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Case No: HQ15D00037

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2016

Before :

MR JUSTICE WARBY

- -

Between :

(1) Khalid Undre	
(2) Down to Earth (London) Limited	**Claimants**
- and -	
The London Borough of Harrow	**Defendant**

- -

Matthew Mason (instructed under the **Bar Public Access** scheme) for the **Second Claimant**
Adam Wolanski (instructed by **BLM LLP**) for the **Defendant**

Hearing dates: 18-19 April 2016

- -

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.

....

MR JUSTICE WARBY

Mr Justice Warby :

1. This is the trial of preliminary issues in this libel action. The issues are whether the words complained of referred to and bore a defamatory meaning about the second claimant company and, if they did, whether they caused serious harm to its reputation within the meaning of s 1 of the Defamation Act 2013.

THE FACTUAL BACKGROUND

2. The first claimant, Mr Undre, is a restaurateur. He is described in the Particulars of Claim as the "owner" of a restaurant in Kensington High Street called "Down to Earth". This is described as a vegan and vegetarian restaurant. The restaurant was operated by a company owned by the first claimant, named Down to Earth (Kensington) Limited (DTE Kensington), until about 26 September 2013. At that time the first claimant caused DTE Kensington to enter voluntary liquidation. It proved to have a deficiency of some £500,000.

3. The business continued however, having been taken over by the similarly-named second claimant (DTE London), of which the first claimant is also the owner, and a director. DTE London has operated the restaurant since 26 September 2013, as lessee of the premises, the lessor being a friend of the first claimant.

4. The first claimant owns some farmland in Harrow, which he bought in 2011. During the winter of 2012-2013 he was keeping 20 cows on that land. The defendant is a London Borough Council responsible for, among other things, enforcement of the animal welfare legislation within its boundaries. The defendant prosecuted the first claimant in the Willesden Magistrates Court, alleging that in January and February 2013 he neglected the welfare of his cows. He was tried before District Judge Jabbitt on six counts over two days, on 26 and 27 November 2013. The District Judge reserved judgment. On 20 December 2013 he handed down a detailed 76-paragraph written decision. This acquitted the first claimant on one count but convicted him on each of the other five.

5. The offences of which the first claimant was convicted were: (1) failing without lawful authority or reasonable excuse to ensure that the cattle owned by him were fed a wholesome diet; (2) failing to take reasonable steps to ensure the cattle were fed at intervals appropriate to their psychological needs; (3) failing to take reasonable steps to ensure all had access to a suitable water supply and were provided with adequate fresh drinking water each day or were able to satisfy their fluid intake by other means; (4) failing to ensure all animals on his holding born after 31 December 1997 were identified by an ear tag; and (5) failing to dispose without undue delay of a cattle carcass. The first three offences were contrary to the Welfare of Farm Animals (England) Regulations 2007. The others were contraventions of the Cattle Identification Regulations 2007 and the Animal By-Products (Enforcement) (England) Regulations 2011 respectively.

6. The District Judge was sure that the first claimant was guilty of "significant underfeeding over at least several weeks". He found that "his enthusiasm for looking after the herd particularly in the bad weather had waned" such that "only once was water seen at the site". He considered the first claimant's failure promptly to dispose of a carcass to be "symptomatic of his approach to the herd" evidenced by, among

other things, the fact "that he did not provide them with adequate food or water." Overall, his conclusion was that "The herd suffered, particularly the cows that were pregnant or had recently given birth." After hearing mitigation, the District Judge sentenced the first claimant to a community order of 12 months, with a requirement to complete 120 hours of unpaid work.

7. On 7 January 2014 the defendant placed a news release about the matter on its website, containing the following words (the numbering has been added by me):-

> "[1] A restaurateur whose neglect led to the deaths of three cows at a Harrow farm has been convicted of mistreating his animals and sentenced to community service.
>
> [2] Khalid Undre, 50, of Kenton, who owned vegetarian restaurant Down to Earth, kept a herd of cows in freezing conditions, with too little to eat and drink.
>
> [3] Pursuing a tip-off in January last year, Environmental Health Inspectors found Mr Undre's cattle exposed in a field in sub-zero conditions. Many were underweight.
>
> [4] One of the cows lay dead in the heavy snow, having given birth without help. Another cow and its calf died later.
>
> [5] Undre pleaded not guilty but was convicted of five charges at Willesden Magistrates Court on 20 December. After pleading poverty, he was sentenced to 120 hours of community work, and ordered to contribute towards prosecution costs.
>
> [6] Mr Undre owned the Down to Earth restaurant on Kensington High Street, which calls itself "environmentally sound, sustainable and animal friendly" and claims to sell "sustainable and ethical organic lifestyle products". A plate of scrambled eggs cost £7.50. while a "raw food" vegan terrine costs £8.50
>
> [7] The restaurant claims that "by-products from our kitchen go to feed the cows in our Harrow farm.
>
> [8] Cllr Susan Hall, Leader of Harrow Council, said: "This was an appalling offence of animal cruelty, made all the more grotesque by the cynical way in which this man paraded himself as a champion of ethical food standards.
>
> [9] Our officers work extremely hard to prosecute these complex cases, and it is down to their hard work that these animals' suffering is over and their owner brought to justice."

8. A document disclosed by the defendant at a late stage shows that it created, and may also have issued, a news release in a different form, by some means other than via the website. This document contains all the words that I have just quoted, but they are

followed by some "notes to editors." The document is headed "For immediate release, January 7th 2014." It looks like the kind of press release that is circulated on paper and/or by email. However, I have no other evidence about this document. Mr Mason, Counsel for the second claimant, thought about but in the end did not pursue an application to amend to embrace a claim in respect of this document. The issues before me therefore relate only to the website publication of the news release, and its consequences.

9. Complaint about that publication was first made on 19 March 2014, when the first claimant complained by means of a letter from Mr Mason, who represents the claimants as their public access barrister. The core of the complaint put forward was that the news release had falsely stated that the first claimant's neglect had led to the deaths of three cows, when no such finding had been made. It was said that the Mail Online and the Evening Standard had "used this false information to publish further articles causing further harm". The letter asserted that "This untrue information published on your website has caused and is causing Mr Undre considerable financial loss." There was no mention then of the second claimant.

10. On 27 March 2014 the defendant responded, in a letter from Ms Wilson of its legal department. This asserted that the first claimant had "no claim in defamation" as the news release was true in its substance, and the comments of Cllr Hall were based on true facts. It also said it was difficult to understand how the news release could have caused the first claimant any financial loss, given what had been stated in mitigation before the District Judge. This was said to be "that the matter had received negative publicity and resulted in Mr Undre's restaurant business suffering hugely to such an extent that it is now in liquidation, resulting in the loss of £500,000." The text on the Council's website was however changed at this point, in what was described by Ms Wilson as "a gesture of goodwill". Paragraph [1] was altered to read "The owner of a Kensington vegetarian restaurant, who neglected his cows at a Harrow farm, three of whom died, has been convicted of mistreating his animals and sentenced to community service."

11. There was a small amount of further correspondence, which continued to advance a claim on behalf of the first claimant only. The present proceedings were issued on 6 January 2015, just before the expiry of the limitation period. The claim form was issued on behalf of both claimants, accompanied by Particulars of Claim. These identified the words complained of as those in paragraph [1] of the news release, in its original form. There is no complaint of the website publication as altered in March 2014, as the first claimant confirmed in his evidence to me. The Particulars of Claim complained in paragraph 3 that the words complained of were defamatory of the first claimant; in paragraph 4, that they bore the natural and ordinary meaning "that the first claimant's neglect caused the death of the three cows"; and in paragraph 5(a), that by reason of the publication of those words the first claimant's reputation had been seriously damaged. The first claimant's claim has been the subject of an offer of amends, which he has accepted. The remedies have yet to be agreed or determined.

12. Paragraph 3 of the Particulars of Claim also alleged that the words complained of were defamatory of the second claimant. No meaning defamatory of the second claimant was pleaded. But paragraph 5(b) alleged that by reason of the publication complained of "the second claimant has suffered serious financial loss which in turn has caused the first claimant as owner and director serious financial loss (the

claimants reserve their position to obtain expert financial evidence as to this loss)." No figures were set out, nor were any details of the facts relied on in support of this assertion given.

13. In support of the claims for damages of both defendants the Particulars relied on the alleged republication of the news release by the Daily Mail, Evening Standard, and others, and on references to those publications which were said to have been made on TripAdvisor, and other restaurant review websites, on Facebook, and on Twitter.

14. At a hearing on 1 May 2015 the defendant applied successfully to Eady J for an order that the following preliminary issues be tried:

(a) Whether the words complained of were understood to refer to the Second Claimant, and if so the meaning of those words in relation to the Second Claimant.

(b) Whether publication of the words complained of has caused or is likely to cause serious harm to the reputation of the Second Claimant.

15. Directions were given for the service of witness statements of fact, and for disclosure. No direction was given for the service of any expert evidence. There was some discussion about this at that time, but no such direction was sought then or at any later stage. When the time came, the claimant served three witness statements: one from the first claimant, one from Mr Rui de Souza, General Manager of the restaurant, and one from Lee Lennon, a Land Development Specialist. The defendant served no statements.

16. At the start of the trial on Monday 18 April 2016 the first matter I had to deal with was an application by the defendant for an order striking out the claim without a trial pursuant to CPR 3.4(2)(a), on the grounds that the Particulars of Claim disclosed no reasonable basis for a claim by the second claimant. This was a surprising thing to do on the first day of the trial which the defendant had sought. It is an application that clearly should have been made, if it was to be made, a lot sooner. Indeed, if well-founded this is the application which should have been made to Eady J on 1 May 2015. As it is, the first the court knew of this application was when the defendant's skeleton argument was lodged, on the morning of Friday 15 April. The application notice was not issued until the morning of the first day of the trial. It did not explain the lateness. I declined to hear it so late, and on such short notice, making clear that I would only deal with the issues it raised in the context of a full preliminary issue trial process.

17. I was also confronted with a late application by the claimants for permission to amend the Particulars of Claim. This was plainly prompted by the defendant's application to strike out. The application notice was not issued until Monday 18 April, either. Despite its lateness, I granted permission to amend in the form applied for, save for one sub-paragraph which sought to introduce matters said to be relevant to damages but which appeared to me irrelevant to the preliminary issues.

18. The amendments I allowed have two key features. The first is to plead for the first time a meaning or meanings defamatory of the second claimant. Paragraph 4 now asserts

(1) that in their natural and ordinary meaning the words complained of "meant and were understood to mean that the first and second claimant's neglect caused the death of three cows"; and

(2) that "the article implied that the second claimant was to some degree responsible for the well-being of the cows and the first claimant's neglect".

This form of pleading seemed to me to raise an issue fit for trial. I declined Mr Wolanski's invitation to rule out these amendments on the basis that the amended case was bound to fail. Although I had not appreciated this at the time, it emerged from the closing submissions that the wording quoted at (2) above was intended to put forward a different imputation, relied on in the alternative to the meaning at (1).

19. The second key feature of the amendments made at the start of the trial is that they expand the pleaded case on "serious financial loss". Paragraph 6(b) of the Amended Particulars of Claim now contains six new factual propositions evidently relied on to support that case. Although these are all entirely new so far as the pleadings are concerned, they all reflect matters stated in the claimant's witness statements, served in June 2015. This of course is back-to-front: the statement of case should come first and the evidence afterwards, tailored to the pleaded issues. But the defendant had been given notice of the points it was intended to pursue, and was not able to contend that it had been prejudiced. It was argued by Mr Wolanski that the case on serious financial loss was bound to fail with or without the amendments, because the evidence falls short of what is needed. But I formed the view that the just solution was to permit the amendment so that the evidence could be led, and properly tested and considered.

20. Having reached that conclusion I was persuaded to allow the defendant to call one witness whose statement it had not served until the first day of the trial, and to grant relief from sanctions for that purpose. This was the barrister who prosecuted the case in the Magistrates Court, Mr Thomas Coke-Smyth. His evidence was of limited scope but some potential importance. In response, I admitted hearsay evidence on behalf of the claimant consisting of written accounts of what was recalled by Mr Giles Morrison, the barrister who represented the first defendant before the District Judge.

REFERENCE AND MEANING

21. Cases where individuals and companies are co-claimants can give rise to difficulties when it comes to reference and meaning. A single set of words can defame both a company director or officer and the company itself, particularly if the individual is so closely associated with the company that those who know them will treat the one as an alter ego of the other. But not every derogatory statement about someone who runs a company defames that company. And a corporation cannot bring an action in respect of allegations which reflect solely on its individual officers, and not on the corporation: *Bognor Regis UDC v Campion* [1972] 2 QB 169, 175 (Brown J). Where words might be thought to "reflect primarily upon human beings" the court will examine carefully a contention that they are damaging to a company's business reputation: *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 737 [41] (Eady J).

22. The second claimant's case as set out in the original Particulars of Claim was, on its face, that the defendant had caused the second claimant company serious financial loss by libelling the first claimant. It appeared to be contended that the company had been defamed because the first claimant had been defamed. These are not sound bases for a defamation claim. As Morland J explained at first instance in *Shendish Manor Ltd v Coleman* (in words recorded by Keene LJ at [2001] EWCA Civ 913 [37]):-

> "A slanderous allegation about the executive chairman of a company may well have an adverse effect on the company, but the company cannot succeed in the claim in slander unless it can establish that the defamatory message, albeit defamatory of its executive chairman, is defamatory of the company. Where, as in this case, the company is not referred to in the words complained of, the company must establish reference."

23. As these words make clear, there are two requirements: the words must refer to the corporate claimant, and they must convey a defamatory meaning about the corporate claimant. Those twin requirements are reflected in the preliminary issues as defined by Eady J in the present case. The defendant was therefore justified in substance in seeking to strike out the claim as pleaded, even though the timing of its application was wholly inappropriate. And Mr Mason was right to respond by seeking permission to amend. The second claimant's case as now pleaded sufficiently asserts the two necessary elements. The question for me is whether they are made out.

Reference

24. My judgment in *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), [2015] 2 WLR 416 contains at [15] a summary of the applicable principles, on which Mr Mason relies:

> **"Reference**
>
> (1) It is an essential element of the cause of action for defamation that the words complained of should be published 'of the [claimant]'": *Knupffer v London Express* [1944] AC 116, 120. This does not mean the claimant must be named. The question is whether reasonable people would understand the words to refer to the claimant:
>
> > "The test of whether words that do not specifically name the [claimant] refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the claimant to believe that he was the person referred to?"
>
> *David Syme v Canavan* (1918) 25 CLR 234, 238 (Isaacs J).
>
> (2) This is an objective test. If the words would be so understood by such people it is not necessary for the claimant to prove that there were in fact such people, who

> read the offending words; so an individual defamed by name in Cornwall has a cause of action even if he was unknown in that county at the time of publication: see Gatley on Libel & Slander 12th ed para 7.3; *Multigroup Bulgaria Ltd v Oxford Analytica Ltd* [2001] EMLR 28 [22] (Eady J) cited with approval in *Jameel* at [28]."

25. This objective requirement is not in dispute at this trial. There has however been some discussion of whether there is also a subjective test of reference, which requires a claimant to prove that at least one individual did in fact understand the words complained of to refer to that claimant. In *Lachaux* I rejected a submission that this is a requirement of the law of reference, observing (at [15]) that this

> "is not an essential element of the cause of action at common law. Whether such proof is necessary to satisfy the serious harm requirement, or to overcome a *Jameel* application, or both, is a separate matter."

26. Mr Wolanski's submissions have brought to my attention the fact that in *Shendish Manor* (above), which was not cited in *Lachaux,* Morland J granted summary judgment against the corporate claimant on the basis that there is such a subjective test, which the company had failed to satisfy. The Court of Appeal rejected a challenge to that conclusion. However, it is clear that the appeal did not challenge the Judge's conclusion of law, but rather his application of the law to the facts. The judgments do not disclose or discuss the basis for the legal principle applied. The appeal was also dismissed on the basis that the case failed the objective test outlined above.

27. Here, the second claimant called no witness to say that they had identified the claimant as referred to in the words complained of. But Mr Wolanski did not rely on the subjective test. Mr Mason did not challenge the test, but submitted that it was met on the evidence in this case, because it was a plain and obvious inference from the words complained of.

28. I do not accept that the objective test of reference is satisfied in this case, save to a limited and unimportant extent. I accept that there are mentions of the restaurant business in paragraphs [2], [6] and [7] of the news release. I accept also that reasonable people "acquainted with" the claimant company, DTE London, would know that it was the company that was operating the restaurant business in January 2014, at the time of publication. It does not follow, however, that such people would understand the mentions in those three paragraphs as references to the claimant company.

29. Any reasonable reader would understand that this article was providing information about events the previous year. The words complained of, published in January 2014, refer at [3] to a "tip off in January last year", that is to say 2013. The references to sub-zero conditions and snow in paragraph [3] and [4] were in fact and will have been understood as references to the unusually severe winter of 2012-2013. Paragraphs [2] and [6] tell the reader that the first claimant "owned" (past tense) Down to Earth. The point thus conveyed to the ordinary reasonable reader is that the first claimant at one and the same time (a) neglected his herd of cows in the ways described and (b) owned

a vegetarian restaurant which made the claims described in paragraphs [6] and [7]. As Mr Wolanski submits, the thrust of the message conveyed is one of hypocrisy. The point is rammed home by the comments of Cllr Hall quoted at [8], describing the behaviour as "appalling" and made more "grotesque" by the fact that the first claimant "paraded himself as a champion of ethical food standards." These comments clearly suggest a gap between the first claimant's deeds and words, at the time of the offending.

30. A reasonable reader, acquainted with DTE London, would not take these references to the first claimant's ownership of the restaurant as references to DTE London. I am not sure whether DTE London even existed in January 2013, but if it did it was not operating the restaurant. It did not start doing so at any time prior to September 2013. It is the now-defunct DTE Kensington that was operating the restaurant business at the time referred to in the news release.

31. It is not necessary for me to decide whether there is a subjective test of reference. The argument in this case has not led me to alter the view expressed in *Lachaux*. But if there is such a test, the claim fails on that ground also. I do not consider that I have any sound basis on which to infer that any reasonable reader actually took the words complained of to refer to the claimant company.

32. The submission that references in the news release to the first claimant's ownership of the restaurant were, objectively or subjectively considered, references to the second claimant company in this action therefore cannot be upheld.

33. The quotations in paragraphs [6] and [7] of the news release were in the present tense. In their context, they clearly conveyed the suggestion that the claims had been made earlier, at the time of the offending described. But they suggested that the same claims were still current. That could not be conduct of DTE Kensington. A person acquainted with DTE London would reasonably take it to refer to behaviour by DTE London. To this extent I accept, therefore that those paragraphs refer to the claimant company. I am not sure I would be prepared to infer, if it were necessary, that anybody actually understood them to refer to the company. But in any event, this conclusion does not assist the company, because such limited reference cannot sustain its case on defamatory meaning.

Meaning

34. The principles to be applied in deciding upon the natural and ordinary meaning of published words are clear and uncontroversial. They were set out by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 [14]. For present purposes it is enough to say that the court gives the words the meaning that they would convey to the ordinary reasonable reader, assuming that person reads the entire document complained of, and is neither unduly naïve nor avid for scandal. Here, there is no difficulty in concluding that the paragraph complained of, read in the context of the news release as a whole, bears the meaning that the first claimant so neglected his cattle that three of them died. The issue is whether it also bears the same meaning or some similar meaning about the second claimant. There are several reasons why I do not consider that it does.

35. The first and most straightforward reason for this conclusion is that the focus of the news release is entirely on the first claimant and his personal conduct. Paragraph [1] describes how he kept a herd of cows. Paragraph [2] refers to "Mr Undre's cattle". It is he that was prosecuted for and convicted of the offences: paragraphs [1] and [5]. The reader would not have been in doubt that the neglect of which the first claimant was accused was personal neglect, not some form of vicarious responsibility for the failings of others. The criticisms of the Council leader were personal. The adjectives she used described the behaviour of the first claimant, and not that of any corporate entity. The document concludes with a statement praising the hard work that has meant "these animals' suffering is over and *their owner* brought to justice" (emphasis added).

36. The claimant company's primary argument, that the words meant that it was guilty of the neglect described in paragraph [1] of the news release, depends on an interpretation of the release that I do not accept. The argument is, as it has to be, that the document suggests to the ordinary reasonable reader that the restaurant business was jointly responsible with the first claimant for the care and welfare of the cattle, and hence for the neglect that is said to have caused the deaths. I do not consider that the reasonable reader would draw that conclusion. True, there is a reference in paragraph [7] to "our Harrow farm." But this is not further explained. Given the heavy emphasis on the personal role of the first claimant throughout the rest of the document, it would be unreasonable for a reader to jump from this brief allusion to some kind of joint activity to the conclusion that the restaurant business bore responsibility for the neglect referred to.

37. In any event, my conclusions on reference would have defeated the claim. The reasonable reader acquainted with DTE London would know that the company was not running the restaurant in January 2013. Such a reader would have even less reason to jump to the conclusion that in January 2013 DTE London (assuming it was in existence then) was jointly responsible for the welfare of the first claimant's cattle herd, and thus for the neglect described.

38. These conclusions apply equally to the alternative meaning relied on, which is merely a weaker version of the primary case. The fact that, as I have found, the informed reader would have understood that in January 2014 DTE London was making the claims described in paragraphs [6] and [7] of the news release is of no significance. That cannot support either of the meanings complained of, or anything similar, not least because the informed reader would have known that, even if DTE London was accurately describing it as "our farm" in January 2014, the Harrow farmland was not in any sense its farm a year earlier, when the neglect took place.

SERIOUS HARM TO REPUTATION

39. Section 1 of the 2013 Act provides:

> "(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

> (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss."

40. If a body that trades for profit is to satisfy the requirements of s 1(1), proof that a statement has caused serious financial loss is necessary, but it is not sufficient. Parliament clearly did not intend to change the rule that B cannot recover damages for loss suffered as a result of a libel of A. This is a general rule which applies as much to spouses, or those in commercial partnership with one another, as it does to companies and their directors. The issue is therefore whether the claimant company can show serious financial loss consequent on serious harm to its reputation caused by a defamatory imputation about the company, contained in the publication complained of.

41. It follows from what I have said that the second claimant cannot show that the publication complained of has caused serious harm to its reputation, because it has not shown that the publication conveyed any imputation defamatory of the company. But its evidence would in any event have fallen a long way short of satisfying s 1. Even if, contrary to my findings, there was such a defamatory imputation, I would not have been satisfied that the imputation caused serious financial loss.

Has financial loss been proved?

Loss of restaurant sales

42. There are three main strands to the company's claim that this is what happened. The first and main contention is that the damaging gist of the news release was republished in the news media and on social media, leading to "cancellations and the restaurant [being] noticeably less busy", with an associated "very marked decrease" in "net sales" at the time of publication in January 2014 "with recovery thereafter".

43. The evidence establishes to my satisfaction, and it is indeed conceded, that the defendant's news release caused or contributed to the publication of articles in the Evening Standard (hard copy and online) and in the online version of the Daily Mail. Those articles repeated the substance of what was said in the news release. The articles or their gist were in turn repeated in other, online, locations, via Twitter and Facebook, among other places. It is not disputed that republication of the gist of the news release was a reasonably foreseeable consequence of placing it on the website (regardless of whether the other document to which I have referred was issued by the defendant).

44. I have also been persuaded that one consequence of the newspaper publications and their repetition was that some people decided to cancel reservations at the restaurant, and some spoke of boycotting it. But it is not shown that this caused any, or any serious loss of profit, or that any loss of profit flowed from the single paragraph complained of, or the defamatory sting that this is alleged to have conveyed about DTE London.

45. There are two aspects to this inquiry: has the company proved that (a) it suffered serious financial loss which was (b) caused by the imputation?

Serious financial loss?

46. A good starting point is to ask whether the company has proved that its financial position worsened in January 2014, after the publication complained of, compared with its previous position. The company rests this aspect of its case on a "Net sales summary" prepared by its accountants, covering the period from January 2013 to December 2015. This is said to be based on the credit card receipts and cash banked by the restaurant. It is not clear what the sales are "net" of. It may be that the reference is to VAT. The document is inherently unhelpful, however, because it shows only revenues and tells me nothing at all about costs, or profits. Worse, for the critical month of January 2014 the figures in the summary do not purport to represent actual receipts for that month.

47. The first claimant explained in his evidence that the liquidation of DTE Kensington meant that the restaurant's credit card and other payment facilities needed replacement. This took some time. As a result, when the net sales summary was prepared the receipts for four months (September 2013 to January 2014) were totted up and divided by four, arriving at an average monthly figure of £15,220.10. Because the figure given for January 2014 is arrived at in this way it is impossible to carry out any meaningful comparison with the corresponding month in 2013. It is also impossible to compare it with any of the previous three months.

48. Faced with this point, Mr Mason directed my attention to some underlying documentation disclosed by the claimant, which includes a monthly "sales analysis" for January 2014 and similar documents for later months. These are stated on their face to be "extracted from VAT returns and bank." The January 2014 total is £14,612, on which Mr Mason invited me to rely. However, not only is this approach in conflict with the first claimant's oral evidence, the "sales analysis" figures for the following months do not agree with the figures for those months that are given in the "Net sales summary". Some of the monthly totals are higher, some are lower. None are the same. The discrepancies are not vast, but they are unexplained. This undermines confidence in both documents.

49. Moreover, a claimant can only recover damages for loss of profit (or increased losses). As Mr Wolanski has pointed out, it does not necessarily follow that a reduction in "net sales" translates into an equivalent, or any, loss of profit or increased loss. Not all costs are fixed. In the restaurant business many costs may be highly variable according to turnover. I cannot derive profit figures from the company's accounts. It has yet to file accounts, and the first claimant's evidence was that it "cannot" do so until 9 months after its financial year end. If draft accounts exist, I have not been shown them. The evidence suggests, unsurprisingly, that the company does do some P&L calculations. Mr de Souza told me that although he had not seen tax returns he had seen spreadsheets which contained some form of "primitive profit and loss calculations". But no such documents were produced in evidence, or even disclosed.

50. The company has not put forward any profit and loss calculations of any kind. The first claimant told me that the annual rental for the property is £30,000, which he understandably suggested was very modest for the location. Otherwise, however, there are no figures for overheads, or labour costs, or the costs of raw materials, or services, from which one might have been able to work out or deduce the levels of

profitability that are likely to have been achieved by the second claimant. A further point that it might be necessary to take into account is the impact of corporation tax (*British Transport Commission v Gourley* [1956] AC 185; McGregor on Damages 19th ed, Ch 17 Section I). None of this has been considered in the preparation of the company's case on this preliminary issue.

51. Nor do I have the benefit of any expert evidence. The (qualified) right to rely on such evidence was reserved in the original Particulars of Claim, but not exercised. Expert evidence might, for instance, have provided at least general information about profit margins in the restaurant trade, seasonal fluctuations, and the like, and might have attempted to apply these to the business of Down to Earth.

52. Nor do I have any documentary evidence or calculations of the financial results for the restaurant when it was operated by DTE Kensington, to enable me to compare the before and after positions. DTE Kensington seems never to have filed accounts. I have the "net sales" figures for January to August 2013, which are followed by the average figures to which I have referred. Otherwise, such accounting information as I have for that company is contained in the liquidator's reports. These show that the company built up a deficit of over £0.5m over less than a year. But the evidence is that the majority of that deficit is accounted for by capital injections made by the first claimant. It might be reasonable to assume that the business was placed in liquidation because it was making operating losses. Otherwise, one might think, the first claimant might not have written off his investment but waited for it to be recouped. There is other evidence, to which I shall come, that supports the view that there were operating losses under DTE Kensington. But the issue of precisely what losses were incurred when was not really explored in the claimant company's evidence.

53. The first claimant and Mr de Souza were both confident that there had been losses, Mr de Souza speaking memorably of the "scars" that he could see the business had suffered. But he took over as General Manager over a year later, neither witness attempted precision, and in any event neither was giving me expert evidence. As Mr Mason conceded, whatever their expertise might be, their evidence was called as evidence of fact. This leaves the court in a difficult position. It is the task of a libel claimant which trades for profit to persuade the court of the probability of serious financial loss. Evidence of this kind is not at all satisfactory.

54. In the end, despite all the deficiencies in the evidence that I have outlined, my conclusion is that there is, just, enough evidence to allow the conclusion that the business probably did experience a significant reduction in profitability in late 2013. By my calculations, average monthly revenues for the first eight months of 2013 were running at about £24,800. On the first claimant's own figures, the average for the next four months was £15,220.10. The difference is significant. But this does not support the pleaded case of a "very marked decrease" in net sales in January 2014. Still less does it follow that there was a "very marked" reduction in *profitability* at that point, or at all. Doing the best I can, I think it likely that profits fell during the four month period identified. But the drop in profitability is likely to have been less than the fall in revenue, due to cost reductions and cost cutting. I simply do not have the necessary evidential basis to find that there was a "serious" financial loss over that period.

55. The pleaded case is that there was a "recovery" after January 2014. The evidential picture is of increased net sales in February, compared to January, and of a

progressive though not smooth increase after that. The case advanced at trial has been, however, that the figures show a loss because the monthly net sales figures for this period in 2014 are below those for the corresponding months in 2013, and that losses continued into 2015 and beyond. The picture presented by the figures is however patchy and inconsistent. In the result the evidence falls short of providing serious financial loss for this period also.

Causation

56. Nor has the company made out its case on causation. Where special damage is alleged in a defamation case the issue of causation is often fraught with difficulty, and this case is by no means an exception. There are invariably competing candidates for causative factors, and confounding factors. It can be very difficult to prove that the alleged libel was the cause of any loss of profit or other financial loss that is established. Here, there are many factors that serve, in combination, to defeat any such conclusion.

57. The first is that the business was loss-making from the outset, under DTE Kensington. This, as a general proposition, is clearly established. The details are obscure. But a reasonable inference is that there was a continuing operating loss at the time that DTE Kensington was placed in liquidation in September/October 2013. A strong possibility, at the least, is that this was a struggling business in any event. Secondly, there is the impact of the prosecution and conviction of the first claimant. This had been embarked on before the time that DTE went into liquidation. It was current when that decision was made. Such matters are inherently likely to become known to members of the public. Thirdly, the trial and the public judgment of the District Judge were plainly liable to lead to the circulation of damaging information about the first claimant, with whom the restaurant was associated. Fourth, I accept the evidence of Mr Coke-Smyth as to what was said to the District Judge by Mr Morrison, Counsel for the first claimant, in mitigation on 20 December 2013; and I find that what Counsel told the Judge is likely to have been substantially true.

58. Mr Coke-Smyth made an attendance note within the hours after the hearing, which he sent to the defendant shortly before 6pm. It is that attendance note which the defendant relied on in responding to the letter before action: see paragraph [10] above. The words of the letter which I have quoted there are not a precise quotation from the attendance note, but they are substantially so. The attendance note records that the £500,000 loss was said to be a loss "to Mr Undre". Key features of Mr Coke-Smyth's attendance note are supported by the recollection of Mr Morrison, recorded in recent email correspondence. He could not recall the figure being mentioned, but believed "it was said in mitigation that he had declared himself insolvent and that his house was at risk because his social media pages had been trolled and business suffered". Later Mr Morrison made clear that he could not recall whether it was the first claimant personally or the business that had been said to be insolvent.

59. The second claimant's case is, as I understand it, that there has been some confusion here. The first claimant's evidence is that it was not true at this stage that there had been negative publicity causing a huge loss, and he could not recall anything of that kind being said. I find, however, that it was said.

60. The clear evidence from both Counsel is that the District Judge was told in the course of mitigation that the matter before the court had resulted in negative publicity causing serious financial loss. It does not matter a great deal for present purposes whether the court was told that the loss had been suffered by the business or by the first claimant personally. I am however confident that it was said that the first claimant had suffered such a loss. He, after all, was the defendant. The probability is that the court was also told that the business had suffered a large financial loss.

61. I find that the figure of £500,000 was mentioned. It is likely that a figure was mentioned, and most unlikely that Counsel recorded the wrong figure. Mr Coke-Smyth was a good witness, and I find his evidence convincing. He told me that he recalled writing down the figure of £500,000 because it was a striking figure, and because it was striking that this point was being made when the submission was that the matter should be dealt with by way of a financial penalty.

62. There may have been some misunderstanding between client and Counsel, Mr Morrison, on this point. The figure of £500,000 is the total deficit accumulated by DTE Kensington over its lifetime. That could not have all been attributable to negative publicity about the criminal proceedings. But was it true that negative publicity had caused a huge, or a substantial or serious loss, to the restaurant business by 20 December 2013? I find that it was substantially true. The first claimant denied this, and pointed out that there is no documentary evidence of any social media trolling or similar. That is true. But the absence of evidence is not evidence of absence. The claimants' disclosure has been less than perfect. I resolve this difficult issue by concluding that what was said was probably true in substance. I rely on two factors in particular. First, it seems improbable that Counsel made such a suggestion in mitigation without instructions to that effect; and nobody has suggested that the first claimant lied to his Counsel. Secondly, there is the fact that the second claimant's "net sales summary" shows the drop in revenues in September 2013 onwards to which I have already referred.

63. As to the period after publication of the news release, I would have rejected the claimant's case on causation grounds even if I had been satisfied that there was financial loss. There is undoubtedly a considerable body of evidence that news of the first claimant's conviction caused anger, hostility and resentment amongst customers, potential customers and others. It is clear that a boycott of the restaurant was proposed as a result. Whether it was implemented is less clear. But in any case the overwhelming effect of the evidence is that all of this was prompted by revulsion at the conduct attributed to the first claimant. There is scarcely any evidence that anybody thought badly of the restaurant on any basis other than its association with an individual convicted of neglecting animals.

64. Remarkably, much of this evidence comes from a print out from the second claimant's own Twitter page, showing that it retweeted a series of hostile messages on and after 9 January 2014, the date when the Evening Standard picked up the story from the defendant's news release. One tweet reads "Owner of vegetarian @downtoearthKen was convicted of animal cruelty on his smallholding". Another reads "Down to Earth Cafe … is owned by Khalid Undre. He allowed 3 cows to freeze and starve to death on his farm." A third suggests "I hope everyone boycotts the Down to Earth café … Animal cruelty from a twat peddling veggie/vegan food." This language represents the whole thrust of the tweets. It is directed at the first

claimant, not the second claimant. The proposed boycott is not based on guilt by association so much as punishment for association.

65. There is another, related problem with the claimant's case. As Mr Wolanski pointed out in cross-examination, the complaint in this case relates only to paragraph [1] of the news release, alleging that neglect caused the death of cows. To succeed in its case that the release and its republication caused serious financial loss to its restaurant business it would have been necessary for the second claimant to show that it was the imputation of causing death that was causative. But the words complained of contain a series of other serious criticisms of the first claimant, of which no complaint is made. Mr Wolanski identified five, each of which the first claimant accepted was present: the animals were exposed in a field in sub-zero conditions; a cow was found dead in heavy snow having given birth unattended; the sentence and costs order; the comment of Susan Hall that the behaviour was "appalling"; and the further comment that the matter was "grotesque" because of its contrast with the ethical claims made.

66. The first claimant accepted that these other matters were damaging and were likely to have caused some loss by deterring customers. But he was adamant that the allegation of causing death was of a different and much more serious order. It was that which will have caused the greatest loss. I do not accept that the evidence or an objective assessment of the position supports that view.

The squatter

67. The second limb of the case on serious financial loss is that one consequence of the alleged libel was the occupation of the first claimant's farmland by a squatter. This defeated a plan to grow organic crops for supply to the restaurant, which therefore had to buy in organic produce from outside at much higher cost. In support of this part of the case I was shown a posting by the squatter, which boasted of his intention to occupy the claimant's land, and some court papers establishing the claim that possession proceedings had been necessary.

68. Mr Lennon also gave evidence in support of this part of the claim, explaining that he estimated he could have grown a minimum of 10,000 lbs of food annually on the land. He told me bought-in produce would cost as much as 10 times as much. The evidence is that the squatter also encouraged neighbours to join him in stealing farm machinery. I would have needed more detail to justify a finding on that issue.

69. This evidence is enough, however, to show that there was a squatter, and that his actions caused the company loss in the form of extra purchase costs for food. I have no evidence as to what those costs were. I refused to allow evidence about these alleged losses to be led from the first claimant by way of supplemental questions in chief, when no warning of an intention to give such evidence had been given, and Counsel told me he did not know what the answers to his questions would be. The justice of that approach was reinforced later, when it became apparent that there are documents relating to these issues, including Mr Lennon's estimates, which have not been disclosed.

70. On the basis of Mr Lennon's oral evidence, the restaurant's alleged turnover figures, and an impressionistic assessment of the proportion of that turnover that is likely to be represented by raw material costs, it is possible to guesstimate the scale of the extra

expense. That is not a very satisfactory approach. Nonetheless, I might have been persuaded that this represented a serious financial loss to the company. I could not have found that it was a loss caused by any libel of the second claimant, however, for two reasons.

71. First, there is no evidence that the squatter was motivated by the alleged libel on the company. Put another way, he does not appear to have been impelled by a belief that the restaurant business was to blame for the fate of the cattle. The evidence powerfully suggests the contrary: that his motivation was hostility towards the first claimant, as an individual. The posting I have referred to, made by the squatter on the website of "Convicted Animal Abusers and Neglecters" on 26 March 2014, said this: "I'm squatting his land anyone want to join me? I'm going to court to make sure he gets what's coming to him." Secondly, I do not accept that such behaviour and its consequences represent harm of a reasonably foreseeable kind. The squatter's behaviour seems to me wholly unreasonable and unforeseeable.

Exhibitions

72. The third limb of the claimant's case on serious financial loss is an assertion that it suffered due to the loss of a business opportunity involving someone described by Mr Mason as "the exhibitionist". This proved to be an infelicitous term for a photographer who had proposed some kind of joint venture involving the use of the basement at the restaurant as an exhibition space. It is clear that the person concerned withdrew from further dealings over such a scheme because of concern over what came up on Google searches. I am sure the search results featured coverage resulting from the news release, and the consequent media coverage. But there is no evidence to enable me to disentangle in the claimant company's favour the complex causation issues to which that gives rise.

73. In the email to the first claimant dated 19 February 2014 that is relied on to prove this element of the company's case the photographer explains her decision on this basis: "After the recent events in the press regarding the herd of cows I won't feel comfortable to exhibit in your lovely café as this is the first link I get referred to when putting 'downtoearth' on google." This is not evidence that the venture fell apart because she took the words complained of or their republication to mean that the claimant company had been guilty of causing the death of cows by neglect.

74. I have not been presented, either, with any evidence as to how exactly such a venture might have yielded a profit for the claimant company, what that profit might have been, how any profit figure is calculated or arrived at, or why I should conclude that it would probably have been achieved. Some attempt was made to elicit some evidence of this kind in supplemental questions in chief, but I refused to allow it. This was for the same reasons as I refused to permit additional evidence about the losses due to the squatter. It is unfair to seek to bounce an opponent with evidence of this kind at the last minute.

CONCLUSIONS

75. The claimant company was not referred to in the defendant's news release, other than as an entity making certain claims in January 2014 about its business methods at that time. The company was not defamed by the news release. The release did not imply

that the Down to Earth restaurant business was jointly responsible for the animal welfare offences of which the first claimant was convicted. Even if it had, the reasonable reader would not have taken the second claimant to be the entity responsible, as the offences were committed in January 2013 (as the release made clear), and the second claimant was not carrying on the restaurant business at that time.

76. It has not been proved that the restaurant business suffered any relevant "serious financial loss". It has been established that it was hugely loss-making between January and September of 2013, and that there was a reduction in profitability during the autumn of 2013. But all of that was before the publication complained of. The reduction is probably due to adverse publicity surrounding the prosecution. Republication of the news release in the media in January 2014 probably had an adverse financial impact on the restaurant business, but the extent of that impact cannot be assessed. In any event, no causal link between that impact and the defamatory imputation complained of has, or more accurately would have been, made out. The probability is that the impact was due to other aspects of the news release and consequent media publication. The most potent causal factor was customers shunning the business because it was associated with the first claimant, whose personal reputation had been harmed. That is not actionable by the company. The other strands of the claimant's case on damage have failed for lack of proof of loss and/or causation.

OBSERVATIONS

77. The trial of the preliminary issue on serious harm to reputation in this case has been conducted on the footing that the only issue is whether the claimant company has shown that its case overcomes the threshold requirement set by s 1 of the 2013 Act. It has failed to do that. But the process raised the question of whether that is how such issues should always be examined, in a case that falls within s 1(2).

78. If the claimant had succeeded on the threshold issue in this case, it is common ground that a further hearing on quantum would have had to follow, if liability had been admitted or proved. Generally it is undesirable for a host of reasons to have two separate hearings on closely related issues. That risk could be avoided by a more thorough examination of loss at a single hearing designed to yield not only an answer to the threshold question but also, if appropriate, a finding on the quantum of the financial loss established. Such an approach would however tend to drive up costs. For one thing, it would often require expert evidence, with all that this involves. That in turn could bring into question the wisdom of ordering a preliminary issue trial in the first place.

79. I am not suggesting that the order in this case, or the process followed, were inappropriate. However, it does seem to me that these issues will deserve consideration in future, to ensure that an appropriate balance can be struck in the circumstances of individual cases. Other points of practice deserving of some thought relate to costs budgeting. Concern has been expressed at the costs involved in some preliminary issue trials, and I share the view expressed by Dingemans J when dealing with costs in *Lokhova v Tymula* on 17 February 2016 that it is desirable to develop means of costs budgeting for such trials. The more elaborate and costly the preliminary issue process, the stronger the arguments in support of that view. Factors

to bear in mind may be that if the quantum of loss is established as a preliminary issue, it may prove easier to settle the claim or, if that does not occur, to budget the remaining stages. Proportionality is of course much easier to assess when it is known what is at stake.

80. A related question is how detailed the statements of case need to be on these issues. The claimant company alleged special damage from the outset, but without any details. The heads of loss and some supporting facts were pleaded by way of amendment at trial, but no details of the loss alleged, or its calculation, have ever been pleaded. No Defence had been served by the time of the hearing before Eady J, and he did not order one. That was appropriate, to save costs and preserve the opportunity to make an offer of amends; but practice has developed, and today the court would have directed service of a statement of the defence case on the preliminary issue: *Lachaux* [163], [168]. The absence of such statements of case has not prevented the fair resolution of the issues at this trial, but clearer definition of the issues at an earlier stage would have supported the overriding objective in several respects.