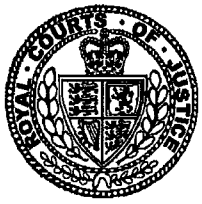

Neutral Citation Number: [2008] EWHC 212 (QB)

Case No: HQ07X03207

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 February 2008

Before:

VICTORIA SHARP QC
Sitting as a Deputy Judge of the Queen's Bench Division

Between:

Lee Anthony Freer

Claimant

-and -

(1) Mr Aurang Zeb (2) Person unknown aka "Boo" (3) Claire Marie McBride

Defendants

The Claimant appeared in person
Mr David Hirst (instructed by **stevensdrake**) for the **First Defendant**

Hearing date: 25 January 2008

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.

.....

VICTORIA SHARP QC

1. THE Claimant, who acts in person, sues for slander in respect of two verbal statements he alleges were made by the Second and Third Defendants respectively on 25th August 2007 at a pizza delivery business in Horley, Surrey called "Chillis" where the Second Defendant is employed as a pizza delivery driver, and the Third Defendant, is employed to take orders for pizzas. It is alleged that the First Defendant, Mr Zeb was present when the statements were made (in other words, that he was a publishee) and that he is vicariously liable for the publication of the statements by the Second and Third Defendants as their employer.

2. The First Defendant now applies under Civil Procedure Rules Parts 3 and/or Part 24 for the claim to be struck out and/or for summary disposal on the ground that the claim has no reasonable prospect of success or because it is an abuse of the process. The Second and Third Defendants did not appear and were not represented before me, though Mr Hirst of counsel, who appears for the First Defendant, has drawn my attention to various matters concerning the Claimant's claim against them.

3. It is necessary to set out the background to the claim in a little detail. It is part of the Claimant's case that he was in a relationship with the Third Defendant (he describes her in his pleadings as his "mistress and paramour") which came to end in about August 2007. The Claimant alleges that the Second and Third Defendants became "lovers" in about April 2007. A violent incident appears to have taken place between the Claimant and the Third Defendant at her home on the 8th July 2007 as a result of which the police were called. This followed the Claimant's discovery (so he alleges) of compromising text messages from the Second Defendant on the Third Defendant's telephone. The Claimant prepared and signed an extremely detailed witness statement relating to this incident dated 15th July 2007, which he gave or sent to the police. In that statement the Claimant says he went to Third Defendant's home. He and the Third Defendant then argued, and he discovered the front door was locked when he tried to leave. He says she assaulted him by scratching his neck, at which point he lost control and gave the Third Defendant a "battering" (which is described in detail) as a result of which she was "obviously in shock and concussed".

4. The Claimant is described by Mr Hirst in his skeleton argument as a seasoned libel litigant, having brought several cases as a litigant in person and assisted third parties in others. Mr Hirst referred me to two unreported decisions. The first, *McBride v The Body Shop International* [2007] EWHC 1658 (QB) 10th July 2007, a decision of Mr Justice Eady, in which the Claimant assisted the Third Defendant, then appearing in person, in a libel action brought by her against her former employers, The Body Shop.

The second, *Freer v (1) Susan Glover and (2) Employment Law Practice* [2005] EWHC 3341 (QB) 19th December 2005, a decision of His Honour John Previte QC (sitting as a Deputy Judge of the High Court) in which the Claimant sued a firm of solicitors, and the sole principal of that firm for libel in respect of a letter written to the Claimant by those solicitors on behalf of their client in relation to an unfair dismissal claim brought by the Claimant against his former employers.

5. Between the 7th and 19th September 2007, the Claimant began at least five High Court actions (including this one): two for slander, two for libel and one for deceit, assault, and trespass. Even though the causes of actions are different they have as their common theme the end of the Claimant's relationship with Third Defendant and the fallout which resulted. The two libel actions were brought in respect of witness statements made to the police by the Third Defendant and Michelle Hill (who is a friend of hers) in relation to the 8th July incident. In addition to this action, another slander action was brought in respect of identical words as are complained of in this action, alleged to have been published by the Second and Third Defendants on the same day, the 25th August 2007, but in a different place - a garage. I shall call that slander action the garage action. The Third Defendant is a defendant in four of the actions, and the Second Defendant is a defendant in two.

6. In the action against the Third Defendant for deceit, assault, and trespass the claims arise from the 8th July incident. The Claimant's case in that action as I understand it, is that the statement to the police which I have referred to was actually dictated by Third Defendant, and in fact (contrary to what is said in it) she beat herself up to get the Claimant into trouble.

7. In three of the actions (that against Ms Hill and the two slander actions) the Claimant has sued the "employer" of the individual defendant or defendants on the ground that they are vicariously liable for the conduct of their respective "employees". Brambles Respite Care Centre were sued as the employer of Ms Hill, a care assistant there; Mr Irfan Ali and Mr Sean Borg trading as Motor Tec were sued as the employer of the Second and Third Defendants in the garage action; and in this action, as I have already said, the First Defendant is said to be vicariously liable for the slanders of the Second and Third Defendant as their employer.

8. The claim form in this action was issued on the 19th September 2007. The First Defendant's application notice was issued on the 16th October 2007, supported by a witness statement from the First Defendant, as well as one from his solicitor, Ian Price. In his witness statement the First Defendant denies the words complained of were ever spoken to him. He also denies that he was vicariously liable for the publication of those words. He says the Second and Third Defendants were not his employees and he did not

trade as "Chillis". He says he is and was at all material times a Director of a company called Horley Catering Limited ("HCL") and it is HCL which trades as "Chillis", a pizza delivery business. He also says that on 25th August 2007, the date of the publications complained of, the Second and Third Defendants were employed by HCL, not him. He denies that he or HCL authorised either of the other defendants to make any defamatory remarks or that (if made) they were made in the course of their employment. The First Defendant exhibits a current copy printout from Companies House which shows that he is a Director of HCL, a private limited company incorporated on 10th January 2006; a letter from his accountant dated 15th October 2007, confirming that HCL trades as "Chillis"; and a copy paying in slip from HCL's bank paying in book for the NatWest branch in Crawley showing the account name "HORLEY CATERING LTD T/AS CHILLIS". The Claimant has served no evidence in response.

9. Despite the issue of the application notice, and the fact that the period for the service of the Defence had not yet expired, on the 22nd October 2007 the Claimant applied for and on 30th October 2007 obtained, judgment in default of defence against the First Defendant. On 20th November 2007 Master Foster set aside the judgment and adjourned this application to be heard by a Judge in the Jury List since the Claimant (who did not attend the hearing) had asked for an adjournment on medical grounds,

10. Meanwhile, on the 12th November 2007 the Claimant wrote to the First Defendant's solicitors asking (in paragraph 2 of that letter) for various documents pursuant to CPR 31.14 and CPR 31.15 – relating to the employment of the Second and Third Defendant including payslips, contracts of employment, P45s and P60s. He also asked for a copy of the accounts of HCL which were said in the Companies House documents exhibited to the First Defendant's witness statement, to be due on 10th November 2007. In their letter of reply dated 7th December 2007, the First Defendant's solicitors disputed the Claimant's entitlement to the documents except on standard disclosure, but provided the Claimant with some copy payslips on a voluntary basis dated 30th June 2007 and 31st July 2007 for a Mr I Ali - who the Claimant has not disputed before me is the Second Defendant - and for the Third Defendant. The payslips showed their employer to be HCL. The Claimant did not respond to that letter. However, on 23rd January 2007 (having told the First Defendant's solicitors the previous day of his intention to do so) he apparently applied to the interim applications court for the documents he had asked for and not been provided with. The Claimant told me that his application before Mr Justice Pitchford was treated as a without notice application, and dismissed on the ground that it was a matter which should be dealt with at this hearing.

11. The Claimant renewed his application for disclosure at the outset of this hearing, supported by a witness statement dated 25th January 2008, handed in shortly before the hearing began. He did so on the basis that the documents must exist if the First Defendant's claims regarding vicarious liability were true, he needed them to establish who the employer of the Second and Third Defendants really was and to understand the case he had to meet. Mr Hirst submitted the Claimant was simply not entitled to the documents under the rules, and the timing of this application indicated it was really an "ambush" designed to put off the hearing.

12. I refused the application. The timing of the application was unfortunate, since the Claimant had been aware of the First Defendant's position on disclosure since 7th December 2007 and had taken no further steps to obtain the documents. But in any event, none of the documents the Claimant asked for in paragraph 2 of his letter of 12th November 2007 were referred to in the witness statement of the First Defendant or Mr Price. The fact that some or other of them would exist if the First Defendant's case on vicarious liability was true, was nothing to the point. The Claimant was not in my judgment entitled to them for the purposes of this application, even though they might be documents he would obtain on standard disclosure. As to the request also made for the Accounts due from HCL, the Claimant appeared to have ascertained that no such document exists because HCL had extended the period for the preparation and filing of its accounts (as he accepted it was entitled to). In those circumstances, it was plainly impossible for an order to be made for the document's disclosure. In any event, the accounts would certainly contain headline information for staff wages, but there was no reason to suppose they would assist in determining who HCL's employees were.

13. Mr Hirst on behalf of the First Defendant then applied under CPR 3.4(2)(a) and/or CPR Part 24 for the claim to be struck out or summarily disposed of on three bases. First, he submitted under CPR Part 24 that the Claimant has no real prospect of proving that the First Defendant was vicariously liable for the publications complained of. He also submitted that the claim should be struck out for non-compliance with the rules for pleading slander claims and that the Claimant has no reasonable prospect of proving publication in any event.

14. CPR Part 24 provides that the court may give summary judgment against a claimant or a defendant on the whole of the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be tried. In relation to defamation actions, as L.J Buxton said in *Spencer v Sillitoe* [2002] EWCA Civ 1579; [2003] E.M.L.R. 10 at [23] "The question ...comes down to whether there is an issue of fact on which, on the evidence so far available, the jury could properly, and without being perverse, come to a conclusion in favour of the claimant. " If so, the issue

must be left for the jury, or for later determination; if not, then it is the court's duty in accordance with the objectives of the Civil Procedure Rules to close off that issue to save time and money.

15. In relation to the issue of vicarious liability, Mr Hirst submitted the evidence from the First Defendant, uncontradicted by evidence from the Claimant, demonstrates that the Second and Third Defendants were employed by HCL, not the First Defendant. But even if the Claimant had sued HCL rather than the First Defendant, he submitted that claim would be doomed to failure because there was no real prospect of the Claimant proving that either of the slanders were spoken by the Second and Third Defendants during the course of their employment, having regard to the circumstances and the nature of what was said.

16. In my judgment, applying the test which I have identified above, the Claimant has no real prospect of proving that the First Defendant employed the Second and Third Defendants and was therefore vicariously liable for the publications complained of. The evidence from the First Defendant himself is part of a nexus of evidence, in the light of which it seems to me a jury would be perverse to come to the conclusion that the Second and Third Defendants were employed by the First Defendant personally and not HCL. The evidence from Companies House, from the Accountant and from the paying in book for HCL exhibited to the First Defendant's witness statement demonstrates beyond doubt that "Chillis" was the trading name of HCL at the material time, and that the First Defendant was and is a director of HCL. The First Defendant's evidence is that HCL employed the Second and Third Defendants at "Chillis" at the material time, and this is supported by the pay slips which were produced in response to the request for documents by the Claimant (the last dates for the pay slips I have seen from the Third Defendant and for "I. Ali", being the 31st July 2007 – about three weeks before the publications complained of).

17. The Claimant has pleaded no facts to support his case on vicarious liability. Nor has he produced any witness evidence to support this aspect of his case for the purposes of this hearing. The Claimant referred me to a letter in the bundle he had obtained from Reigate and Banstead Borough Council dated 11th September 2007. In response to a request from the Claimant to confirm the details of the proprietor and license holder of "Chillis", the Borough Council wrote: "Our records indicate a Mr Aurang Zeb is the food business operator at the business in question". He submits that this raises a factual issue as to who was the proprietor fit to be tried by a jury. He also submits that the pay slips were not conclusive, since they did not cover the period when publication is alleged to have taken place. But the fact that the First Defendant is identified as "the food business operator at the business in question" does not in my judgment raise any relevant factual issue as to who employed the Second and Third

Defendants at "Chillis", or leave room for legitimate argument as to the primary facts put in evidence by the First Defendant. Though the pay slips do not cover the date of publication they are very close to it in time, and in any event are only part of the evidence produced by the First Defendant. The Claimant's case against the First Defendant therefore falls at the first hurdle.

18. Faced with the evidence on this issue from the First Defendant, the Claimant did not apply to join HCL as a defendant in substitution for the First Defendant. Even if he had however, the outcome would not have been different. In order to make good his case on vicarious liability (whether against the First Defendant or HCL) the Claimant would have to establish that in speaking the words complained of, the Second and Third Defendants were acting within the scope of their employment. In my judgment, the Claimant's pleading on this issue discloses no reasonable case, in accordance with CPR Part 3.4(2)(a) that they were. The Claimant's case on this aspect of vicarious liability is that the Second and Third Defendant acted within the scope of their employment or in an unauthorised way within the scope of their employment. In support of his case, the Claimant relied before me particularly on what is said in paragraph 7 and 8 of the Particulars of Claim in which he alleges:

> "7. The convolution of surreptitiousness in which the second and third Defendant and entangled themselves became unravelled in the circumstances described in claim HQ07X03141, thereby and in any event occasioning the vexation and ire of the first Defendant and the second Defendants wife and family at the apparent opprobrium that had been committed. Accordingly, the Claimant claims that the facts and matters of the adulterous relationship between the second and third Defendant became exposed to the first Defendant in circumstances that caused the first and second Defendant bewilderment from discharging their duties to the first Defendant and thereby and in any event adversely affecting the first Defendants ability to operate as a business. In order to avoid being dismissed from the service of the first Defendant the second and third Defendant assumed a confederate plan to temper the situation to avoid the consequences of their own actions and in such a way as to allow them to continue their affair with impunity and in the knowledge that no further suspicion would befall them and/or in any event that any further suspicion that may otherwise befall them would be extinguished by the effects of the defamation they collaborated to cause the Claimant to suffer. "
>
> 8. Accordingly, the second and third Defendant decided to fallaciously and in any event affirmatively assert that they merely shared an innocent friendship of an entirely plutonic (sic) nature, and that the facts and matters of their alleged affair were the insane creation of the Claimants irrationality and paranoia, and

that the interference with the first Defendants business was caused entirely by the lunatic ravings of the Claimant and for which they, the second and third Defendant, did not cause and should not be held accountable. "

19. Mr Hirst referred me to the relevant principles on vicarious liability contained in paragraphs 8.31 of Gatley on Libel and Slander, Tenth Edition, and in particular that part of the paragraph which states:

> "The employee will be deemed to have acted within the scope of his employment when the publication, although itself unauthorised, is so directly incidental to some act which he was authorised to do that it may be said to be a mode, though no doubt an improper mode, of performing such authorised act...The ultimate question is whether there is a sufficiently close connection between the employment and the wrongdoing. It is not, however, sufficient that the publication of the libel takes place while the employee is on the employer's premises ...it must be possible to say that the employee had express or implied or apparent authority to communicate with others on behalf of the employer and that publication was within the scope of that authority."

20. Mr Hirst submitted that it is plain from the words complained of that they relate solely to the Second and Third Defendant's private life and were not spoken within the scope of their employment. The words alleged to have been spoke by the Second Defendant are:

> "Claire's just a mate, right, I'm not with her, I'm not fucking her, it's not like that, she's just a mate and someone to talk to at work. I can't help it if some twat's got the wrong idea and started shouting his mouth off and stressing everyone with bullshit. I'll tell what is right, Claires got a lot of problems caused by this twat Lee, she dumped him nearly a year ago but he wont let go and move on. She's tried to stay his friend cos she's like that but he keeps playing sick mind games with her and fucking with her emotions the whole time and wont let her have her own life. I'm telling you, right, he's a freak with nothing better to do than try to fuck her life up, he attacked her and really fucked up her face for no reason and he's still trying to mess her life up. He's just a shit stirrer that's crawled from under a stone that can't keep a girl cos he's got a small diseased dick in his pants or no dick at all. I'll tell you right, Claire's gonna tell the police about what he's doing and hopefully that'll be an end of it, I just want to get on with my work."

21. Those alleged to have been spoke by the Third Defendant are:

> "Boo's just my friend and we get on really well, we just talk about stuff. I haven't been with Lee for nearly a year cos we had a lot of problems with our relationship. All I wanted was to be with him but all he would do is treat me like dirt and do me down and make me feel shit. I once got an infection down there when I was with him and he denied it was anything to do with him. He's just a liar. I've tried to stay his friend but he's got issues. He's always playing mind games and trying to fuck my head up. I cant believe he's telling everyone I'm seeing Boo, I'm not with Boo, we're just friends. I do really like Boo and I respect him but as a friend, I think Lee's jealous of Boo cos he knows Boo's more of a man than he'll ever be. Lee attacked me and really hurt me and it was Boo who talked to me about it all and helped me though it. Lee even attacked his own mum and tried to mug me into believing that he spent all his time with her. Well I'm sorry but I'm not gonna let Lee ruin my friendships any more and I'm going to report him to the police."

22. There are two fundamental problems it seems to me with this part of the Claimant's claim. First, there is nothing in the words themselves to suggest they were an explanation to the First Defendant, or indeed had anything to do with the Second and Third Defendant's employment in the pizza business or the "discharge of their duties" as a delivery driver and the person taking the orders for pizzas respectively. Both statements appear to be made about their personal lives, in particular, whether they were in a relationship, and in response to a question about it. There is nothing therefore in the words themselves which supports the claim that when speaking them, the Second and Third Defendants were doing anything relating to their employment at all, let alone acting within the scope of their employment – whether in an authorised or unauthorised way.

23. But additionally, this part of the Claimant's case (as I understand it) hinges on the pleaded claim that the Second and Third Defendants were explaining themselves to the First Defendant. There is however no evidence that the words were spoken to the First Defendant at all. The only positive evidence on this issue comes from the First Defendant, who denies in his witness statement having been present when either of the two alleged slanders were spoken.

24. Thus the Claimant has no real prospect of proving that the Second and Third Defendants were acting within the scope of their employment, whether they were employed by the First Defendant or by HCL. There being no other reason why this aspect of the case should be tried, that is sufficient to dispose of the Claimant's case against the First Defendant. But it is necessary for me to go on to consider the First Defendant's further

submissions since both in respect of publication and abuse of the process, they concern the viability of the case as a whole.

25. The Claimant's case on publication is that the two slanders were spoken not only to the First Defendant, but also to the staff and customers of the First Defendant, including a colleague of the Claimant, who is not named in the pleading. The Claimant relies on publication to "the Unknown Publishees" (presumably the staff and customers) who he says he cannot presently identify until after the completion of discovery, the exchange of witness statements and/or the service of interrogatories. He pleads that he relies on those publications on the basis of the confirmation by the unnamed colleague that several customers and staff were present and listening when the alleged slanders were spoken. The only publishee identified by name is therefore the First Defendant.

26. Mr Hirst submits that the pleading as it stands is defective, because it does not name the colleague, as it should, or the other publishees to whom publication was made; and that the Claimant has no real prospect of proving publication. This is not a case says Mr Hirst, where the court should, exceptionally, allow the Particulars of Claim to stand notwithstanding the failure to name the publishees, and to allow the Claimant to await disclosure or to ask for further information as to the identity of the person or persons to whom the words were published.

27. It is well established that in a claim for slander a claimant is obliged so far as possible, to set out in the Particulars of Claim, the precise words used and the names of the person to whom they were spoken: (see CPR 53PD2.4 and 2.2(2) and, for example, *Bishop v Bishop* [1901] P.325). The Claimant himself was not present when the words complained of were spoken. Since the claim against the First Defendant cannot stand for the reasons I have already given, the Claimant's case on publication now rests on proving publication to unidentified staff and customers, and to his unnamed colleague. The Claimant has not identified the colleague by name in the pleading as he should have done; and no evidence has been put before the court as to his or her identity, or to support the claim that this person was a publishee.

28. The Claimant in the course of his submissions said (in effect) that if the Defendants wanted to know his colleague's name, they only had to ask; and told the court what the name of the colleague was (a Mr Ahmed).

29. I do not regard this as satisfactory answer to the point. So far as the pleading is concerned, the Claimant is it seems to me, well-versed in the practice and procedure of libel litigation, including in relation to the issue of publication. He knows that publishees should be named when their name is known (he has done so in the garage action). It seems therefore

that for his own reasons he has decided not to name the colleague – despite the fact he obviously knows who he or she is. He has also produced no evidence from the colleague to contradict the First Defendant's evidence before me that the words complained of were not spoken to him. Given the fundamental importance of that evidence to the viability of the claim against the First Defendant, its absence gives rise to a real concern as to whether the colleague's evidence would actually support the Claimant's case, even if he was named in the pleading.

30. On the other hand, the First Defendant made no request for further information as to the identity of the colleague; and in neither the application notice itself, nor in the evidence in support, was this point "flagged up" as an issue going to the validity of the case on publication. The application focused instead on the issues of vicarious liability and abuse of the process. In those circumstances the Claimant might be said to have been taken by surprise. In *Armstrong v Times Newspapers Ltd* [2005] EWCA 1007; [2005] EMLR 33, CA (Civ Div) it was made clear by the Court of Appeal that on an application for summary judgment, the application notice should set out the grounds for the application in clear terms, and I see no reason why the same approach should not apply on this application. In any event, in accordance with ordinary principles, a court would be unlikely to strike out a claim when a defect in the pleading could be easily cured, without giving a party the opportunity to do so.

31. Different considerations arise in respect of the inclusion in the pleadings of publishees whose name the Claimant does not know. If a claimant does not know the name of the persons to whom publication was made, the court may, exceptionally, allow the claim to stand if it is unreasonable to require a claimant to identify the publishees, or the claim may be to allowed stand pending disclosure or the provision of further information by the defendant(s) which it is reasonable to suppose will identify the publishee concerned. However, it is clear that the court will only follow this course in either case where the claimant can show by uncontradicted evidence that publication by the defendant has taken place and that he has a good cause of action in defamation (see *Best v Charter Medical of England Ltd* [2001] EWCA Civ 1588 at [11] to [13]; *Bareham v Huntingfield (Lord)* 2 K.B. 193 C.A. and *Russell v Stubbs* [1913] 2 K.B. 200n). In the absence of such evidence, the claim is merely speculative. As Lord Justice Keene said in *Best* at [13]:

> "I conclude that the exception to the normal rule [that a claimant must set out in the particulars of claim the name of the persons to whom the words were spoken, and the exact words used] only operates where the claimant can satisfy the court that he has a good cause of action, because there is credible evidence that the defendant on a particular occasion and to a particular person made a defamatory statement about him of a specified nature. Unless there is evidence that there is a good cause of action in

defamation, an order for further information under Civil Procedure Rules Part 18 would indeed be a fishing expedition…".

32. As was also made clear by the Court of Appeal in *Best* at [14] and [19], the fact that the Particulars of Claim are verified by a Statement of Truth is not evidence of a prima facie cause of action for this purpose, and the traditional strict approach to pleading has not been changed by the use of the words "so far as possible" in the Practice Direction to CPR Part 53.

33. In this case there is at present no evidence before the court that any publication has taken place. The only evidence as to publication comes from the First Defendant and it is that there was no publication to him. I have already mentioned the striking absence in this context of evidence from the unnamed colleague on this issue. In those circumstances, there is no evidence that the Claimant has a good cause of action in defamation, and the Claimant would not therefore be entitled to rely either on publication to individuals he cannot name (for example, possibly, customers) or on publication to those he might be able to name after disclosure or the provision of further information.

34. It is necessary to mention here the troubling and striking similarity between the formulation of the claim in this action, and the garage action. Specifically, the words complained of in both actions are identical, the date when they were spoken is the same, it is alleged that the Second and Third Defendants were employees of a Mr Ali and Mr Borg when the words were spoken in the garage action and the case on vicarious liability against Mr Ali and Mr Borg is advanced in an identical manner to that against the First Defendant in this action, as is the case on publication to "the Unknown Publishees". There are only two differences apart from the place of publication. The Third Defendant is not alleged to have been present when speaking the words in the garage action, but to have spoken the words by telephone over a loudspeaker so they could be heard there; and as to the identity of the publishees. In the garage action publication is alleged to Irfan Ali, Mr Borg, the Second Defendant's wife, and Kevin Felton - said to be a customer of Mr Ali and Mr Borg.

35. The similarities between the two claims (in particular, as to the words complained of, unless the words complained of were taped and played back, or the Second and Third Defendants were speaking from a script) is simply not credible. This was a matter addressed in the evidence of Mr Price, but not answered in evidence by the Claimant. During the hearing however, the Claimant told me quite casually, that he "Put his hands up" in respect of the garage claim; it had been started in error based on a misunderstanding he said and was discontinued on the 3rd December 2007. Beginning High Court claims against individuals without proper evidence,

is a serious matter, and I very much doubt that the defendants to the garage claim were in a position to shrug off the receipt of proceedings, in the casual way that the Claimant appeared to shrug off his error in bringing the claim against them. I agree with Mr Hirst's submission that the existence of the garage claim and Claimant's conduct in relation to it is evidence that the Claimant is prepared to begin actions for slander without proper evidence and on a speculative basis, and gives real cause for concern as to whether there is any proper evidential basis for this action either.

36. Having regard to all these matters, in my judgment, the action against the Second and Third Defendant could only be permitted to continue if the Claimant produced proper evidence of publication. It would not be sufficient for the Claimant simply to give the name and address of his colleague by way of further information. He would have to produce evidence from that colleague in a witness statement verifying the relevant matters in the pleadings (namely that he or she heard the words complained of spoken by each Defendant, identifying by name (if known) or description who else was present and heard the words, and verifying that "several staff and customers" were present and listening to the words complained of"). In default of such evidence, the action against the Second and Third Defendants would be struck out.

37. But there is a more fundamental objection made by Mr Hirst to the claim, to which I turn next, namely that it is an abuse of the process, as indeed are the other actions brought by the Claimant to which I have already referred. CPR 3.4.2(b) provides:

> "The court may strike out a statement of case if it appears to the court...(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."

The court must exercise its powers in this respect, have regard to the overriding objective, and the considerations identified in CPR Part I.

38. In summary, Mr Hirst submitted this is expensive, oppressive and unmeritorious litigation relating to highly private matters, which has been launched to enable the Claimant to "get at" the Third Defendant, following the breakdown of their relationship. He submitted the other litigation is similarly vexatious. He draws attention to the striking similarity between this action, and the garage action which I have already referred to; and to the identical and formulaic way in which in three of the actions it is sought to make the employers (or in this action, someone who wasn't even the employer) vicariously liable for the actions of the individuals who he wants to harass. These matters he submitted raise a strong presumption that the claims are speculative and brought with the improper motive he has identified. He says it is believed that there are criminal proceedings pending against the Claimant initiated by the Third Defendant, and that the

two libel actions brought in respect of witness statements given to the police are not only manifestly without merit (since the publications concerned were absolutely privileged) but are obviously designed to harass and deter potential witnesses to the criminal proceedings. Mr Hirst referred me to *Wallis v Valentine* [2002] EWCA Civ 1034, in particular, the judgment of Sir Murray Stuart-Smith at paragraphs [31] to [33] where he said:

> "31. The relevant principles when considering strike out for abuse of process have recently been stated in the judgment of Simon Brown LJ, with whose judgment Nourse and Waite LJJ agreed, in *Broxton v McClelland and Another* [1995] EMLR 485 at 497-498:
>
> > "(1) Motive and intention as such are irrelevant (save only where 'malice' is a relevant plea): the fact that a party who asserts a legal right is activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent is nothing to the point. As was said by Glass JA in *Champtaloup v Thomas* (1976) 2 NSWLR 264, 271 (see *Rajski v Baynton* (1990) 22NSWLR 125 at p.134):
> >
> > > "To impose the further requirement that the donee [of a legal right] must be actuated by a legitimate purpose, thus forcing a judicial trek through the quagmire of mixed motives would be, in my opinion, a dangerous and needless innovation. "
> >
> > (2) Accordingly the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the Court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings. The cases appear to suggest two distinct categories of such misuse of the process:
> >
> > ...
> >
> > (ii) The conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment and commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation.
> >
> > (3) Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a

> plaintiff from bringing an apparently proper cause of action to trial."
>
> 32. I respectfully adopt that statement of the law. But I would add the following three matters. First, where Simon Brown LJ speaks in paragraph (2)(ii) of the conduct of proceedings, this is not confined as Mr Price submitted, to the conduct of the proceedings after the issue of the claim, but includes the initiation of the claim itself. Secondly, at the interlocutory stage the test is an objective one...
> ...Thirdly the *Broxton* and *Goldsmith* cases were prior to the Civil Procedure Rules. In Schellenberg v British Broadcasting Corporation [2000] EMLR 296 Eady J, in an application to strike out for abuse of process, rejected the claimant's submission that the overriding objective under the CPR was irrelevant. At page 318 he said:
>
> > "Even in a jury action it is regarded under the CPR as a judge's duty to take a realistic and practical attitude. He or she is expected to be more proactive even in areas where angels have traditionally feared to tread.
> >
> > I have seen nothing to suggest that the CPR are to be applied any less rigorously, or the judges are to be less interventionist, in litigation of the kind where there is a right to trial by jury. That important right is sometimes described as a 'constitutional right', although the meaning of that emotive phrase is a little hazy. Nevertheless I see no reason why such cases require to be subjected to a different pre-trial regime. It is necessary to apply the overriding objective even in those categories of litigation and in particular to have regard to proportionality. Here are tens of thousands of pounds of costs at stake and several weeks of court time. I must therefore have regard to the possible benefits that might accrue to the claimant as rendering such a significant expenditure potentially worthwhile."
>
> 33. I agree with Eady J. And although the judge must not usurp the function of the jury, as was explained by this court in *Alexander's* case, he is entitled, and indeed bound, to look at the case at its highest from the point of view of the claimant, and ask himself the relevant questions which arise when considering the overriding objective. That is what the judge did here."

39. In relation to this claim, Mr Hirst submitted that even if the Claimant was able to establish publication, say, to the unnamed colleague, having regard to the minimal publication of the slanders, the nominal damages that would be recovered would be wholly disproportionate to the costs of the proceedings; and that this claim was accordingly an abuse, having regard

to the principles identified by the Court of Appeal in *Jameel v Dow Jones & Co Inc* [2005] QB 946.

40. The Claimant told me in the course of his submissions that as a result of a private agreement with Brambles Respite Care Home, the claim against Michelle Hill has been discontinued. The garage claim has also been discontinued as I have already mentioned. So far as the two remaining claims against the Third Defendant are concerned (the action in respect of her witness statement to the police over the 8th July incident and the action for deceit, assault and trespass) he told me he had entered judgment in default in both actions which the Third Defendant has apparently been successful in setting aside. He then told me about a sixth action against the Third Defendant (apparently for delivery up of certain property) in which he had also entered judgment, but said he had been unsuccessful in four attempts at enforcing that judgment. Because of the problems of enforcement, he said he had concluded there was no point in spending time and money on the other two actions against the Third Defendant and had attempted to discontinue them – but was out of time to do so and there remained outstanding an issue as to the Third Defendant's costs.

41. Thus out of the five actions brought in relation to the breakdown of his relationship with the Third Defendant, the Claimant has either discontinued, or attempted to discontinue four. He told me the discontinuance notices in all the actions had been issued on 3rd December 2007 (that is three months approximately after the claims were begun and about two months after service of Mr Price's witness statement in which he invited the court to conclude that these actions were an abuse of the process). He denied that his motive in bringing the claims was to get revenge on the Third Defendant, and said it was to undo the significant damage which the Third Defendant's conduct and the breakdown of the relationship had caused him. He told me that criminal proceedings against him in respect of the 8th July incident were no longer being pursued.

42. Even if this history of the other claims is accurate, Mr Hirst submitted the bare facts in relation to those other claims, provides a picture and background of abusive litigation, against which his submissions in relation to this claim can be assessed.

43. There are it seems to me a number of features which taken together give rise to very serious concerns about the initiation and pursuit of this action and the other actions to which I have referred. All the actions were brought within a few days of each other, shortly after the breakdown of the relationship between the Claimant and the Third Defendant. The breakdown of the relationship is a central feature of all the actions, even though the causes of action and the parties may be different. Two of the actions (this action and the garage action) are almost identical not only as

to the words alleged to have said in both, and the "sting" complained of, but also as to the formulation of the claim of vicarious liability. I have not seen a copy of the claim for libel against the Third Defendant, though Mr Price has. He describes its subject matter in his evidence, and says that the statement by the Third Defendant is alleged to have the same "sting" as is alleged in this action. But both that claim, and the claim for libel against the Third Defendant's friend, Ms Hill (which I have seen) appear to have been brought in respect of statements which were absolutely privileged (namely on the content of two written statements made to the police following the 8th July incident).

44. That the Claimant discontinued four of the actions (or has attempted to do so) so soon after they were begun, and after it was alleged they were an abuse of the process, reinforces these concerns. No proper explanation has been advanced for the initiation and then the abandonment of the garage action. Indeed, no evidence at all has been advanced by the Claimant to rebut the case on abuse advanced against him in the witness statement of Mr Price. No evidence has been advanced to support the claim that the First Defendant was present when the words were spoken, a matter fundamental as I have said to the inclusion of the First Defendant in this litigation at all, or to explain how that case came to be pleaded against him in the first place. Despite the amount of detail contained in the pleadings, the Claimant chose not to identify by name the only other identifiable individual who (on his case) heard the words. He entered judgment in default in this action in breach of the rules, before the time for service of the defence had expired, and after this application to strike out had been issued. He also waited until the last minute to contest the First Defendant's position on disclosure. The complaints in this respect from the First Defendant's solicitors contained in their letter of the 23rd January 2008 are in my judgment well-founded. He entered judgment in default in two other actions against the Third Defendant, which she was apparently successful in setting aside, and then discontinued those actions, or attempted to do so.

45. A substantive contest of the four actions brought against the Second and the Third Defendant, would involve the Defendants in a substantial duplication of time, effort and expense. It would be necessary to delve into the details of the relationship between the Claimant and the Third Defendant, albeit the causes of action in each action was different (and a full flavour of what would be involved if that happened can only be gleaned by reading the pleadings in full and the witness statement of the Claimant dated 15th July 2007). Even if no substantive defences were relied on, the claims to damages on their own which include claims to aggravated damages, special damages and exemplary damages would require a formidable amount of time and resources (both those of the parties and of the court) to resolve. The claims to damages are far reaching, difficult to follow, lack proper particulars and appear to overlap to a considerable extent. The claims to special damage include (in the slander actions) a claim for "loss of the consortium or conjugal society of

the third Defendant" and a claim that that the slanders caused the Claimant significant physical harm. In his claim against the Third Defendant for deceit, assault and trespass, the Claimant alleged he had been diagnosed with a psychiatric injury due to the emotional trauma of having to use force against the Third Defendant.

46. Mr Price says in his witness statement (and the Claimant has not disputed) that the Claimant was declared bankrupt last year, and has just been discharged. The claim states he is unemployed. Mr Price says he is unaware of any assets in the Claimant's name, the address given in these proceedings is not registered in the Claimant's name, and it is assumed that he claims an exemption from the payment of the court fees associated with the bringing of the claims. Even if the Defendants were successful in defending this action therefore, he says there would be little prospect of them recovering their costs from the Claimant.

47. So far as the extent of publication in this action is concerned, on the Claimant's case at its highest, publication is modest. The words complained of are defamatory of the Claimant, but he will only have a cause of action in respect of their publication to people who know they are being said about him. He is not however identified by his full name – but only as "Lee". It is extremely doubtful having regard to the circumstances, that the unidentified customers coming in for their pizzas would know who was being talked about, even if they heard the words complained of. The Claimant did not work at the premises; and there is nothing pleaded as particulars of reference to support the case that any one other than the Claimant's colleague would have understood them to refer to the Claimant. Accordingly, damage to his reputation would be modest as well.

48. I have to consider therefore whether, even if the unnamed colleague is identified to the court's satisfaction, and the Claimant has an apparently proper cause of action, it is clear and obvious that this action is an abuse of the process. I have come to the clear conclusion that it is. This case obviously differs from *Wallis* in a number of respects. The publication (if there is one) cannot be described as technical, there is no history of protracted disputes between the parties (though the history of the relationship between the Claimant and its breakdown are in my view important in this context) nor are there assertions in correspondence of the nature there were in that case. But, not surprisingly, the circumstances in which abuse of the process can arise can vary considerably. The jurisdiction to strike out an action as an abuse of the process derives as Lord Diplock said in *Hunter v CC West Midlands Police* [1982] AC 529 at 536 from:

> "[An] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of the process can arise are very varied;..."

49. I have identified some of the most significant circumstances in relation to this issue above. I have also had the opportunity to hear the Claimant's submissions, which were made in person. I do not consider the fact that Claimant has discontinued or attempted to discontinue the actions other than this one renders them irrelevant, as the Claimant suggested to me in argument. The court should, in my judgment, when considering an application such as this have regard to the whole picture, which can include other sets of proceedings initiated by the Claimant against the same parties or arising out of the same subject matter. I entirely accept that only in exceptional cases will an apparently valid claim be struck out as an abuse of the process, and that the court should be very cautious about doing so. But in my judgment, applying an objective test, I am satisfied that this is an exceptional case, that the action is vexatious and oppressive, and that by bringing this action, the Claimant has used the court's processes in a manner designed to cause the defendant problems of expense, harassment and prejudice beyond those ordinarily encountered in the course of properly conducted litigation. I am not able to say at this stage that this action falls squarely within the mischief identified by the Court of Appeal in *Jameel,* given the uncertain scope of the claim for damages, but the features of limited publication at best, limited damage to reputation and the expense that this litigation would entail for the parties, are nonetheless part of the overall picture and are relevant to the conclusions I have reached. I do not consider that any measure short of striking out will address the nature of the abuse or do justice between the parties in this case, and this action will therefore be struck out.

50. Mr Hirst invited me consider, in accordance with CPR 3.4(6), whether it would be right to make a civil restraint order against the Claimant under CPR 3.11 (Power of the court to make civil restraint orders) and the Practice Direction – Civil Restraint Orders 3CPD. Those rules and the Practice Direction were introduced in 2004, following the decision of the Court of Appeal in *Bhamjee v Forsdick [Practice Note]* [2003] EWCA Civ 1113; [2004] 1 WLR 88, and reflect the inherent jurisdiction of the court to prevent a litigant from abusing the court's process by persisting in bringing vexatious claims. It is not suggested that the Claimant should be subject to a limited restraint order (which can be made by a judge or the court where a party has made two or more applications which are totally without merit, and which prevents a party from making any further applications in the proceedings in which the order is made without first obtaining the permission of a judge identified in the order) but that he

should be subject to an extended restraint order. An extended restraint order may be made where a party has persistently issued claims or made applications which are totally without merit (3CPD, paragraph 3).

51. It seems to me that a claim which is struck out as an abuse of the process can be characterised as totally without merit for this purpose, even where the a claimant has an apparently proper cause of action. If it were otherwise a civil restraint order could not be used to deal with the very mischief it is designed to prevent.

52. In *Bhamjee*, where Lord Phillips MR gave the judgment of the court, it was said at [42]: "there has to be an element of persistence in the irrational refusal to take "no" for an answer before an order of this type can be made." Some further guidance as to as to the type of behaviour which could be described as persistent for these purposes may be found in *AG v Barker* [2000] 1 FLR, 759 where Lord Bingham CJ said:

> "The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim: that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who if they were to be sued at all should be joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop."

52. Having regard to all the matters which have led to my conclusion that the action should be struck out, I am of the view that the Claimant's claim against the Defendants in this action is totally without merit, and the court's order should record that fact. Nonetheless, the Claimant's conduct does not in my view presently have the necessary hallmark of persistent vexatiousness, which would trigger the court's power to make an extended civil restraint order.