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Case No: IHJ/08/0785  
IHJ/08/0796

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/11/2008

**Before :**

**THE HON MR JUSTICE TUGENDHAT**

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**Between :**

**KEVIN CLARKE t/a ELUMINA IBERICA UK**

**Claimant**

**- and -**

**(1) LAWRENCE D. BAIN**

**(2) PROLINK HOLDINGS CORP**

**Defendants**

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**Miss Caroline Addy** (instructed by **Stitt and Co**) for the **Claimant**  
**Mr Godwin Busuttil** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendants**

Hearing date: 24<sup>th</sup> October 2008  
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## **Approved Judgment**

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

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**THE HON MR JUSTICE TUGENDHAT**

**Mr Justice Tugendhat:**

1. There are three Application Notices in this libel action. In the first, dated 18 August 2008, the Defendants applied for declarations that this court has no jurisdiction to try the claims advanced in paragraphs 8, 9, 10, 18.2 and 18.3 of the Particulars of Claim, alternatively that they be struck out. All of these paragraphs relate to an e-mail dated 18 February 2008 sent by the First Defendant to a Mr Chung in China (“the Chung e-mail”). In the second Application Notice, the Claimant applies for leave to amend the Claim Form and Particulars of Claim, in part to meet the objections raised by the Defendants concerning paras 8, 9 and 10 of the Defence. In so far as the application is to delete those paragraphs, the Defendants do not object to the proposed amendment, but there are other proposed amendments to which they do object. Thirdly, by an Application Notice dated 5 September, the Defendants apply for rulings pursuant to CPR 53 PD para 4 as to certain of the meanings pleaded by the Claimant, and, if they are successful on that application, for an order that para 18.1 of the Particulars of Claim to be struck out on a related basis. In addition, in that Application Notice the Defendants apply to strike out para 18.7 of the Particulars of Claim, on the ground that it is not open to the Claimant to rely in aggravation of damages upon publications which are separate from those relied upon as causes of action.
2. In the Particulars of Claim the Claimant describes himself as an English national who resides in England and trades under the name Elumina Iberica UK. He acts as the UK agent of Elumina Iberica SA, a company which supplies golf course management systems employing Global Positioning System satellite technology to golf courses throughout Europe. He also states that he is a shareholder in Elumina Iberica SA.
3. The First Defendant is the Chief Executive Officer of the Second Defendant. Both are domiciled in Arizona. The Claimant states that until 31 January 2008 the golf course management systems supplied by himself and Elumina Iberica SA were manufactured by the Second Defendant and supplied under a distribution agreement between those two companies. The Second Defendant had commenced negotiations with Elumina Iberica SA with a view to a takeover, and Elumina Iberica UK Ltd had been formed for putting such a takeover into effect. The negotiations failed in about January 2008 and Elumina Iberica UK Ltd has been dormant.
4. The action was brought upon the following publications:
  - i) A press release headed “ProLink Holdings Files Suit against Elumina Iberica and its shareholders”

(Particulars of Claim paras 5 to 9) allegedly published on 4 February 2008 through two outlets on the internet available to be read within this jurisdiction and in an attachment to an e-mail dated 29 February 2008 and addressed to 105 golf clubs in the UK. The two outlets were PR Newswire (an internet news service) and Thomson One (a specialist financial new website, on which, it is said, the press release remains available);
  - ii) An e-mail written and sent by the First Defendant on 18 February 2008 to a Mr Chung in China, who was a representative of a client of the Claimant (Particulars of Claim paras 8 to 10);

- iii) A letter dated 10 March 2008 written by the First Defendant, addressed and sent to the managers and owners of the 105 golf courses, together with a copy of a letter addressed to the Claimant dated 5 March 2008 (Particulars of Claim paras 11 to 14);
  - iv) Words spoken at a public conference call broadcast via the internet with a dial-in facility on 15<sup>th</sup> April 2008 (Particulars of Claim paras 15 to 16).
5. On 3 July 2008 the Claimant obtained leave to serve the claim upon the Defendants outside the jurisdiction pursuant to CPR 6.20(2) and 6.20(8)(a) and (b) (claims in tort where damage was sustained within the jurisdiction or the damage resulted from an act committed within the jurisdiction).
6. The Defendants' objection to Particulars of Claim paras 8 to 10 is that an e-mail sent from the USA to an addressee in China does not come within CPR 6.20,(now paragraph 3.1 (9) of Practice Direction B to CPR 6) and that has been conceded in correspondence. In response to that objection the Claimant has put forward a draft Amended Particulars of Claim. In it the substance of what had been set out in para 8 of the Particulars of Claim (that is the allegation of publication of the e-mail) is substantially reproduced and inserted into para 18, which contains a plea of aggravated damages. The Defendants object to this attempt to rely upon the e-mail in aggravation of damages.

#### MEANING

7. I shall consider first the Defendants' applications for ruling on certain of the meanings. Under CPR PD 53 para 4.1 a judge may decide whether a statement complained of is capable of bearing any meaning attributed to it, or any meaning defamatory of the claimant. The principles applicable are not in dispute. Ms Addy for the Claimant reminds me of them as they are set out in *Skuse v Granada Television* [1996] EMLR 278, 285-7, *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263 and *Berezovsky v Forbes Inc* [2001] EMLR 1030, 1040. It is unnecessary to set them out in this judgment.
8. The press release of 4 February 2008 headed "ProLink Holdings Files Suit against Elumina Iberica and its shareholders" reads, so far as set out in the Particulars of Claim para 5, as follows:
- "Chandler, Ariz., /PRNewswire - FirstCall/--ProLink Solutions, a wholly-owned subsidiary of ProLink Holdings Corp. (OTC Bulletin Board: PLKH) and the world's leading provider of Global Positioning Satellite ("GPS") golf course management systems and on-course advertising, announced today that it has commenced litigation against Elumina Iberica, S.A., Elumina Iberica UK Limited, GPS ADS LTD and related parties (collectively "Elumina") as a result of multiple breaches, including non-payment, under its distribution agreement. ProLink has also commenced legal action against Elumina in connection with the previously announced acquisition of Elumina. Effective February 1, 2008 the Company terminated its distribution agreement with Elumina Iberica S.A. On January 9, 2008 the Company terminated its agreement to acquire Elumina.

Pursuant to the terms of the acquisition agreement, ProLink is filing claims against Elumina with the International Chamber of Commerce Court of Arbitration, seeking a determination that it properly terminated the acquisition and damages for non-payment of \$4.5 million in receivables generated from ProLink's sales of commercial equipment and other services to Elumina. The Company has also filed a complaint in U.S. District Court in Phoenix against Kevin Clarke d/b/a Elumina UK for non payment of goods sold and delivered, and has filed a claim against Elumina Iberica S.A. with the International Centre of Dispute Resolution (ICDR) for arbitration under the UNCITRAL Arbitration Rules for arbitration, for arbitration in Phoenix, Arizona as provided for in the parties' Exclusive Licensing and Distribution Agreement seeking damages for non-payment of goods sold and delivered, breach of representations and warranties, legal fees and consequential damages.

The Company expects to take undetermined non-cash reserve in its 2007 fourth quarter, in connection with the \$4.5 million receivable from Elumina..."

9. The meanings pleaded in para 7 are that the Claimant:

"7.1 acting together with Elumina Iberica SA and Elumina Iberica UK Limited, had committed or enabled multiple serious and dishonest breaches of the distribution agreement an the acquisition agreement with Prolink Solutions, including non-payment for goods received, so that Prolink Solutions had been forced to terminate the agreements and bring litigation against them;

7.2 Had himself also dishonestly and inexcusably failed to pay Prolink Solutions for goods the company had sold to him and was being sued as a result."

10. Mr Busuttill submits that these words are not capable of bearing any meaning referring to the Claimant beyond that there are reasonable grounds to suspect that he had failed to make payment to the Second Defendant in respect of goods sold and delivered to him. In particular, the words are not capable of bearing a meaning involving dishonesty. And in so far as they may bear the meaning that there were multiple breaches of the distribution agreement that is not capable of referring the Claimant personally. Mr Busuttill also submits that the Press Release is incapable of bearing the meaning that the Claimant inexcusably failed to pay for goods sold and delivered.
11. Ms Addy submits that the words are capable of meaning dishonesty, and that the Claimant is referred to in relation to the distribution agreement by the words "and related parties (collectively 'Elumina')", and that he is named in relation to the allegation of non-payment of goods.
12. I am unable to see how any reasonable reader could understand the words to allege dishonesty. Breaches of a distribution agreement and non-payment of goods sold and delivered can in principle be accompanied by dishonesty, but that is neither necessary nor common. Other explanations are much more likely. Only a person who was unduly suspicious and determined to select a bad meaning where a lesser meaning

was available could understand that an allegation of dishonesty was being made in the Press Release. In my judgment the Press Release is not capable of bearing the meaning attributed to it in Particulars of Claim paras 7.1 and 7.2, in so far as they allege dishonesty.

13. On the other hand, in my judgment the Press Release is capable of bearing the meaning that the Claimant inexcusably failed to pay for goods sold and delivered. The Press Release is reporting on a suit filed in Phoenix by the Second Defendant against the Claimant. It is not reporting upon the actions of a third party. It seems to me that a jury could understand that the Press Release was alleging that there was no excuse for the non-payment.
14. I also accept that the phrase “and related parties” is capable of being understood as referring to the Claimant. Mr Busuttil points to the Claimant’s pleaded case that the distribution agreement was with Elumina Iberica SA, and not with the Claimant himself. He describes himself as a shareholder. He points to the fact that the Press Release (after referring to “related parties”) states that “effective February 1” the Second Defendant “terminated its distribution agreement with Elumina Iberica SA” and that “On January 9, 2008 the Company terminated its agreement to acquire Elumina”. But what the Press Release says about the “related parties” is that the Second Defendant has commenced litigation “as a result of multiple breaches, including non-payment, under its distribution agreement”. The Press Release does not say in terms that there has been a breach of the acquisition agreement, nor on what basis it claims to have terminated it.
15. In my judgment it might be unclear to a reasonable reader of the Press Release precisely what was being alleged against the “related parties”, but that such a reader could understand it to be alleged that the Claimant was involved in the breaches of the distribution agreement sufficiently to be described as having “committed or enabled” the breaches, and that there were some unspecified, but related, breaches of the acquisition agreement.
16. Accordingly, in my judgment the words set out in para 5 are not capable of bearing either of the meanings at present pleaded in paras 7.1 and 7.2, and it will be for the Claimant, if so advised, to put forward other proposed meanings, provided that these do not include dishonesty.
17. The letter of 10 March 2008, so far as set out in the Particulars of Claim para 11, reads as follows:

“I am writing this letter to clarify some confusion that may be in the market. Prolink is the manufacturer of the equipment that you lease or purchased from Elumina Ibercia SA or Kevin Clarke trading as Elumina Ibercia UK. As you already may know Prolink terminated the distribution agreement with Elumina on February 1, 2008. In addition, Prolink has sued Elumina and Kevin Clarke in multiple jurisdictions requesting the payment of approximately \$4.6 million for purchases of equipment sold and not paid for.

Elumina no longer has the right to sell and install Prolink equipment and they no longer have the rights to our intellectual property, patents, software, designs or Brand.

Elumina may have signed a service contract with you or your course. If that is the case please be advised that we have no interest in interfering with that agreement. However, Prolink will not sell to Elumina replacement OEM parts and supplies, certainly not until they satisfy their obligations with us. The use of non authorised parts may cause greater damages to the units and may ultimately make the equipment non-repairable and may terminate any remaining warranty that may be provided by Prolink. Furthermore, Prolink will not provide to Elumina any software codes or updates.

In order to facilitate a smooth working season for you, our call centre has already attempted to contact you. We are here to assist in any issue that may arise. In addition, Prolink has dispatched service technicians that will be on the ground the week of March 17<sup>th</sup> and will stay there until all repairs and updates are completed.

Within the next three weeks you will be contacted by our partner management group and sales department to ascertain the status of your account, the service contracts executed and the provision needed from Prolink, if any, going forward.

It has come to our attention that Elumina through GP Ads has made certain guarantees and warranties as to the financial performance of your systems and leases. The magnitude of the problem does appear to be substantial...

I have included for your review a copy of our last communication with Elumina and its principles [sic] outlining our position.”

18. The meanings pleaded in para 12 are that the Claimant:

“12.1 wrongly failed to pay for \$4.6 million’s worth of equipment supplied to it by Prolink;

12.2 had deceived his clients by falsely representing that he was entitled to sell and install Prolink equipment and that he could honour maintenance agreements, when in truth he could do neither”.

19. There is no objection at this stage to the meaning pleaded in para 12.1.

20. It is to be noted that the letter is said to be dated 10 March 2008, and that it refers to the distribution agreement having been terminated on 1 February 2008. The addressees are said to have leased or purchased equipment from Elumina Iberica SA

or the Claimant, and it said that the addressee “may have signed a service contract”. It is not alleged that any addressee did in fact enter into such lease, sale or service contract or contracts in the five weeks interval between the termination and the letter. It is only an addressee who had entered into such a contract in that short period, or who knew of another club which had or might have done so, who might be, or know of, a possible victim of misrepresentation or deceit. It is only an unduly suspicious reader who would understand it to be implied in the letter that the Claimant had entered into any such contract relating to the Second Defendant’s products since 1 February 2008.

21. In my judgment, absent an allegation that a reader knew of a contract that might have been entered into by the Claimant after 1 February 2008, the words are not capable of bearing a meaning involving deceit or misrepresentation on the part of the Claimant.
22. Accordingly, in my judgment the words set out in para 11 are not capable of bearing the meanings pleaded in para 12.2.
23. The words complained of in the public conference call of 15 April 2008, so far as set out in the Particulars of Claim para 15, reads as follows:

“We really have ...um... recognised that they have created a ... they’ve got some serious issues coming at them. Not only us. They have other banks and lending sources that are pursuing litigation. The golf courses in the UK have filed against them and the advertising company so we think its pretty well a done deal with them [Elumina]. I don’t think there’s much chance of them coming back in these markets...but they may....”

“We think they um.. (Kevin Clarke and Mark Smart) acted um...outside the scope of their responsibilities”.

24. The meanings pleaded in para 16 are that the Claimant had:

“16.1 Caused a fiasco which resulted in the commencement of litigation against him by numerous disgruntled banks, customers and others, with the result that his business was finished;

16.2 Acted improperly and outside the scope of his proper responsibilities”.

25. There is no objection at this stage to the meaning pleaded in para 16.2.
26. Mr Busuttill submits that there is no reference to the Claimant in the words complained of which is capable of supporting the meaning pleaded in para 16.1.
27. Ms Addy accepts that the Claimant is not expressly referred to in the first paragraph of the words complained of in para 15, which are the basis of the meaning pleaded in para 16.1. In a draft attached to her Skeleton argument she sought to remedy this with particulars to support the allegation that these words referred to the Claimant. But on

further consideration she accepted that a further draft would be necessary to meet the points raised by Mr Busuttil.

28. Accordingly, as matters stand, in my judgment the words complained of in para 15 are not capable of bearing the meaning pleaded in para 16.1. It will be for the Claimant, if so advised, to put forward other proposed meanings, in an application to be made, if there is no agreement, on some other occasion.

#### PARA 18.1 OF THE PARTICULARS OF CLAIM

29. Paras 18 and 18.1 of the Particulars of Claim read as follows:

“18. The Claimant will rely on the following facts and matters in relation to damages including aggravation of damages.

18.1 Following the breakdown of his principal’s distribution agreement with the Defendant, the Claimant did not hold himself out as a Prolink supplier nor did he infringe Prolink intellectual property rights, whether by supplying their goods or otherwise. He provided products from other manufacturers and suppliers as he was perfectly entitled to do. The Defendant failed to ascertain the true position from the Claimant or his customers but simply made the communications complained of without any attempt at verification”.

30. Mr Busuttil submits that this paragraph is linked with para 12.2, and must be struck out in the light of my decision on that paragraph.
31. Ms Addy submits that para 18.1 also relates to a different part of the publication of 10 March 2008 to which it has not yet been necessary to refer. In Particulars of Claim para 13 it is alleged that with the letter dated 10 March there was enclosed another letter dated 5 March written by the First Defendant and addressed to the Claimant and Mark Smart of Elumina Iberica SA. That is a long letter, part of which reads:

“Finally it has come to our attention that you have sent a letter to golf courses in the UK and Spain alleging that you still have the right to service Prolink products. In fact, you have no such rights. You may have contractual obligations to do so but you have no right under the terms of our agreements. We will advise the golf courses that subject to section 3.4 under the agreement any service performed by Elumina or its employees which entails the need of Elumina’s access to OEM replacement parts or software updates will void any Prolink warranty remaining on the products as you no longer have access to OEM replacement parts of software updates.”

32. To that part of the letter of 5 March 2008 there is attributed, in para 14, a meaning (in respect of which I am not asked to make a ruling) that the Claimant had acted dishonestly in that he:



“(v) lied to UK and Spanish golf courses by claiming he and/or other Elumina entities still had a right to service [the Second Defendant’s] products, when in fact they would be breaking the law if they did so”.

33. Mr Busuttil submits that the letter of 5 March does not refer (at least explicitly) to representations made by the Claimant to his clients “following the breakdown of his principal’s distribution agreement with the Defendant” (being words used in para 18.1). But it seems to me that the letter of 5 March may impliedly refer to representations which the Defendants allege the Claimant made to his clients following the breakdown of the distribution agreement. Accordingly, I cannot strike out para 18.1 on the basis that it refers back only to para 12.2.

#### AGGRAVATED DAMAGES

34. The point made by the Defendants in relation to para 18.1 has been dealt with above.
35. The Defendants object to paras 18.2, 18.3 and 18.7(ii) on the ground that where the action is brought with leave given under CPR 6.20, (now paragraph 3.1 (9) of Practice Direction B to CPR 6) it is anomalous and objectionable that a claimant should be allowed to rely in aggravation of damages upon a publication which also discloses a separate cause of action, being an action in respect of which leave could not be given under that rule.
36. Paras 18.2 and 18.3 (proposed to be renumbered 15.2A and 15.3) read:

“18.2 Notwithstanding being informed by Mr Chung that the Claimant was not supplying him with the Defendant’s products, the Defendant sent the e-mail complained of in paragraph 8 above. As a warning, it was entirely spurious and unwarranted. The Claimant will invite the court to infer that the real purpose of the e-mail was to provide a pretext for the forwarding of the letter from PGA Europe in order to smear the Claimant;

18.3 The attachment of the PGA letter to the e-mail to Mr Chung was particularly misleading and improper. As Mr. Bain well knew, the relationship between the Claimant, the Elumina companies and the PGA broke down at the instigation of one of the Defendant’s directors, M.G. Orender, who used his position as a former President of PGA America to prevail upon PGA Europe to end it. The letter which PGA Europe then wrote was misleading and wholly unfair to the Claimant and the Elumina companies, who until then had been welcome sponsors of the PGA for some time. Neither the Claimant nor any Elumina company had had misused or been party to the misuse of the PGA logo in any way.”

37. To these the Claimant now applies for leave to add a new paragraph after para 18.1 (proposed to be numbered 15.2, because after the amendments to delete paras 8 to 10 para 18 will become para 15) which reads:

“The First Defendant, acting for and on behalf of the Second Defendant wrote and sent a highly misleading and defamatory e-mail dated 18 February 2008 to a Mr. Chung, a representative of GPS Media in China. The e-mail clearly referred to the Claimant, in that it acknowledged the relationship between ‘Elumina’ and GPS Media. GPS Media is a customer of the Claimant t/a Elumina Iberica UK. The e-mail falsely alleged that:

“There is NO legal or correct way that Elumina or anyone else can supply you ProLink Product on any basis without violating an agreement. We believe that they are working on a path to provide 5 year old used equipment to you that does not have the right to use our IP or patents. As you can tell we enforce our agreement to the full extent of the law. Once again I implore you to visit with us in the United States before you begin this important project...”

This email also attached a letter from the Professional Golfers’ Association (“PGA”) of Europe addressed to Elumina Iberica UK Limited and sent to the Claimant’s business address, which was also highly defamatory of the Claimant. The letter claimed:

“You have been using the PGA trademark/logo and an apparent association with this company in an unauthorised way since 1 September 2007.

Even accepting that your position with ProLink Solutions makes your position with us untenable, our non-payment and attitude towards this company means that I formally withdraw the offer of 14 September 2007 (by e-mail) for Elumina Iberica UK Limited (and any associated company or business) to be a sponsor of this company.

You have no contract with us and have paid no money.

...

I regard our invoice to you for sponsorship as cancelled. It is more important for our brand to distance ourselves from your company than claim for the five months that you have been using our logo and apparent association in an unauthorised way.

Yours sincerely

John Yapp”

38. The Defendants object to para 18.7 on a wider basis, namely that it is not open to the Claimant to rely in aggravation of damages upon publications which are separate from those relied upon as causes of action.

39. Para 18.7 reads:

“The Second Defendant, by the First Defendant, has communicated allegations similar to those contained in the publications complained of to customers of the Claimant on other occasions. By way of example, the First Defendant:

- i. Took part in a conference call with the owners or representatives of sixteen golf clubs within the jurisdiction (a list of which is attached to these Particulars of Claim as Appendix 1) which had been organised by an English solicitor, Patrick Battersby. The ostensible purpose of the meeting was to discuss forming an action group to bring a winding up petition against GP Ads Ltd, an entirely separate company from any Elumina entity. However, Mr Bain alleged to the callers that the Claimant owed the Defendant more than \$4 million and that the Claimant was acting illegally in his business because he was barred from being a company director. In fact, the Claimant was not acting illegally for this or any other reason. This was an entirely gratuitous attempt to damage the Claimant in his business by smearing him to his customers;
- ii. In a meeting held (at the First Defendant’s instigation) with John Taplin and Norman Carson of Bank of Scotland on or about 13 February 2008. Bankers to the Claimant in his business, the First Defendant, informed the bank that the Claimant had sold equipment to which he did not have title, and the bank would probably be dragged into the proceedings as a third party. He also claimed that the golf courses in the UK would soon be taking legal action against the Claimant and the bank because of this. The First Defendant also alleged that some kind of ‘scam’ was being perpetrated and demanded that the bank cease dealing with the Claimant since to continue meant financing illegal activity. The First Defendant went on to claim that the Claimant was carrying out a con worth millions of dollars. These allegations were false, for the reasons given in paragraphs 15.1 to 15.7 above. The Claimant will invite the Court to infer that the Defendants nevertheless published them to Bank of Scotland in order to damage and disrupt the Claimant’s business by depriving him of bank finance.”

40. Finally, Mr Busuttil objects to all these paragraphs on the ground that the pleaded state of mind is not sufficient to give rise to a claim for aggravated damages, and there is no plea of malice or other conduct such as to found such a claim.
41. The following propositions are common ground:
- i) In assessing damages the court can take into account the distress hurt and humiliation the defamatory publication has caused to the claimant, in addition to the injury to his reputation. Evidence of matter tending to establish malice on the part of the defendant is, as a general rule, admissible to support a claim for aggravated damages. So, to establish a malicious motive in the mind of the defendant, evidence may be given that the defendant has published other defamatory words about the claimant, whether such words were or were not connected with the subject matter of the action, and even if publication took place subsequent to the publication giving rise to the action. This principle was established in *Pearson v Lemaitre* [1845] 5 M & Gr 700, 719 and is discussed in *Gatley on Libel and Slander* 10<sup>th</sup> ed para 32.48, 32.51.
  - ii) It is not only malice on the part of the publisher that can be relied upon in aggravation of damage. In *Rookes v Barnard* [1964] AC 1129, 1121 Lord Devlin said: “There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff’s proper feelings of dignity and pride”. In *McCarey v Associated Newspapers (No 2)* [1965] 2 QB 86, 104-5 Pearson LJ said that “if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff’s pride and self-confidence, these are proper elements to be taken into account in a case where damages are at large”. In *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, 184D, Nourse LJ listed the conduct that might support a claim for aggravated damages as including: “... a repetition of the libel, conduct calculated to deter the claimant from proceeding, ... persecution of the plaintiff by other means”.
  - iii) If the evidence also establishes another cause of action, then the jury must be cautioned against giving damages in respect of that cause of action: *Pearson* at p720.
  - iv) If the evidence also establishes another cause of action, then the defendant is entitled to plead matters which would afford him a defence to that cause of action, if it had been pleaded as a separate cause of action, including issues of meaning: *Collins Stewart v FT* [2006] EMLR 100, para [27].
  - v) Notwithstanding the admissibility of such evidence, the court may, in exercise of its case management powers, determine to exclude such evidence.

#### AGGRAVATED DAMAGES AND SUBSEQUENT PUBLICATIONS

42. Mr Busuttil submits that the allegations in para 18.7(i) and (ii) give rise to separate causes of action. Para 18.7(i) is an allegation of a publication which bore the meaning

that the Claimant was acting illegally, because he was barred from being a company director. Mr Busuttill notes that this defamatory publication is at least (so he would say) a publication within the jurisdiction.

43. As to para 18.7(ii), Mr Busuttill submits that this too gives rise to a separate cause of action, including an allegation of a scam being perpetrated by the Claimant, and he notes that it is not stated where the alleged publication was made. He submits that there is good reason for believing that what is intended to be referred to is a publication in Scotland, although there is no evidence as to this before me, one way or the other.
44. In addition, in relation to each of paras 18.7(i) and (ii), and to paras 18.2 and 18.3, and the proposed new para 15.2, Mr Busuttill submits that there is no reference to injury to feeling, which, alone, is the proper basis of a plea in aggravation of damages. So, he submits, these paragraphs are not in truth a plea in aggravation at all, but an attempt to obtain increased damages for injury to reputation, contrary to principle.
45. Ms Addy submits in her skeleton argument that the Claimant's case is that his hurt feelings have been increased by these actions of the Defendants. Ms Addy submits that the publications in para 18.7 are examples of the conduct complained of in the preceding paragraphs which she says effectively complain of a course of malicious publication by the Defendants. However, she recognises that that is not what the pleading says in these paragraphs. She submits that this defect can be remedied by an amendment which makes clear that injury to feelings is the only basis on which the publications referred to in para 18.7 is advanced. If necessary the pleading will be amended to make this part of the Claimant's case clear, to this effect. I understand her submission to be the same in relation to paras 18.2 and 18.3 and the proposed new para 15.2.
46. As set out above, malice in the making of subsequent publications is not the only state of mind or conduct which is capable of founding a claim for aggravated damages.
47. I would accept Mr Busuttill's submission that malice is not pleaded in these paragraphs. A plea of malice requires a precision and particularity that is lacking. It is not pleaded that the Defendants made statements which they knew to be false, supported by particulars of falsity. But Mr Busuttill accepts that, in the light of dicta such as those in *McCarey* it is not necessary for the Claimant to plead malice. It is necessary for the Claimant to make clear that what they are relying on in these paragraphs is injury to feeling, and not injury to reputation.
48. The nature of the Claimant's case should be set out by an appropriate amendment, if it is to go forward. In deciding whether or not it is to go forward I shall assume, subject to agreement between the parties or approval by the court, that this can be done.
49. Mr Busuttill responds that even with such an amendment the pleaded case would still not meet his objections. In addition, he submits that the plea is objectionable on case management grounds.
50. Mr Busuttill submits that this is a complicated action. There were four publications sued on. Although these have been reduced to three, the Defendants are applying to re-introduce the fourth, the Chung e-mail, in a plea of aggravated damages. Even after

reducing the number of publications to three, the Claimant is alleging eleven different meanings in respect of the three publications. And paras 18.7 (i) and (ii) allege two further publications in support of the plea of aggravated damages. So in addition to the three publications relied on as causes of action, there are now a further three sought to be relied on in aggravation of damages.

51. Mr Busuttil relies on further passages of the judgment of Gray J in *Collins Stewart*. In that case Gray J was concerned with a claim by a corporate claimant, which has not feelings to be injured. But much of what he said applies as much to personal claimants in particular the following:

“26... What is the position where a claimant is the subject of a series of articles? There are various possibilities. Assume that the defendant publishes three defamatory articles referring to the claimant, articles A, B and C. If articles B and C add to the damage caused by the publication of the original article A and are not defensible, then I think that articles B and C should in principle generally be made the subject of separate complaint as separate causes of action. To do so would make matters simpler and clearer for the jury (or judge) if and when it comes to assessing damages. If on the other hand articles B and C, whilst defamatory of and damaging to the claimant, do not repeat the libel which was contained in article A, it appears to me to be objectionable in principle to allow the claimant to rely on articles B and C in connection with damages recoverable for the publication of article A. Articles B and C would be separate torts giving rise to separate claims for damages. If on the other hand articles B and C consist in part of the repetition of the libel contained in article A and in part of other distinct libels on the claimant, formidable problems will in my opinion arise in disentangling the recoverable and the irrecoverable damage in respect of article A.

27. My starting point is therefore that there are sound reasons both of principle and of practice why a claimant, whether an individual or a corporation, should not be permitted to seek to recover increased damages in respect of the publication by the defendant of article A by reason of the publication by that defendant of subsequent articles B and C which are not themselves the subject of complaint...

34. I am not persuaded that it is illogical or unprincipled for the court on the one hand to reduce the award of damages to reflect the mitigating conduct of the defendant in apologising for the libel and on the other hand to refuse to permit the claimant to seek increased damages because of the aggravating or exacerbating conduct of the defendant. The reason why an apology has the effect of reducing compensatory damages is that the apology, to a greater or lesser extent depending on its terms, reduces or repairs the original damage to reputation. If there is no apology, the appropriate compensatory award is unaffected. A failure to

apologise (where an apology was called for) introduces an entirely new element, that is, an entitlement on the part of the claimant to extra damages which are not for injury to reputation but for the additional separate element of injury to feelings.”

52. Mr Busuttill also refers to the principle which was summarised in *Rath v Guardian* [2008] EWHC 398 (QB) at [13(iv)] as follows:

“although the court's case management concerns to keep libel actions within their proper bounds can be traced back to long before the introduction of the CPR, the CPR re-emphasises the importance of limiting actions to the central issues to be determined. For example, in *McKeith v News Group Newspapers Ltd* [2005] EMLR 780 Eady J held that the Court needs to identify the "real issue" at the heart of the case [17]:

"For the purpose of defining what the "real issue" is, one is not confined to that which is pleaded. It is necessary to stand back from the formulation of the case by the parties' counsel and to take a broad and non-technical approach. That would plainly follow from such cases as *Polly Peck and Rechem International Ltd v Express Newspapers, The Times*, 18 June 1992. In that case Neill LJ referred to the need to reduce the "expense and complexity" of libel actions and stated that:

"A balance has to be struck between the legitimate defence of free speech and free comment on the one hand and on the other hand the costs which may be involved if every peripheral issue is examined and debated at the trial".

What is or is not "peripheral" must be judged objectively, on the facts of the individual case, having regard to both of those considerations.”

53. Ms Addy submits that in so far as Gray J was referring to personal claimants, his remarks were obiter and at odds with principles established in *Pearson v Lemaitre* and subsequent cases. She accepts that there may in principle be cases where it would not be proportionate to allow reliance on subsequent publications, but she submits that this is not such a case.
54. In addressing issues of proportionality, the following must be borne in mind. Defamation actions are not primarily about recovering money damages, but about vindication of a claimant's reputation. If a successful libel claimant recovers, say, £30,000, that figure does not represent the measure of his success. In many cases, after paying his irrecoverable costs, he will be out of pocket if he recovers that amount as damages. That does not mean the litigation is not worthwhile. A claimant wrongly accused of some serious fault, such as malpractice or dishonesty in business, may well suffer very large unquantifiable loss if he does not recover his reputation. The value of the verdict in his favour is expected to consist substantially in the future loss that it is hoped will be avoided by the vindication. Where, as here, the publication

complained of is on an internet news service, a verdict in his favour may provide him with a means of persuading the publishers of an archive to edit it.

55. The long term effect of a libel has commonly been expressed in metaphorical terms, such as “the propensity to percolate through underground passages and contaminate hidden springs” (e.g *Slipper v BBC* [1991] 1 QB 283, 300). The position today can be expressed more strongly, as it was in an article published in *The Guardian* (by Siobhain Butterworth, on 20 October 2008):

“The consequences of putting information ... into the public domain are more far-reaching in a world where things you say are linked to, easily passed around and can pop up if [the subject’s] name is put into a search engine by, for example, a prospective employer. The web makes a lie of the old cliché that today’s newspaper pages are tomorrow’s fish and chip wrapping. Nowadays, ... the things ... in a newspaper are more like tattoos - they can be extremely difficult to get rid of.

The web is an easily searchable repository of everything published online, which makes it a very unforgiving medium. The problem is not that things can’t be removed easily, but that news organisations are inherently resistant to un-publishing. Should a newspaper website agree to un-publish on request? The answer to that question depends on what you think a newspaper’s archive is for, and whether you think it matters if there are holes where articles used to be.

The established view is that a newspaper’s online archive is a historical record and that there is therefore a strong public interest in maintaining its wholeness, unless deletions or amendments are strictly necessary.

Saying yes to all requests for the removal of material that causes the people concerned distress or hinders their employment prospects would be easier, but it’s a solution that, over time, will leave a patchy and unreliable record of what was published. It also means abandoning conventional thinking about the importance of the integrity of the archive.

A less extreme solution, ... is to replace a real name with a pseudonym and add a footnote explaining that the change has been made. It’s not ideal, but it’s preferable to re-writing history completely by deleting an article, blog post or letter and pretending that it didn’t exist.”

56. By contrast, the damages to injury to feeling are entirely represented by the money award of damages. Where the courts award damages for injury to feelings, the sums are generally modest. And under the law as it is now, awards of damages for defamation are regarded as subject to an effective ceiling of £220,000. It will thus be an unusual case where compensatory damages are increased by a very substantial amount to take account of the aggravation caused by subsequent publications.



57. The time has not yet come for the service of a Defence. I invited Mr Busuttil to state, if he could, what the Defendants would be minded to plead in response to the subsequent publications relied upon in aggravation of damages, assuming that I were to permit them to be advanced. He was not in a position to give a firm response, which is understandable at this stage. But he indicated that the Defendants would wish to consider pleas to the merits of those alleged publications, including that, if relied on as causes of action, there would be defences, including qualified privilege.
58. It seems to me that if the paragraphs I am now considering are permitted to be advanced, the scope of the trial will be enlarged, not only as to the facts but also as to the law. I note that the factual, and probably also the legal, basis for a plea of qualified privilege in relation to the Chung e-mail and the conversation with the bankers referred to in para 18.7(ii) would be likely to cover different ground from any plea that might be advanced in relation to publications either to the golf club operators or the public at large. This has implications for the time spent on preparing pleadings, and on advancing the case at trial.
59. The meanings of which the Claimant complains in this action, and which are accepted to be, or which I have ruled to be, possible meanings are serious. The five meanings pleaded in para 14 (being a separate part of the publication of 10 March 2008), upon which I have not been asked to rule, include allegations of dishonesty. If they are established at trial, and if the claim succeeds, these are meanings which could be regarded as requiring substantial vindication and damages to reflect injury to feelings. That will be a matter for trial, and I am doing no more than assuming that this is a possible outcome of the trial.
60. I have held that some of the meanings including dishonesty attributed to all three of the publications complained of are not meanings that the words in question complained of are capable of bearing. But that is not, or may not be, the end of the case in respect of these publications. It follows that if the claimant succeeds on all three publications, he will have a basis for claiming aggravated damages arising out of multiple publications. He would not then need the additional three publications relied on solely in aggravated damages to advance that part of his case. So I also conclude that any aggravated damages arising out of the additional three publications are unlikely to bring any award of damages in this case very much higher up the permissible scale of awards of damages for libel than it would be if those three additional publications are not to be relied upon.
61. On case management grounds alone, such as are fully set out by Gray J in *Collins Stewart*, I would decide that these sub-paragraphs of para 18 to which objection is taken, that is paras 18.2, 18.3 and 18.7 should not go forward, and permission should be refused for the proposed amended para 15.2. The directions to the jury, and the task of the jury (or of judge, if trial were to be by judge alone) would be greatly enlarged and complicated by the inclusion of these paragraphs. I think it very unlikely that the cost of pleading, proving and contesting the allegations in these paragraphs could be proportionate to any benefit that the Claimant could expect to obtain if he were to succeed in establishing his case, both generally and in particular in relation to these paragraphs. On the other hand, a detriment to both parties, and to the public, arising out of the prolongation of the proceedings, is likely.

## AGGRAVATED DAMAGES AND PUBLICATIONS ABROAD

62. Mr Busuttil accepts that injury to a claimant's feelings may be suffered in the jurisdiction where the claimant lives. But he submits, correctly, that injury to feelings is not damage which is sufficient for a libel claimant to bring his case within CPR 6.20, (now paragraph 3.1(9) of Practice Direction B to CPR 6). The damage which is necessary for that purpose is damage to his reputation by publication to a reader within the jurisdiction. And where a court has jurisdiction over a foreign publisher it should award damages only for the harm suffered within its own jurisdiction. See *Shevill v Presse Alliance* [1995] 2 AC 18 and [1996] AC 959, Gatley paras 9.8 and 24.21. Mr Busuttil submits that the court's jurisdiction under that provision is discretionary, and that it has long been the law that permission will not be given unless the court is satisfied that England and Wales is the proper place in which to bring the claim (see CPR 6.21(2A) now CPR 6.37(3)).
63. Ms Addy refers to the cases on aggravated damages cited above, and to the summary of the position in Gatley at para 32.51. The jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. In her submission it follows that it matters little whether the publication relied on in aggravation of damages occurred within the jurisdiction or outside it, provided that the claimant has become aware of it and suffered as a result.
64. As a matter of logic, Ms Addy's submission has force. If the claim is properly brought within the jurisdiction, and if injury to feelings is suffered within the jurisdiction, then so far as the cases on aggravated damages are concerned, there is no reason to exclude aggravating conduct that occurred outside the jurisdiction. The cases on aggravated damages do not touch on that point.
65. Similarly, the cases on service out of the jurisdiction are generally addressing issues of jurisdiction, and not issues of damages when the damage in question is not an essential ingredient of the cause of action. Mr Busuttil referred me to no case in support of his submission.
66. Nevertheless, I see force in Mr Busuttil's submission. For reasons given by Gray J in *Collins Stewart*, reliance on publications in aggravation of damages which would also give separate causes of action creates difficulties. This is another difficulty, one to which Gray J did not refer. It would be surprising if a claimant, after being refused leave to rely on a cause of action in respect of a publication outside the jurisdiction could simply move his plea from the substantive claim to the the part of the pleading dealing with damages. That is what the Claimant seeks to do here.
67. In the event I do not need to decide the case on this separate ground, and I do not do so. Had it been the only ground, then I would have decided that what the Claimant is seeking to do by moving his claim in respect of the Chung e-mail from paras 8-10 (where the e-mail was relied on as a cause of action) to para 18 (where it is sought to be relied on in aggravation of damages) ought not to be permitted, at least on the facts of this case. There were four meanings relied on in para 10, which are different from the meanings which are to go forward in relation to the other causes of action. If the Chung e-mail were to be relied upon in aggravation of damages, the issues that would arise would be likely to be substantially the same as the issues that would arise if that publication were relied upon as a cause of action (in addition, of course, to the issue

of injury to feelings), namely what the words of the e-mail mean, and, if they are defamatory, whether there is a defence to them, such as qualified privilege.

## CONCLUSION

68. It follows that paragraphs 18.2, 18.3 and 18.7 of the Particulars of Claim will be struck out. The Claimant's application for permission to amend to insert the proposed para 15.2 is refused, except in relation to the deletion of paras 8, 9 and 10, which would have had to be struck out if not deleted by consent.
69. I rule that the Press Release of 4 February 2008 pleaded in para 5 is not capable of bearing the meaning attributed to it in Particulars of Claim paras 7.1 and 7.2, in so far as they allege dishonesty; that the letter of 10 March 2008 pleaded in para 11 is not capable of bearing the meaning pleaded in para 12.2; and that the words in the conference call of 15 April 2008 pleaded in para 15 are not capable of bearing the meaning pleaded in para 16.1. The Defendants' application to strike out para 18.1 fails.