out the careful analysis of the above, the existence of which the Judge acknowledged, but the analysis of which she largely side-stepped. With respect to the learned Judge, serious harm was a threshold issue and it was not open to

her to ignore evidence contrary to the imputation of causal responsibility as she did. Her conclusions were in any event, plainly wrong, on any fair consideration of the evidence.

E. QUALIFIED PRIVILEGE (REPLY TO ATTACK) DEFENCE

108. **Ground 6** concerns the Judge's cursory dismissal of D's positive defence of Qualified Privilege (Reply to Attack) at **[L§104-109]**. D's case on this defence had been fully set out in his Trial Skeleton at §§160-178 and Closing Submissions at §§151-162.

109. Both the common law and Article 10 ECHR require *"great latitude"* to respond to a defamatory attack and that the defendant's language is *"not to be weighed in nice scales"*. The Judge rightly recognised that this was the law at **[L§106]**.

110. It was indisputable that D's 'reply' was to a prior defamatory 'attack' by each of Cs. Given the Judge's recognition of the gravity of the allegation in Cs' tweets, she should have been driven to afford D a latitude properly commensurate with that attack.

111. Instead, the Judge rejected the QP defence in dismissive terms as *"hopeless"* **[L§104]**.

112. The Judge held at **[L§107]**, the only paragraph that gives any legal reasoning for rejecting the defence, that it failed because of two factors which, in combination, led to the *"very epitome of 'mere retaliation' – an escalatory and disproportionate response by way of entirely irrelevant statements"*.

113. As to 'irrelevance', at **[L§107]** the Judge:

113.1 mischaracterised C's attacks on D as "a racist" as merely *"an opinion comment critical of his call to boycott Sainsbury's on grounds of racial segregation"* (the reference to them being 'opinion comment' [sic] presumably being to the TPI ruling on s.3(3) DA2013 that they were statements of opinion)*;*

113.2 described D's responses to the defamatory attacks on him as *"utterly random, and harmful, factual allegations of paedophilia"* (which is a reference to the Single Meaning, which was determined to be a statement of fact at the TPI). The Judge in the same paragraph refers to paragraph [69] of the Court of Appeal's judgment on appeal from the TPI ([2023] EWCA Civ 1000) saying that there was *"no apparent connection"* to the ordinary and reasonable reader, although this ignores the paragraph went on to say that *"the reader would probably have understood that Mr Fox was seeking to counter the charge that he was a racist"*;

113.3 It is clear that for the purposes of determining 'relevance' or 'irrelevance', the Judge's reasoning rested on comparing, not the words of the statements complained about, but the Single Meanings.

114. As to 'disproportionality', the reply to attack QP defence does not arise if the reply is published to a greater, or wider, or different audience to the original attack. If you are attacked in a small meeting room of a few attendees, you cannot publish your reply in the local newspaper. This does not arise here, because the audiences on Twitter for Cs and D were broadly the same in size and character. The Judge's reasoning on disproportionality can only be based on the relative gravity of the defamatory imputations ("a racist" vs "paedophile"), which are derived from the Single Meaning.

115. Three legal errors arise from the Judge's approach at **[L§107]**:

115.1 First, the QP reply to attack defence requires a comparison (in terms of relevance and proportionality) of the statements actually published, not the Single Meanings, or the imputations, or other matters (like fact/opinion) determined for other purposes at a TPI. The Judge failed to consider the statements D actually published. This is an error made throughout the Liability Judgment, and indeed repeated in the Remedies Judgment.

115.2 Second, there is no authority for the proposition that the 'single meaning' of a statement governs or is even relevant to the QP (reply to attack) defence. The Privy Council in *Bonnick v Morris* [2003] 1 AC 300 held that in *Reynolds* QP, the objective Single Meaning does not apply and it is the latter meaning which governs a conduct-based defence: see [21]-[22]. The Judge was wrong to rely on the objective Single Meaning as found in relation to the ordinary & reasonable reader rather than the subjectively-intended meaning in the mind of the publisher. QP (reply to attack) is a conduct-based defence rooted in qualified privilege (much like the *Reynolds* species of QP that evolved into the s.4 DA2013 public interest defence), and defendants should not be subject to liability on conduct-based defences purely because (as the Privy Council said in *Bonnick* at [24]) they have misjudged their own meanings.

115.3 Third, the characterisation of D's reply to attack as 'mere retaliation' was in essence a finding as to his *purpose* and/or *state of mind*, inconsistent with the failure of Cs to even put their malice plea to D in cross-examination.

116. The Court was therefore wrong at **[L§108]** to say the Reply to Attack defence failed because it is *"not a licence to defame"*. In fact, that defence provides protection against liability in respect of the publication of defamatory material in certain circumstances and therefore does indeed provide *"a licence to defame"*. The Court's statement indicates a misunderstanding of the nature of the defence.

F. QUANTUM OF DAMAGES

117. **Ground 7** challenges the quantum of damages. Declining to distinguish between C1 and C2 for the purposes of remedies any more than she had done in determination of serious harm to reputation, the Judge awarded both of them the same sum: £90,000.

118. The Judge's decision is vitiated by each and all of her errors of approach to serious harm in the Liability Judgment and should be set aside for that reason alone.

119. The primary legal error in the Judge's assessment of quantum was at **[R§22]** to make no reduction whatsoever for the conduct of C1 and C2 prior to publication by D, by provoking the libels by making seriously defamatory attacks on D's reputation by calling him "a racist" in abusive terms. This is an established basis for reduction in damages, and yet was rejected entirely by the Judge.

120. Furthermore, as set out in the Grounds of Appeal, the Judge's determination of quantum:

(1) failed to account adequately or at all for Mr Fox's apology and/or clarificatory remarks, and other positive evidence of an absence of malice in publishing;

(2) failed to account for the Claimants' misconduct during the litigation, including:

(a) the wholesale failure to provide standard disclosure of any private communications, each Claimant signing an untrue disclosure statement;

(b) presenting through their lawyers an untrue account as to both the existence of such communications and whether or not they were covered by legal professional privilege;

(c) concealing until oral evidence a mistake of fact by both Mr Blake and Mr Seymour (not clicking on the hyperlink in the boycott tweet) which fatally undermined both their Honest Opinion defences;

(d) exaggerating both harm to reputation and distress, which were shown to be inconsistent with belatedly disclosed documents;

(e) abuse of Mr Fox throughout the litigation, published on Twitter by Mr Seymour's husband, with Mr Seymour's knowledge and apparent acquiescence;

(3) failed to account for the fact that Cs' own republications were by far the majority of publication on Twitter and that Cs' own republications persisted 3 years to trial (as opposed to hours when published by D), in flagrant breach of their duty to mitigate their loss.

121. In any event, the identical awards (for different cases) were plainly far too high on any proper analysis, if (*quod non*) the Claimants suffered any harm at all. The Judge awarded more than the damages to be awarded for serious personal injuries, as set out in the 17th Edition of the JSB Guidelines, which had themselves significantly increased the level of awards. The following examples are instructive:

(1) Severe Leg Injuries (Moderate: complicated or multiple fractures or severe crushing injuries, generally to a single limb): £33,880 to £47,840

(2) Complete Loss of Sight in One Eye: £60,130 to £66,920;

(3) Total Loss of One Eye: £66,920 to £80,210.

122. There is no proper basis for an award of damages approaching any of those sums fairly to compensate C1 and C2 for any harm to their reputation that could conceivably be identified as having been caused by D.

PATRICK GREEN K.C.

ALEXANDRA MARZEC

GREG CALLUS

2 July 2024