Case No: HQ10D02014

Neutral Citation Number: [2011] EWHC 75 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2011

Before :

MR JUSTICE CHRISTOPHER CLARKE

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Between :

(1) PHILLIP WALLIS and **(2)GHP SECURITIES LIMITED**	**Claimants**
- and -	
JUSTIN MEREDITH	**Defendant**

- -
- -

Ian Helme (instructed by **Mishcon de Reya**) for the **Claimants**
David Price of **David Price Solicitors & Advocates** for the **Defendant**

Hearing dates: 29th November 2010 and 1st December 2010

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Judgment

Mr Justice Christopher Clarke:

1. This is an application under the principle established in *Jameel v Dow Jones & Co Inc* [2005] QB 946.

2. Justin Meredith ("Mr Meredith"), the defendant, is a chartered surveyor who was employed initially by GHP Group Limited ("GHP Group") and then until December 2009 by GHP Securities Ltd ("GHP"), the second claimant, which is a property development company. Mr Philip Wallis ("Mr Wallis"), the first claimant, is a founder of that company. On 7th December 2009 Mr Wallis told Mr Meredith that he would be made redundant from GHP. Mr Meredith continued to work for GHP until 23rd December 2009 when he was told by Mr Wallis that his employment was being terminated with immediate effect.

3. On 10th February 2010 Mr Meredith telephoned Mr Wallis to ask about the payment of money owed to him in respect of his notice period and his redundancy.

4. On 12th February 2010 Mr Adam Morallee ("Mr Morallee") a partner in Mishcon de Reya ("MDR"), GHP's solicitors, wrote to Mr Meredith on behalf of GHP Group and GHP to tell him that MDR were investigating what were said to be "*various breaches of obligations of confidence and fidelity*" owed to GHP Group and GHP. The letter stated that Mr Meredith had forwarded confidential and sensitive e-mails from his work account to his wife's e-mail account. MDR sought undertakings from Mr Meredith that he would no longer access his work e-mails, would return the Blackberry being used by him and abide by the duties of confidentiality owed to those companies. This was the commencement of a chain of correspondence which was persistently harsh in tone and belligerent in content.

5. On 15th February Mr Meredith replied. He acknowledged that he had an ongoing duty of confidentiality but only insofar as GHP needed to protect any trade secrets. He disputed the allegation that he had breached any duty of confidentiality surviving the termination of his employment. On the same day he returned the Blackberry on which access to his work e-mails could be made. He referred to his conversation with Mr Wallis of 10th February in which he had reminded him that GHP still owed him money in relation to his notice and redundancy entitlements and said that he would be writing to him shortly in this regard.

6. On 1st March Mr Morallee wrote again setting out the basis of his clients' threatened claim for breach of confidence and fiduciary duty, which related to the alleged misappropriation of two business opportunities. He sought various further undertakings and Mr Meredith's agreement to pay costs and compensation by 5th March, failing which legal proceedings would be instituted.

7. On 5th March Mr Meredith replied in a six page letter addressing in considerable detail the points made in the letter of 1st March. He also made a claim for damages in lieu of notice, statutory redundancy, outstanding expenses, and compensation for loss of earnings. His letter ended with the following:

> *"I would also point out that on Wednesday 10 February I telephoned Philip in order to find out why GHP were not paying me what is due. I accept that the conversation got quite*

heated and resulted in my putting the phone down on him. The very next evening (Thursday 11 February) I answered my front door to two burly men with East European accents who threatened me and told me to "phone the man who you have offended and say "sorry". You have 24 hours".

Needless to say I found these two individuals turning up on my property both sinister and extremely intimidating. My wife was beside herself with worry. Obviously concerned about the safety of my family, I reported this incident to Woking police.

I can confirm that I am not, nor have I been, in dispute with any other person or company. Therefore, in view of the spat that I had with Philip less than 24 hours before, it is not unreasonable to assume that someone at GHP instigated this visit. Whilst I have reported the incident to the police, I'm also realistic enough to know that it would be difficult to prove GHP was behind this incident, but on the balance of probabilities there can be no other plausible explanation in my view.

I would like GHP to give me their assurance that they had absolutely nothing to do with this incident and, if they cannot do this, then to undertake that they will not do something like this again

I await your proposals to settle my wrongful and unfair dismissal claims".

8. On 15th March MDR wrote responding to the points Mr Meredith had made in relation to breach of confidence/fiduciary duty. The letter also said that he had made a serious and false allegation that their client had arranged for "*two burly men with Eastern European accents*" to threaten him and that their client was behind this attack ("the Allegation"). MDR asked Mr Meredith to tell them within 48 hours which third parties he had repeated the Allegation to and said that their client would be speaking to third parties about this matter in order to verify his response. They also asked him to provide an undertaking within the same period that he would not repeat the Allegation any further. This letter was copied by MDR to Schroder Property Investment Management by fax.

9. The request for information as to the third parties to whom Mr Meredith had repeated the Allegation assumed that he had done so. Nothing in the letter of 5th March or elsewhere indicated that Mr Meredith had repeated the Allegation other than to the police. The request in the letter of 15th March was to form, as Mr Price for Mr Meredith put it, the start of a recurring theme, where the claimants relied upon Mr Meredith's refusal to be interrogated in this way as evidence of publication by him.

10. On Thursday 17th March Mr Meredith emailed Mr Morallee to acknowledge receipt of his letter. He told him that due to a longstanding commitment he would be away on Monday 22nd and would respond to his letter on Tuesday 23rd March. He indicated that he was having to take legal advice and was unable to respond any earlier. Mr Morallee replied the same day saying that his client was content to wait until then for a response on the substantive issues but needed a response on the defamation issues immediately.

11. On Friday 18th March Mr Meredith responded as follows:

> *"Given what had happened to me all I was seeking was an assurance from, or on behalf of, Philip Wallis and Kevin Reardon that they were not behind the incident, or that if they were that such an incident will not be repeated. This assurance still hasn't been provided and I am not clear on whose assurance you are suggesting that the allegation is false.*
>
> *I note that they are intending to speak to third parties about this and I therefore have no intention of fuelling their investigation in this regard. No doubt if you decide to pursue such investigations then I will consider commenting on anything you wish to refer to me.*
>
> *For obvious reasons I would rather forget the incident and I am therefore quite happy to give the undertaking".*

12. On the same day Mr Morallee emailed to say that for the avoidance of doubt and as was clear from his letter his client could assure him that it was not behind the Allegation. He added "*Please now inform us precisely who you repeated the Allegation to. I note that you have agreed never to repeat the Allegation again*".

13. On 23rd March Mr Meredith wrote to MDR to deal with the substantive issues.

14. On 31st March Mr Morallee sent an e-mail to Mr Meredith in which he said that, as Mr Meredith had not provided the unequivocal undertaking requested in relation to the Allegation and had not informed them which third parties he had repeated the Allegation to, he now had 24 hours to provide the undertaking and information else his client might be forced to use legal proceedings against him for defamation. Mr Meredith replied on the same day and referred MDR back to his original response in his e-mail of 23rd March. This appears to have been an erroneous reference. Mr Morallee replied saying that he assumed that Mr Meredith was referring to his email of 18th March. He observed that in that response Mr Meredith did not give an unequivocal undertaking and did not say to whom he had disclosed the Allegation; and he asked him now to do so. He said that this was now the fourth time that Mr Meredith had been asked the question and that "*the only inference that can be drawn by your failure to answer the question is that the Allegation has been widely publicised. If it has not been widely publicised then you would tell us otherwise immediately. We put you on notice that if you ignore this question for the fourth time we will make the inference set out above*".

15. Mr Meredith replied:

> *"My apologies – looking back at my email to you I note that I did offer to give you the undertaking but hadn't actually given it. I therefore confirm that I undertake not to repeat the Allegation you refer to in your letter dated 15th March. However in providing this undertaking it does not mean that I accept that I made the Allegation to any third party as I do not know who did it."*

16. On 29th April MDR wrote again to Mr Meredith alleging that "*yet again in breach of fiduciary duties of confidence, [he had] unlawfully utilised our client's confidential*

information..” to contact certain individuals in order to exploit a business opportunity for his own benefit. MDR said that they would shortly be sending legal proceedings in relation to his defamation of Mr Wallis. On 6th May Mr Meredith responded to this allegation.

The proceedings

17. On 6th May MDR sent Mr Meredith “*by way of service … in draft*” the Claim Form and Particulars of Claim and an Application for pre-action disclosure of documents evidencing publication of the Allegation to third parties.

18. On 13th May David Price Solicitors & Associates (“DPSA”) notified MDR that they had been instructed; said that the publication of Mr Meredith’s letter of 5th March was clearly covered by qualified privilege and added:

> *“There is no merit in your clients’ Part 31 application: it is simply a fishing expedition. Our client confirms that there are no documents that would be discloseable in any event”.*

19. No Application was in fact issued. Instead on 27th May MDR sent by way of service the Claim Form, Response Pack and Particulars of Claim.

20. The Particulars of Claim relied on the passage in the letter of 5th March set out in para 7 above (other than the last sentence) which it claimed Mr Merdith had published or caused to be published to MDR by post and e-mail where it was read by Mr Morallee. The Particulars contained a claim for damages and aggravated damages in support of which the matters relied on included the following:

> *“6.2. Of further concern is the fact that the Defendant was prepared to make such an allegation to a third party despite freely admitting on 18 March 2010 and again on 31 March 2010 that he did not in fact know who was behind the incident if it happened at all; The Defendant has provided the Claimant with no evidence that it did).*
>
> *6.3. The Defendant has refused four requests – dated 15 March 2010 (by letter) and 18 and twice on 31 March 2010 (by email) – for a list of those to whom he has published the allegation. Thus he has deliberately hampered the Claimants’ attempts to mitigate any damage that has already been caused, prevented them from attempting to vindicate their reputations and wilfully risked that such damage that has been caused will spread and grow. The fact that the allegation is spreading unchallenged or uncorrected is extremely aggravating to the first.*
>
> *6.4. In consequence of the Defendant’s refusal, the Claimants are being forced to make an application to the court for such information in order to protect (and, if necessary, vindicate) their reputations, and the Claimants expressly reserve the right to rely upon such further publication of the same or similar allegations as are proved in this claim”,*

21. On 8th June DPSA wrote to MDR asking them *“what your client hopes to achieve in bringing this claim and whether it is your position that the publication complained of amounts to a real and substantial tort. If so please let us know on what basis”.*

22. On 24th June MDR replied to the effect that the Allegation was extremely serious and that their clients were entitled to vindication. They said that it was clear to them that the Allegation was made cynically to attempt to divide their clients from the firm. They also said that it was *"abundantly clear"* that the defendant had repeated these allegations to others. Reliance was placed on Mr Meredith's failure to respond to requests for information as set out in para 6.3. of the Particulars of Claim. They also stated that if DPSA intended to apply to strike out the claim on the grounds of abuse of process, the claimants would make a cross-application for disclosure in relation to the third parties referred to in para 6.3.

23. DPSA wrote back the same day to say that such a cross application would be putting the cart before the horse and invited MDR to indicate the basis upon which the claimants were entitled to the information sought. The letter also said:

> *"The primary justification for pursuing this claim appears to be the allegation that our client has made the same allegation to others. As the claimants it is your clients' responsibility to make good their case on publication. The courts have, for understandable reasons, refused to allow a claimant to interrogate a defendant in relation to alleged additional publications except in limited circumstances. We note that you served a draft application for pre-action disclosure, but did not pursue it, notwithstanding the alleged damage to their reputations. We can tell you now that, even if your clients were entitled to such an order there are no such documents other than the letter to you of 5 March which is the subject of the claim.*
>
> *The Particulars of Claim complain of one publication i.e. to you. There are no other publications complained of.*
>
> *If other publications were to be complained of they would have to be identified and pleaded. Paragraph 6.3. does not even purport to do this.*
>
> *On the basis of the contents of the Particulars of Claim and your letter today the claim does not disclose a real and substantial tort and paragraph 6.3 is not a proper particular in support of a claim for damages in relation to the sole publication complained of…"*

24. On the next day DPSA wrote to say that Mr Meredith reserved the right to allege that the publication complained of was covered by absolute privilege and/or that it was contrary to the public interest to allow the claimants to bring a claim on it.

25. On 30th June MDR wrote to DPSA saying, inter alia, that it was "*absolutely clear … [that] our clients are complaining of the only publication that they know about*". They asserted that Mr Meredith had, as a matter of fact, refused to provide an undertaking – an assertion difficult to comprehend in light of the e-mail of 31st March (para 15) – and requested an undertaking in the form of the injunction sought in the Particulars of Claim.

26. On 2nd July, following an e-mail from MDR in which they disagreed with the proposition that the issue of disclosure had to be dealt with before Mr Meredith served a defence, Mr Meredith applied to strike out the claim on the basis (i) that it was an abuse of process in that the allegedly tortious publication did not disclose a real and substantial tort, and (ii) that the publication was made on an occasion of absolute

privilege and/or that it was contrary to the public interest to allow the claimants to bring a claim for libel in relation to a publication to their solicitor in the course of pre-action correspondence. The latter application is not presently being proceeded with. He applied in the alternative to strike out clauses 6.3. and 6.4. on the grounds that they disclosed no reasonable grounds for a claim for damages or aggravated damages and were an abuse in that it was not permissible to rely on unidentified publications in support of a claim for damages.

27. On 5th July DPSA included in their letter of that date the following:

> *"You request that our client provides an undertaking in terms of the injunction sought in the Particulars of Claim. For the avoidance of doubt (not that any should exist), our client, through us, undertakes not to make the following allegation or any similar allegation:-*
>
> *"That your clients were prepared to use such sinister methods to get their way that on their instructions our client who had crossed them was threatened at home by two extremely intimidating and burly men to such a degree that he became concerned about the safety of his family"*
>
> *We stress that this undertaking is made in order to avoid the stress, hassle and costs of litigation of this kind. It is not an admission of any liability".*

The undertaking repeated the meaning pleaded in the Particulars of Claim and was in the form sought in the prayer.

28. On 7th July MDR wrote to DPSA inviting Mr Meredith "*once again, to provide the undertaking requested on his headed notepaper, signed by him*". On 8th July DPSA asked MDR to explain why they required Mr Meredith's signature to be on his headed notepaper and signed by him and asked whether their clients intended showing it to third parties and, if so, for what purpose. On 12th July MDR said that the claimants wanted the undertaking so that if Mr Meredith repeated the allegation he could be sued for breach of contract. On 13th July DPSA observed that Mr Meredith provided an undertaking on 18th March and that, even if MDR disputed this was an undertaking as opposed to an offer to give one, they asked to know on what basis their letter of 5th July did not provide a sufficient undertaking on behalf of their client. This produced no substantive reply.

The application for disclosure

29. Notwithstanding their stance that disclosure should be dealt with after the defence, on 15th July the claimants applied for an order (for pre-action disclosure pursuant to CPR 31.16) that Mr Meredith should disclose to the claimants (a) the time, place and nature of each and every publication by him to third parties that alleges or alleged that the claimants or either of them were involved in and/or responsible for, or were to be suspected of being involved in and/or responsible for, threatening Mr Meredith and/or his family at his family home; (b) to the extent that it was not covered by paragraph (a), the identities of each individual or organisation to whom any allegation of such a nature had been made; and (c) anything in which the information contained in paragraph (a) was recorded.

30. Mr Wallis provided a witness statement in support of the application in which he said that, since the statement in the letter of 5th March was sent, people with whom he regularly conversed had completely stopped talking to him and were refusing to return his calls. He described these as including representatives (unidentified) of Cushman & Wakefield, Schroder's, where Mr Meredith's brother worked, and Helical Bar. He said that he could think of no other reason why these people would not talk to him other than because Mr Meredith had repeated the Allegation to them.

The hearing before Tugendhat, J.

31. On 29th July 2010 the claimants' application was roundly rejected by Tugendhat, J. He referred to some of the correspondence which I have set out and observed that there was nothing in the letter of 5th March, or anywhere else therein, to suggest that there were any grounds for believing that the Allegation had been made to third parties. He recorded the acceptance by Mr Helme for the claimants that the application was not in the existing action but in respect of a possible future action. He referred to the terms of clauses 6.2 – 6.4 of the Particulars of Claim. He described the process of reasoning *"(if that is what it can be called)"* of Mr Wallis as being that, having accused Mr Meredith of making further publications and not having got what he regarded as an adequate denial, then "*to use his own words "we will make the inferences set out above"*. In his judgment the inference was entirely baseless and there was absolutely no reason whatever for it.

32. He decided that there was going to be no resolution of the proceedings or saving of costs if disclosure was ordered and did not see how any such disclosure was going to assist fairly in disposing of the anticipated proceedings. He pointed out that the premise of the application was that there was evidence that there were further publishees and :

> *"As I suggested to Mr Helme early in the proceedings, it seems to me that the whole premise of this application is along the lines that if somebody asks me four times when I stopped beating my wife and I refused to answer the inference is that I am continuing, and have always, beaten her, That may be a slight exaggeration but it seems to me not by very much"*.

33. His conclusion was that the application was a *"fishing"* one as referred to in Gatley 11th edition para 33.2 (*"It should not be thought that rule 31.16 gives carte blanche to libel litigants to fish for a case… by obtaining disclosure of documents thought to contain defamatory words…"*); and that the jurisdictional threshold (that the making of an order would dispose fairly of the anticipated proceedings or assist the dispute to be resolved without proceedings or save costs), was not established. Even if he was mistaken on that he said that he would refuse the application as a matter of discretion. He pointed out that letters exchanged between parties in the circumstances of the present parties are likely to contain defamatory statements about each other. If he were to make the order sought, "*without having any indication given to me as what might distinguish one allegation from another"* the court would expect other litigants to make similar applications in respect of almost any letter written by a party in the circumstances of the defendant to the claimants' solicitors.

34. On 15th September DPSA wrote to MDR. They referred to the transcript of the hearing before Tugendhat, J at which Counsel for the claimants had made clear that

the present proceedings were in respect of a single publication (and not in respect of any publications which the pre-action disclosure sought might reveal). The transcript reveals the following exchange:

> "*MR JUSTICE TUGENDHAT….you say the application notice is not in the existing action and it is in an intended action.*
>
> *MR HELME: My Lord, yes. My Lord, I will be robust about that. These are all separate publications. There is an action in respect of one publication and not in respect of these".*

35. DPSA referred to the bafflement expressed by Tugendhat, J at the July hearing as to what vindication was required (*"I am completely baffled by this. Solicitors constantly write letters which necessarily are defamatory of the opposing party. It is practically impossible in litigation to write a letter which is not defamatory of the opposing party"*). They asked why the claimants required vindication of a publication to Mr Morallee.

36. On 13th October MDR replied saying that DPSA was under:

> *"a fundamental misunderstanding: namely that you incorrectly believe that other publications do not form part of this claim. They do. Paragraph 6.4. of the Particulars of Claim is clear on this point."*

They said that the point Mr Helme was making to the Court was to distinguish between disclosure in this action and pre-action disclosure and that their clients would be actively pursuing lines of inquiry in relation to other publications on which they would be writing separately. They also said that the letter of 5th March 2009 was read by the partner in charge, the client partner, the solicitor working on the matter and other trainees and paralegals.

37. On 15th October MDR wrote directly to Mr Meredith (with a copy to DPSA) on behalf of the claimants, Mr Kevin Reardon and Lizzano Limited, threatening claims for causing loss by unlawful means, breaches of the Business Protection from Misleading Marketing Regulations 2008 and patent infringement. In that letter they said that their clients had become aware that the defamatory statement had been repeated to certain other persons and would be amending their Particulars of Claim in the defamation action in due course. On the same day they wrote to Mrs Meredith asking her for documents relating to the allegations made in their letter to Mr Meredith of that date and said that they might be forced to apply for *Norwich Pharmacal* relief. They also sent a letter to the Office of Fair Trading on behalf of Lizzano Limited requesting that the Chief Inspector of Trading Standards undertake a formal investigation against Mr Meredith in relation to what was said to be misleading advertising in breach of the 2008 Regulations and take necessary enforcement action.

38. On 18th October MDR wrote to Mr Jameson Evans, a specialist car park surveyor, with whom Mr Meredith had worked on one project for the claimants in early 2010 and who was (unbeknownst to the claimants) Mr Meredith's cousin, referring to the proceedings and to the Allegation, and saying that it had recently come to their attention that Mr Meredith had published the Allegation to him and that they intended

to amend their Particulars of Claim to incorporate that publication. The letter asked him to allow a representative of MDR to interview him with a view to his providing a witness statement; failing agreement as to which they would issue a summons under Part 34. MDR said that they would require his witness evidence to cover any and all defamatory (or potentially defamatory) statements made by Mr Meredith to him and that:

> *"Should you refuse to offer your witness evidence voluntarily, upon summoning you to give evidence at Court our client will seek to make similarly thorough enquiries of you in cross examination."*

This letter skates over the fact that Mr Jameson Evans could not properly be summonsed to provide evidence if no amendment to the pleading could be made and, even if it was, he could not, unless he showed himself hostile, be cross examined by the party calling him.

39. On 2nd November DPSA wrote to MDR rejecting the new claims. On 19th November MDR wrote to DPSA to say that they were in the process of finalising their investigation into the extent of any further publication of defamatory material by Mr Meredith, which had taken some time because of Mr Meredith's refusal to assist, and that once they had done so they would be finalising the amendment to the Particulars of Claim. They said that they had made approaches to "*certain individuals*" whom their clients had good grounds for reasonably believing could provide further evidence and such steps had been taken "*with the effective approval of the Court*". They also put forward a further claim in malicious falsehood on behalf of Lizzano Ltd.

40. No application has been made to amend the Particulars of Claim so as to allege a publication other than to Mr Morallee. Nor have any proceedings been commenced against Mr Meredith other than the present proceedings.

The witness statement of Ian Bean.

41. On 24th November, i.e. very shortly before the commencement of the hearing, the claimants served the witness statement of Mr Ian Bean, an assistant solicitor of MDR. He stated that he had the conduct of the claim on behalf of the claimants. Such conduct appears to have been of recent origin since every letter from MDR up to 19th November has only had Mr Morallee's reference.

42. Mr Bean expressed the view that it was very likely, and that there was good evidence, that the Allegation had been published to a significant number of persons. He said that Mr Wallis had, since the allegation was made, been unable to communicate with Mr David Morris of Prudential Property Investment Management Limited ("PRUPIM") as a result of which Mr Wallis wrote to the Head of Asset Management on 29th September 2010 to establish a further line of contact and had had no reply. He also said that MDR had not resolved the position with regard to Schroders.

43. The letter of 29th September is concerned with the Kennet Valley Park project and the inability of Mr Wallis to communicate with Mr Morris on that topic. What the witness statement did not reveal was that there had been correspondence between MDR and Mr Morris. MDR had written to Mr Morris on 18th October in similar terms to those

in which they had written to Mr Jameson Evans. On 19th November they had been told by Mr Morris' solicitors, Hogan Lovells, that Mr Morris had no recollection of Mr Meredith publishing the Allegation to him.

44. Mr Bean's witness statement referred to the fact that various people with whom Mr Wallis regularly conversed in the property industry had completely stopped talking to him and that "*For example, the First Claimant has been unable to communicate with a key contact, Mr David Morris...*" The statement went on to say that "*The Claimants think that a very likely reason that PRUPIM and others in the industry … will not talk to him other than because the Defendant has repeated the allegation to them*". Despite the muddled phrasing this suggested that Mr Morris of PRUPIM (among others) had failed to communicate with him because Mr Meredith had repeated the Allegation to him. Whilst the claimants may well have had the view expressed (as stated in Mr Wallis' later statement of 1st December 2010: see para 48 below) the omission of any reference to what Mr Morris had told MDR meant that a misleading impression was created that Mr Meredith was likely to have published the Allegation to Mr Morris and that there was no reason to doubt that to be so..

45. It became apparent in subsequent correspondence between the solicitors that there had been correspondence between MDR and Mr Morris. This was because on 25th November DPSA wrote to MDR to say that they understood that there had been communications in which MDR and the claimants had been told that Mr Meredith had not made the Allegation to Mr Morris or to anyone else at PRUPIM. On the same day MDR accepted that they had been in correspondence with Mr Morris in the course of gathering evidence. But they declined to inform DPSA of its contents and claimed privilege. In the event DPSA obtained the response of Hogan Lovells on behalf of Mr Morris so that, by that route, it came before the court.

46. I was told that Mr Meredith understood that there had been correspondence between MDR, Schroders and their former employee Peter Cooper about the libel case and that Mr Cooper had informed MDR that he had no relevant information. I do not know and do not propose to speculate as to whether that information is correct, although it is clear that the claimants or MDR have been in touch with Schroders. I am, however, entirely satisfied that, if Mr Morris or Schroders or anyone else had produced any evidence to the effect that the Allegation had been published by Mr Meredith to them, it (or the results of the inquiry) would have featured in Mr Bean's witness statement in the light of his statement that MDR had hoped to be in a position to provide further particulars of publication in good time but that this had not been possible.

47. Mr Bean recounted that MDR had approached a number of individuals whom they had good grounds for reasonably believing could provide the further evidence sought. Certain individuals had informed MDR that the Allegation was not published to them. Some had not replied. Some they were still to meet "*to discuss the extent of the Defendant publishing the extent of the allegation to them*". He repeated the information about publication within the firm contained in the letter of 13th October. He said that the claimants were not satisfied with the form which the undertaking took and noted that the defendant was unwilling to provide an undertaking on headed note paper. The claimants were unaware of the full extent of the damage caused and therefore did not know whether the undertaking was sufficient to deal with the non pecuniary relief that the claimants were seeking.

48. On 1st December 2010 Mr Wallis filed a further witness statement in which he stated that on 15th September 2010 he met a contact who ran his own business in the property sector one of whose biggest clients was in the same group as PRUPIM. That contact told him that there was a rumour circulating at PRUPIM that Mr Wallis had sent two heavies round to Mr Meredith's house to threaten him and his family. He said that he could never tell anyone that he had told Mr Wallis this because, if it became known at PRUPIM that he had released this information, then he would risk losing them. Mr Wallis discussed this with MDR and as a result instructed them to write to those people to whom he believed himself to have been defamed, including in particular PRUPIM.

49. I do not accept that this is evidence of the publication of the Allegation by Mr Meredith to PRUPIM, nor have the claimants sought so to plead. It is second hand evidence from an unidentified contact, who is not an employee of PRUPIM and whose source (and whether that source is a direct or an indirect one) is unrevealed, of the circulation of a rumour in circumstances where the Allegation is one that was (a) published by MDR to Schroder Property Investment Management on 15th March; and (b) the subject of discussion in court on 29th July 2010. In those circumstances there is ample scope for a rumour to circulate otherwise than as a result of a publication by Mr Meredith to PRUPIM.

50. Mr Price further submitted (a) that the evidence should not be entertained and (b) that it was inherently unworthy of belief.

51. As to (a) the evidence was served a few hours before the commencement of the adjourned hearing when PD 23.9.4 requires evidence in reply to be served as soon as possible. The stated reasons for its late service, namely (i) that Mr Wallis thought he could "reverse" into the evidence as a result of the approaches to potential witnesses made by MDR in September and (ii) that Mr Price had claimed on 29th November that there was no evidence of the Allegation being published to anyone other than Mr Morallee, were, he submitted, not justified. It was apparent by the time of Mr Bean's first statement that the "reverse" attempt had failed and it was obvious from the outset, and from the judgment of Tugendhat J, that Mr Meredith was contending that there was no evidence of any wider publication.

52. As to (b) Mr Price submitted that the supposed drastic consequences of the source being identified did not ring true; further if a rumour was rife it was inherently unlikely that the claimants would not have obtained evidence of it; and, if the source had told Mr Wallis on 15th September that there had been rumours circulating at PRUPIM it was inexplicable that MDR did not write to other individuals at PRUPIM. It was highly suspicious that Mr Wallis' second witness statement only emerged after Mr Morris' denial that he had been told the Allegation. There was also no motive for Mr Meredith to have told PRUPIM and nothing in the wording of the letter complained of to suggest that he had communicated to anyone other than Mr Morallee and the police.

53. Whilst there is force in these contentions, in the light of my observations in para 49 above, I do not propose to consider further whether, if the evidence amounted to evidence of publication by Mr Meredith to PRUPIM it was capable of belief.

The relevant principles

54. The decision of the Court of Appeal in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 establishes that the court is required to stop as an abuse of process defamation proceedings that do not serve the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation had been unlawfully damaged; and that the test was whether there was a real and substantial tort (the test applied in deciding whether to grant permission to serve out).

55. In that case the online internet edition of the Wall Street Journal, which was available to subscribers within the jurisdiction (of whom there were about 6,000), had an article which, together with a list of names in an internet hyperlink referred to in the article, implied, so the then claimant alleged, that he had been one of the first financial supporters of Osama Bin Laden and Al-Qaeda and that there were reasonable grounds to suspect that he had continued to support such terrorism in recent years and, in particular, that he supported those responsible for the September 11 attacks. The defamatory imputation was thus extremely grave. The case proceeded on the premise that only five subscribers had followed the hyperlink two of whom (unidentified) were said not to know the claimant or to have any recollection of reading his name, and three of whom were "*in the claimant's camp*".

Discussion

Paras 6.3. and 6.4 of the Particulars of Claim

56. In English law each separate publication gives rise to a separate cause of action (*Jameel* para 32). It is, therefore, necessary for the Particulars of Claim to identify which is or are the publications relied upon. In a claim for slander the Claim Form must so far as possible contain the words complained of, and identify the person to whom they were spoken and when: *CPR PD 53, para 2.2 (2).* The precise words used and the names of the persons to whom they were spoken, and when, must, so far as possible, be set out in the Particulars of Claim if not already contained in the Claim Form: *para 2.4.* To that position there is a narrow exception summarised by Sharp J in *Freer v Zeb & Ors* [2008] EWHC 212 (QB) at 31:

> *"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 allowed to 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 satisfythe 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…"."

It is clear from *Best* that the provisions of the CPR have not materially altered the common law position.

57. In the present case the only publication in respect of which the action is brought is the publication to Mr Morallee: see para 3 of the Particulars of Claim. No other publishee is identified. It is obvious that strenuous efforts have been made to identify another publishee but they have not borne fruit. Assertions of belief in further publication are not evidence of it; nor is a failure on more than one occasion to respond to questions as to what further publication has occurred. As Tugendhat, J pointed out in the present case, a failure of individuals to communicate with the claimants may have been for any number of reasons (e.g. distaste for the treatment of Mr Meredith; disinterest in the projects involved; or disinclination to respond). Such assertions and failures are certainly not evidence that Mr Meredith on a particular occasion and to a particular person made a defamatory statement about the claimants so as to enable the case to come within the exception summarised by Sharp, J.

58. In those circumstances paragraphs 6.3. and 6.4 cannot be allowed to stand. I accept Mr Price's submission that, whilst neither paragraph directly asserts any additional publication, they are implicitly premised on that. The reference in para 6.3 to requests for a list of those to whom Mr Meredith has published the Allegation assumes that he has done so. It is only on that footing that he could be said, by refusing the requests, to have deliberately hampered the claimants' attempts to mitigate any damage that had already been caused or that the Allegation could be said to be spreading unchallenged or uncorrected. (It is not to be supposed that the Allegation has been spread unchallenged by MDR). Para 6.4 reserves the claimants' right to rely upon such further publications of the same or similar allegations as are proved in the claim following an application to the court which has now failed.

59. The supposed additional publication by Mr Meredith is thus relied on in aggravation of the damages due in respect of the publication that forms the cause of action. Although this point was not taken before me I regard it as doubtful whether it is open to the claimants to take this approach: *Collins Stewart Ltd v Financial Times Ltd* [2005] EWHC 262 QB. But, even if it is, the obligation to identify the words spoken and those to whom the defendant publishes them must, as it seems to me, extend to publications that are relied on in aggravation of damages as much as it does to the publication which alone constitutes the cause of action. These paragraphs are an impermissible attempt to circumvent the requirement to identify what was said, when and to whom, and should be struck out.

60. The court must determine whether there is a real and substantial tort by reference to the tort complained of in the Particulars of Claim. The publication relied on is to one person only, who is the claimants' solicitor. I doubt that he is likely to have thought the worse of his client on account of it particularly in the light of his client's denials; and there is no evidence to that effect or of any harm from that publication or even of any concern on the part of Mr Wallis as to what Mr Morallee might be thinking of

him. Although, as Eady J put it in *Mardas v New York Times Company* [2009] EMLR 8 at 15 "*whether there has been a real and substantial tort within the jurisdiction (or arguably so) ...cannot depend upon a numbers game*", each case must be determined on its own facts, and much may depend on the identity of the publishee(s) or the publisher[1], the publication relied on is as numerically minimal as it could get, and was to the claimants' professional agent, who was acting in respect of a commercial dispute with Mr Meredith. It does not seem to me that the claimants require vindication in respect of such a publication to a solicitor who has been busily engaged in stating that the allegation is false; and that any "vindication" by success in the action will be illusory or, at best, minimal. It would not be legitimate for the claimants to justify the pursuit of the proceedings by praying in aid the effect that they may have in vindicating them in relation to any wider publication, quite apart from the fact that they have not shown any: *Jameel* [66].

61. Further, as Tugendhat, J trenchantly pointed out, solicitors are routinely the recipients of defamatory imputations about their clients (since most allegations of unlawful conduct are likely to be defamatory). Whilst such publication is likely to be covered by qualified privilege on the basis of a common and corresponding interest, and perhaps of absolute privilege, so that any claim based on them will in the end be likely to fail[2], it seems to me that the court is entitled, in the light of the overriding objective and the interests of proportionality, to discourage and prevent the use of its time, at great expense, on actions in which the only publishee is the claimant's solicitor and thus someone in the claimants' camp.

62. Mr Helme referred me to *Sanders v Percy and the Ministry of Justice* [2009] EWHC 1870 (QB) in which HHJ Moloney QC, sitting as a judge of the High Court, declined to strike out a claim in slander on *Jameel* grounds where the only publishee was the claimant's solicitor. That was, however, a case in which the slander (that the claimant was a benefit fraudster) was apparently intended to persuade the solicitor to act to his client's detriment (there is no reasonable basis for supposing that to be so in the present case); and "*crucially*" (as the judge put it) the speaker was a court officer acting or purporting to act in relation to court business, which gave rise to the possibility of exemplary damages and bore, in the judge's view, powerfully on the appropriateness of striking out. Mr Helme also referred to *Stelios Haji-Ioannou v Dixon and Ors* [2009] EWHC 178 (QB), where the publishee was someone outside the claimant's camp and there was republication in the Financial Times, and *Freer v Zeb & Ors* [2008] EWHC 212 (QB).

63. Even if the claim were to succeed any damages properly awardable would be likely to be very modest indeed. The continuation of the claim cannot be justified on the footing that it is necessary to obtain final injunctive relief. A claimant is not entitled to an injunction unless there is good ground for apprehending a wrongful repetition: *Jameel* [74 – 76]; *Hays Plc v Hartley* [2010] EWHC 1068 [57]. Mr Meredith has already given an undertaking which appears to me perfectly adequate. In the light of the undertaking given, and of these proceedings, there are no reasonable grounds for thinking that he is likely to republish. Paradoxically such republication as has

[1] Thus in *Hughes v Dick* it was significant that the publishee was an immigration officer and arguably a police officer; and in *Sanders v Percy* that the publisher was a court official.

[2] I recognize, of course, that a plea of qualified privilege could be defeated by a successful claim of malice and that the time for such a claim has not arisen, there is nothing to suggest that such a plea would be viable.

demonstrably taken place outside the claimants' camp would appear to consist of the claimants asking third parties whether the Allegation has been made to them.

64. Lastly I bear in mind that the fact of being sued at all is a serious interference with freedom of expression. Mr Meredith is not a journalist and does not occupy the special place in a democratic society of the media as purveyor of information and public watchdog (see *Prager and Oberschlick v Austria* [1995] 21 EHRR [34]). But he was entitled to express his understandable concerns about what he said had happened, which he did in measured tones, and it was appropriate that he should do so to MDR.

65. Having regard to all these considerations and reminding myself of the care that must be exercised before striking out a claim, I have come to the clear conclusion that these proceedings do not assert a real and substantial tort or that there would be any "*tangible or legitimate advantage to their continuance such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources*" – per Eady J in *Schellenberg v BBC* [2000] EMLR 296, cited in *Jameel* para [56]. It would be an abuse of the court's process to allow them to continue. Although other cases are only a limited guide I consider my conclusion consistent with the conclusions reached by Gray J in *Bezant v Rausing* [2007] EWHC 1118 (QB): Eady J in *McBride v Body Shop Int Plc* [2007] EWHC 658 (QB) and Coulson J in *Noorani v Calver* [2009] EWHC 561.

66. Since the test for striking out is in essence the same as that applicable to an application for permission to serve out, it is material to consider whether, had Mr Meredith been outside the jurisdiction, I would have granted the claimants permission to serve him there. I would not. To use the expression used in *Jameel* the game is not worth the candle.

67. I should make plain that I would have reached the same decision if the claimants had applied to plead publication to MDR personnel other than Mr Morallee or if I had required them to undertake so to plead (Mr Helme suggested that the claimants could give such an undertaking), I would not regard the claimants' position as being improved on account of such further publication, which could only have occurred because others in the firm were shown the letter of 5th March by Mr Morallee or as a result of his instructions or on his authority.

68. For these reasons I shall dismiss the claim.