**Neutral Citation Number: [2012] EWHC 2719 (QB)**

Case No: IHJ/12/0217

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Court No: 13
Strand London WC2A 2LL

Date: Friday, 11th May 2012

Before:
THE HONOURABLE MRS JUSTICE SHARP

B E T W E E N:
- - - - - - - - - - - - - - - - - - - - -

JOHN KING

and

COLIN GRUNDON
- - - - - - - - - - - - - - - - - - - - -
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MR KING appeared In Person
MR J SCHERBEL-BALL appeared on behalf of the Respondent
JUDGMENT

MRS JUSTICE SHARP:

1. This is an application by the Defendant, Colin Grundon, for an order striking out the Claimant's claim for libel pursuant to CPR 3.4(2) (b) on the ground that it amounts to an abuse of the process and/or asking for summary judgment pursuant to CPR 24.2(a) (i). Mr Jonathan Scherbel-Ball appears for the Defendant. The Claimant appears in person.

2. The Claimant issued a claim form and particulars of claim for libel on the 7th December 2011, complaining of one publication and was given permission to amend his particulars of claim on the 9th February 2012 to complain of an additional publication. Before setting those out, it is necessary to set out some of the underlying facts.

3. The Claimant is a former English barrister and a former member of the Honourable Society of the Middle Temple. On the 13th June 2003 (under his previous name of John Burrett) the Claimant and one of his co-defendants, his nephew, Matthew Payne, were convicted by a jury in New Zealand after a 7 week trial of two offences: (i) Conspiracy to unlawfully detain a person without his consent with intent to force him to be confined; and (ii) Possession of a pistol otherwise than for some lawful, proper and sufficient use.

4. The Claimant's conviction related to a plot to kidnap a businessman and to detain him in a large plywood box buried in the ground in a bush reserve. On the 18th June 2003, the Claimant was sentenced to seven years' imprisonment for those offences. On the 12th February 2004, his appeal against conviction and sentence was rejected by the New Zealand Court of Appeal: see *R v Payne and others* [2004] NZCA 3.

5. A third defendant, the Claimant's stepson, Simon Philpott, had earlier pleaded guilty to a charge of conspiring to unlawfully detain a person without his consent with intent to hold him for ransom and was sentenced to two and a half years' imprisonment.

6. The following facts appear from the Court of Appeal judgment, which has been put into evidence by the Claimant for the purpose of this hearing. The numbers that are referred to are the relevant sub paragraphs where they are set out:

*1. "The Claimant was convicted after trial before a jury on one count of conspiring to unlawfully detain a person without his consent with intent to cause him to be confined and one account of possession of a pistol otherwise than for some lawful, proper and sufficient purpose.*

*2. The Claimant was acquitted on a charge of conspiring to unlawfully detain a person without his consent with intent to hold him for ransom.*

*3. The Claimant had been charged with attempted kidnapping, but the "attempt" charges were discharged by the trial judge as he was not satisfied that the actions of the Claimant and his co-conspirators, by the time they were apprehended by the police, constituted a "full attempt".*

*4. The Claimant was sentenced to seven years in prison as a result of his convictions.*

*5. The Claimant together with Payne was arrested on the evening of 22 July 2002 as they entered Wellington Botanic Garden, in possession of a bag containing a sawn off shotgun, live ammunition, overalls, balaclavas and other items capable of being used for the commission of a crime. They had been followed by police on 3 previous occasions when they had visited the Gardens.*

*6. Recorded covert conversations involving the Claimant indicated that a Wellington businessman who lived in close proximity to the location of arrest, at the top of Botanic Gardens was to be kidnapped. The Claimant did not dispute at trial what was said on the recordings.*

*7. The Claimant had been involved in the construction of a box or "bunker" built of plywood, big enough to hold a man, buried in the ground of a bush reserve. The box had a trap door, a supply of foods and words written on the inside wall "Welcome to your new home. We will not hurt you. Max. Stay 6 days." The Claimant did not deny that they had buried this box.*

*8. There was no dispute as to the primary facts and the only dispute was as to intent. The Claimant's defence was that he and his co-conspirators were playing a game of kidnapping and lacked any criminal intent. The box they said had initially been constructed for one of the Claimant's co-conspirators to live in but when they started the kidnap "game" the box became incorporated in that "game".*

*9. The Court of Appeal regarded the evidence against the Claimant as*

*10. "strong".The trial judge stated that the Claimant's offending was of the gravest kind and consequently imposed upon him the maximum term of imprisonment on the conspiracy charge and a two year concurrent sentence on the firearms charge with a minimum term of two thirds to be served of each sentence.*

The Court of Appeal upheld the maximum sentence on the conspiracy charge against the Claimant. In doing so, the Court of Appeal stated that the judge was entitled to regard

the Claimant's action in this case as being at the most serious end of offending of this nature. The presence of the sawn off shotgun and ammunition for it was a serious aggravating factor, as was a proposal to detain someone in an underground bunker. The traumatic effect of such a detention had it been carried out was obvious.

7. I will not set it out, but the decision of the court should obviously be read in full. It is to be noted that the Claimant was represented by counsel, that the analysis of that court was, as might be expected, very thorough and that though not uncritical of certain aspects of the trial judge's summing up, the Court of Appeal came to a very clear conclusion that there was no ground to disturb the conviction.

8. It is also to be noted that the crucial issue at trial, as it was described by the Court of Appeal at paragraph 12 of its judgment, was whether the Crown could prove beyond reasonable doubt that 'What the appellant had done was not a game, but was a conspiracy to commit the crime of kidnapping.'

9. A decision by the Disciplinary Tribunal of the Council of the Inns of Court to disbar the Claimant and expel him from the Honourable Society of The Middle Temple was brought into effect on the 29 July 2005. The Claimant had already been informed of the finding and sentence, but did not then appeal against the finding or the sentence within the 21 days provided for.

10. The Disciplinary Tribunal took the decision it did as a result of its finding that the Claimant was guilty of the offence of professional misconduct, the particulars of which were as follows:

> *'John Burrett engaged in conduct which was discreditable to a barrister and was or likely diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute in that:*
>
> *A) On the 13th June 2003 you were convicted by a jury at the High Court of New Zealand, Wellington registry of offences of:*

> *1) Conspiracy to unlawfully detain a person without his consent with intent to cause him to be confined and*
>
> *2) Possession of a firearm, namely a pistol (a cut-down shotgun) otherwise than for some lawful, proper and sufficient purpose.*
>
> *B) On the 18th June 2003, at the same court, he was sentenced to a period of seven years' imprisonment in respect of the above offences.'*

11. The Tribunal noted it had seen a certified copy of Mr Burrett's conviction, that all avenues of appeal had been exhausted and also what was said in the sentencing remarks of the judge. Due to the gravity of the offences, for which seven years' imprisonment had been imposed, and where no remorse had been shown, the Tribunal's conclusion was that Mr Burrett was unfit to be a member of the Bar.

12. The Privy Council refused the Claimant leave to appeal against his conviction. The Claimant tells me that this is because the case was not a 'capital one' and was not one therefore in which the Privy Council would interfere. He was subsequently deported from New Zealand.

13. All these matters, that is the Claimant's conviction, his sentence and his expulsion from the English Bar were widely reported in this jurisdiction. Examples of those reports are exhibited to the witness statement of Mr Grundon. They include the following.

14. Reuters news agency published accounts of his conviction on the 13th June 2003 and then his subsequent sentencing. The latter report, included the judge's sentencing remarks, which describe the Claimant as a '*highly manipulative person… you are oblivious to the results of your actions on those around you. There should be no doubt who the central villain in this case is*.'

15. These matters were also widely and prominently reported in various local newspapers. The *Birmingham Post*'s report of the sentencing recorded the judge's remarks about the Claimant's '*sheer nastiness*' and the '*utterly damning*' police recordings of the Claimant. One of those recordings included the Claimant stating, '*Having a shotgun stuck up his nose should be enough to make him do what he is told*.'

16. Both the Birmingham Post's report and the Kentish Gazette's report also describe the judge's concern about the manner of the Claimant's self-representation which had hugely and unnecessarily protracted the trial.

17. The fact that the Claimant was disbarred was also reported in this jurisdiction. PA News carried the story, repeating the details of his conviction which led to the Bar's disciplinary action. When the Bar Standards Board announced in 2007 that barristers who were found guilty of misconduct would be publicly named, the Claimant's conviction, the reasons for it and the fact that he was disbarred as a result was one of the examples given in the Independent newspaper of '*Lawyers behaving badly*' in an article entitled '*Errant barristers to be named and shamed on the website*'. That article was published on the 28th September 2007, and is still available online.

18. The Claimant's convictions have been further referred to in the local press, including when he attempted to judicially review the Council of the Inns of Court in 2007. The Claimant tells me that this application was refused on the grounds it was made out of time. As recently as the 17th November 2011, a date almost contemporaneous with that of one of the publications complained of by the Claimant in this action, a former colleague of the Claimant, referred in an article published in the Canterbury Times to the fact that the Claimant was '*Jailed for seven years after being found guilty of plotting to kidnap a New Zealander*'.

19. The Defendant is a retired civil engineer. It is common ground that he has known the Claimant for several decades and that there is a history of ill feeling between the parties, to some of which it will be necessary to refer in due course. The Defendant's former wife is Mrs Elizabeth Nagle, and as I shall also have to refer to shortly, there has been litigation in this jurisdiction and in Portugal between her and the Defendant (the Portuguese litigation) arising very broadly out of disputes following the breakdown of their marriage.

20. Against that background, the two publications complained of in this action are these. First an email sent and published by the Defendant on the 22nd November 2011 to a solicitor,

Michael Trigg, who either was or had been instructed by Mrs Nagle in the Portuguese litigation. It said in part as follows:

> *'Dear Michael, please find the attached letters to my UK solicitor relating to the boat, Liberte of Cowes, which I believe you advised me you were still acting for Mrs Nagle in this matter. These letters are written by Mr John Burrett, AKA Mr John King, the disbarred criminal barrister, convicted of armed kidnap in New Zealand in 2003, spending seven years in jail there…'*

21. The Claimant complains only of the words 'convicted of armed kidnap in New Zealand in 2003' to which he attributes this meaning (described by him as the 'natural and ordinary meaning'):

> *"The Claimant had been convicted by a Judge and Jury in New Zealand in 2003 of two very serious criminal offences namely: a. Kidnapping a person contrary to section 209 of the Crimes Act 1961 of New Zealand; and b. Using a firearm while committing a Kidnap contrary to Section 198B of the Crime Act 1961 of New Zealand."*

22. The second publication is an item published on the 22nd November 2011 on the Amazon.co.uk website under the pseudonym 'Judge John Dee' as a review of thewebsite's listing for the Claimant's self-published book "*One Game Too Many"*. This book is the Claimant's account of how he 'spent over four years in prison in New Zealand for a crime that he did not commit'. The item, including its misspellings, said as follows:

> *"A complete deception by this author John Burrett on the public,*
> *This book Author of 'One Game Too Many' Mr John Burrett is now known as John King who writes his own reviews! I suggest one looks up on the internet 'Mr John Burret, Armed kidnaper in New Zealand' also 'Mr John Burrett disbared Criminal Barister' He has now allias, strangly the same name as the person reviewing this publication!!! It could be he required some sort of credability to his publication as if you Google John King, up comes a top UK Criminal Barister, pratacing in London. This is clear deception to the public" [sic]*

23. The Defendant denies that he is responsible for the second publication, but it is accepted that the issue of responsibility for publication is not suitable for summary disposal. In respect of this item, the Claimant complains only of the words 'John Burret, Armed

kidnaper in New Zealand'. The natural and ordinary meaning complained of for these words is identical to that attributed to the first publication.

24. The Defendant's present application is advanced on the following grounds:

(i) The continuation of the litigation will not achieve any substantive vindication of the Claimant's reputation and it is an abuse of process to continue an action where so little is at stake pursuant to *Jameel (Yousef) v Dow Jones* [2005] EWCA Civ 75;

(ii) The statements when considered in the proper context are substantially true; and/or

(iii) The first publication was made in the course of *inter partes* correspondence concerning ongoing litigation and the words complained of are therefore protected by absolute privilege.

I shall deal with each of these issues in turn.

*Abuse of the Process*

25. The Defendant's submission is based on the decision of the Court of Appeal in *Jameel*. That decision has given rise to a fairly substantial number of applications to strike out claims for libel for what is called *Jameel* abuse, the rationale for which was described by Lord Phillips, Master of the Rolls, in *Jameel* as follows:

> *"54 An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.*
>
> *55. There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court*

*to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.*

*69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.*

*70. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR."*

26. See also what was said by Sir Anthony May, then President of the Queen's Bench Divisionin *Khader v Aziz* [2010] EWCA 716; [2011] EMLR 2:

*"31. This court held that, adopting the proactive approach required by the overriding objective under the CPR of dealing with cases justly, and keeping a proper balance between the Convention right to freedom of expression and the protection of individual rights, the court was required to stop as an abuse of process defamation proceedings that were not serving the legitimate purpose of protecting the claimant's reputation. The test to be applied was whether there was a real and substantial tort. The publication within the jurisdiction was minimal and did not amount to a real and substantial tort when the damage to the claimant's reputation was insignificant. It was disproportionate and an abuse of process for the claimant to proceed with his claim. If the claimant succeeded in the action and was awarded a small amount of damage, it could perhaps be said that he had achieved vindication for the damage done. But both the damage and the vindication would be minimal. This court endorsed at [57] in Jameel the approach of Eady J. in Schellenberg v British Broadcasting Corporation [2000] E.M.L.R. 296 with regard to proportionality. Eady J. said that he was bound to ask whether the game was worth the candle. He could not accept in that case that there was any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantage to the parties in terms of expense, and to the wider public in terms of court resources. This court had earlier endorsed that approach in Wallis v Valentine [2003] E.M.L.R. 175.*

*32. In my judgement, the principle in Jameel applies in the present appeal. The appellant's claim on the first publication is at best fraught with difficulties. But even if it were to succeed at trial, it would not be worth the candle. She would at best recover minimal damages at huge expense to the parties and of court time. This would be so, even if she and those representing her were to adopt for the future a hitherto elusive economical approach to the amount of paper and time which the case might need. As things are, the parties' expenditure must vastly exceed the minimal amount of damages which the*

*appellant might recover even if she were to succeed in overcoming all the obstacles in the path of such success."*

27. In *Lait v Evening Standard Limited* [2011] EWCA Civ 859, [2011] 1 WLR 2973 Lord Justice Laws said this:

*"41… Jameel was also applied by this court in Khader v Aziz [2010] EWCA Civ 716 where it was held (para 32) that the appellant 'would at best recover minimal damages at huge expense to the parties and of court time'.*

*42. The principle identified in Jameel consists in the need to put a stop todefamation proceedings that do not serve the legitimate purpose of protecting the claimant's reputation. Such proceedings are an abuse of the process. The focus in the cases has been on the value of the claim to the claimant; but the principle is not, in my judgment, to be categorised merely as a variety of the de minimis rule tailored for defamation actions. Its engine is not only the overriding objective of the Civil Procedure Rules but also in Lord Phillips' words, 'a need to keep a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation'...."*.

28. In *Kaschke v Osla* [2010] EWHC 1075 (QB) Eady J. emphasised at paragraph 22 that the test was:

*"whether or not a 'real and substantial tort' had been committed and [...] whether any damages recovered might be so small, as to be totally disproportionate to the very high costs that any libel action involves. It is an important consideration for the court to have in mind on any abuse application that the fact of being sued at all is a serious interference with freedom of expression. That may be appropriate in the majority of libel actions, where it is necessary to countenance such interference in order to vindicate the rights of another person in respect of whom a real and substantial tort has occurred. But the court must be vigilant to recognise the small minority of cases where the legitimate objective of vindication is not required or, at least, cannot be achieved without a wholly disproportionate interference with the rights of the defendant(s)."*

29. Eady J. applied those principles in *Williams v MGN Ltd* [2009] EWHC 3150 (QB) when striking out a libel claim brought by a convicted criminal in relation to an article which described him as a '*henchman*' of another notorious criminal. It was not suggested for the purposes of that application that the allegation was true, but that the claim was an abuse of the process on the ground that as a result of the Claimant's conviction for murder, he had no

reputation capable of being damaged.

30. The judge decided the claim did not constitute a real and substantial tort and at paragraph 11 he said this:

> *"A better way of putting this part of the case might be to say that the circumstances fall within the principle identified by the Court of Appeal in Jameel (Yousef) v Dow Jones Inc [2005] QB 946 ; that is to say, that these proceedings are an abuse because they cannot serve the legitimate purpose of protecting the Claimant's reputation. If he were to achieve a modest award of damages, it would be out of all proportion to the cost of the proceedings to the Defendant and to the public purse. Furthermore, any potential vindication that could be achieved can be characterised as minimal. As it was put in the judgment of Lord Phillips MR, at 969–970, "the game would not have been worth the candle".*

31. *Ewing v News International Ltd & Ors* [2008] EWHC 1390 (QB) was a case concerning an application by a vexatious litigant pursuant to Section 42(3) for permission to bring certain proceedings, including the proceedings for libel. The issue was whether the claim he wished to bring had a real prospect of success. One of the reasons given by Coulson J. at paragraph 99 for refusing the permission asked for was that as the Claimant was a convicted fraudster who had been sentenced to a term of imprisonment of seven years for his offences, it was difficult to see how, in relation to his business activities, he had a reputation which could be damaged by articles which related to such activities. Even if a claim for libel succeeded, the Claimant would only recover nominal damages.

32. For present purposes, it is also relevant to observe that a long-established foundation of the law of defamation is that it 'Will not permit a man to recover damages in respect of an injury to a character which he does not, or ought not, to possess': *M'Pherson v Daniels* [1929] 10 B & C 263 and 272.

33. In this context, regard has to be had to the effect of previous convictions on a person's reputation. Previous convictions within the relevant sphere of a claimant's reputation are admissible as evidence of general bad reputation. They are the raw material upon which bad reputation is established and are "*the best guide to [a Claimant's] reputation and*

*standing*": see the observation of Lord Denning, Master of the Rolls, in *Goody v Odhams Press Ltd* [1966] 1 QB 333 at 340 G and 341 C.

34. A further aspect which the court will consider in relation to an application to strike out an action as an abuse is the extent of the publication complained of. In this respect a claimant who complains about an internet publication cannot rely on an automatic presumption of law that there has been a substantial publication in the jurisdiction: see *Al Amoudi v Brisard* [2006] EWHC 1062 (QB), [2007] 1 WLR 113. It is necessary for a claimant to plead and establish any publication relied upon where complaint is made concerning an internet publication. There must be some evidence from which an inference of substantial publication within the jurisdiction can be drawn. It is not sufficient to simply plead that that posting has been accessed by a '*large but unquantifiable number of reader*s' as that pleading is no more than a bare assertion. There must in other words be some solid basis for the inference of substantial publication: see *Carrie Tolkein* [2009] EWHC 29 (QB) per Eady J at [17]-[19].

35. Against that background, in my judgment, this case is, as Mr Scherbel-Ball submits, a paradigm example of a claim to which the principles of the *Jameel* abuse apply. I say that for the following reasons.

36. First in my view it is fanciful to suppose in the light of the facts to which I have referred, that is the Claimant's conviction in New Zealand, his subsequent disbarment and the reports that those gave rise to, that the Claimant has a reputation in the relevant sector of his life which is capable of being vindicated by these proceedings.

37. In my judgment, the reality is he has none which is capable of being vindicated in these proceedings. I regard this case in this respect as on all fours with the decision in *Williams* approved by implication by the Court of Appeal in *Lait*. In this context it is important to note two things. First, the conviction is not only entirely directed to the relevant sector of the Claimant's reputation which the words complained of put in issue, but is also a central

part of the words complained of. Second, none of the Claimant's convictions are spent convictions under the Rehabilitation of Offenders Act 1974, which is capable of application to convictions abroad (see section 1(4) of that Act) because of the seriousness of the offences and his seven-year jail sentence.

38. It is true that the Defendant cannot rely upon the Claimant's convictions in New Zealand as conclusive proof, pursuant to Section 13 of the Civil Evidence Act 1968, that the allegation is true. Nonetheless, the court, in my opinion, is entitled to have regard to the findings of a court of competent jurisdiction on an application of this nature, a view I have already expressed in *El Diwany v Hansen* [2011] EWHC 2077 (QB) at 70. In my view Section 13 plainly does not operate to prevent a defendant from relying on a conviction in a different jurisdiction as evidence of bad reputation, in particular where, as here, it relates directly to the relevant sector of the Claimant's reputation, is not spent and is notorious.

39. Second for reasons I shall explain shortly, in my view there is no difference of substance between alleging that someone is an armed kidnapper on the one hand and an armed kidnapper plotter on the other. But even if I am wrong about that, in my opinion, the difference between the two as a matter of substance is minimal; and the facts the Defendant will be able to prove would in any event reduce the damages the Claimant would recover to vanishing point.

40. As to the limited extent of publication, it is of course right that this is not, or not merely a "numbers game". It needs only one well-directed arrow to hit the bull's eye of reputation in certain circumstances, but in my judgment, the arrow does not do so here. The first publication was an email to one person, a solicitor, Mr Trigg. There is no evidence at all that he thought any less of the Claimant as a result. His witness statement says nothing to this effect. He obviously knew about the Claimant's conviction. Indeed it was he who put in evidence the New Zealand Court of Appeal's judgment from which the relevant difference – if there is any that is material – between the actuality and the words complained of was

demonstrable. Similar considerations apply in respect of the further foreseeable publication to Mr Trigg's client, Mrs Nagle. Indeed it is clear from her witness statement she is also fully aware of the Claimant's conviction.

41. What then of the extent of the second publication, assuming as I must for this purpose, as I have said, that the Defendant is in fact responsible for it? The mere fact of course that an item is available on the internet does not give rise to a presumption that the publication has taken place, as I have already indicated. As Mr Justice Tugendhat said in *Trumm v Norman* [2008] EWHC 116 (QB):

> *"There is no presumption in law that a claimant on an Internet libel is able to rely on to prove publication…Whether the court is able or willing to infer that such publication has occurred will depend on all the circumstances."*

42. The burden of proof to show a real and substantial tort within the jurisdiction is on the Claimant, but he has failed to produce any evidence of substantial publication within the jurisdiction, despite the Defendant's repeated requests that he should do so. What evidence there is points firmly against such a conclusion.

43. The second publication is no longer available having been taken down by Amazon after the Claimant's complaint about it, but there is nothing in the evidence to give rise to the inference that it would have been seen for the short period of its posting. There is no evidence that there was any real interest in the Claimant's book or its online listing which would have resulted in a visit to the website. The book, as Mr Scherbel-Ball described it, is of niche interest only. It was self-published by the Claimant who established his publishing company '*to help overcome some of the genuine frustration and feeling of helplessness felt by so many first-time writers trying to get their book published. In particular their feeling that no one cares enough about their work to read it properly*.'

44. The book is apparently only available on the Amazon website in "Kindle" edition. Though the Claimant pointed to another document in the bundle from the Amazon website, asevidence that it is available in hardcopy form, on examination, that page showed that the readers are simply

invited to 'sign up to be notified when this item becomes available.'

45. Be that as it may, there is no evidence of any interest in the book or in its online listing (other than the Claimant's own averments about the matter which are, as Mr Scherbel-Ball points out, unsubstantiated). The only online review of the book was posted by the Claimant himself under the name John King and the Claimant only noticed the second publication himself some seven weeks after it was first published despite the fact there is a link to the Amazon posting for the Claimant's book from his own website, which he says receives 'literally hundreds of hits per week'.

46. I should add that the only publishes the Claimant has identified in his submissions (though not in evidence) are the family of his co-defendant, Mr Payne, his sister's family and Mrs Nagle, all of whom, like Mr Trigg will have known about the Claimant's conviction in any event.

47. Thus, though an appropriate platform of facts (or factual matrix) can give rise to an inference of substantial publication within the jurisdiction there is nothing that points to this here: as I have said, the evidence points the other way.

48. I turn then to the fourth relevant consideration, that of proportionality which, as Mr Scherbel-Ball submits, lies at the heart of the *Jameel* jurisdiction. In this case, in my judgment there is no or no significant damage to reputation. There is no evidence of a real or substantial tort in the jurisdiction. The difference between what is alleged and what can be proved to be substantially true is minimal at best and the action would not in truth serve any useful purpose by way of vindication. In the circumstances, I consider it would be wholly disproportionate to allow this case to continue with all the costs and resource implications of what would, in effect be a re-run of the decision taken, to a higher standard of proof in a court of competent jurisdiction some 10 years ago.

49. It is to be borne in mind that the Claimant's trial in New Zealand lasted seven weeks. It was

tried contemporaneously to the events in question, when events were still fresh in the witnesses' minds; and it was tried in the relevant jurisdiction, that is, in New Zealand, applying New Zealand law. The Claimant was convicted to the same standard of proof that applies in this jurisdiction in criminal cases. He then had the opportunity to take the matter to the New Zealand Court of Appeal with the benefit of representation and the Court of Appeal, after a thorough and independent consideration of the matter rejected his appeal.

50. It is apparent from what the Claimant has said in his submissions to me that he would wish to demonstrate that he was wrongfully convicted. He does not accept such a 'retrial' would take seven weeks as the original trial did, and he says it would be easy to demonstrate that his original trial fell far short of what would be expected of a trial in this jurisdiction. I do not agree and the examples he gave in argument of the issues he would wish to explore simply underscore the disproportionate nature of the exercise he wishes to engage in. I simply do not think it would be appropriate in all the circumstances to allow this libel claim to be used as a vehicle to re-run the Claimant's original criminal trial.

51. The Claimant also says he would be entitled to injunctive relief and that is all he really wants here. In my opinion, however, this is not a case where the court would grant an injunction. No injunction will be granted where a defendant can prove the words to be substantially true. For reasons I shall explain, in my view, the Defendant can do here but in any event, the grant of an injunction is a discretionary remedy. As a matter of first principle, an injunction will only be granted to apprehend a threatened real and substantial tort. An injunction prohibiting the publication of "*the said or similar words defamatory of the Claimant*" would be unworkable bearing in mind the minimal distinction, if there is one, between the imputation that he is an armed kidnapper, and that he is an armed kidnapper plotter. The grant of such relief would amount to an unjustified interference with the Defendant's Article 10 rights, as well as undermining the statutory prohibition on the Claimant's conviction becoming spent under the Rehabilitation of Offenders Act 1974.

52. I am conscious that the abuse jurisdiction is exceptional, but if the Claimant were to succeed at trial the cost of the exercise would in my judgment have been out of all proportion to what had been achieved. In short, therefore, this is a classic example of a claim which is 'not worth the candle' and which should be struck out as an abuse of process.

*Substantial truth*

53. I turn therefore to the second ground on which relief is claimed, namely that this is one of those cases where it is fanciful to suppose that a plea of justification will fail or, to put it another way, that the defence of justification is bound to succeed. It is necessary first to consider the applicable legal principles for summary judgment generally and then how they should be applied to an application in which the issue if justification is brought into consideration.

54. So far as the general principles are concerned, they are explained in *Swain v Hillman* [2001] 1 All ER 91. As s Lord Woolf explained at paragraph 94:

> *'It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in PartIt saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is the claimant's interests to know as soon as possible that that is the position.'*

55. As has also been emphasised however, in determining whether a claim is appropriate for summary judgment, the role of the court is not to conduct a mini – trial. As was explained by Lord Hobhouse in *Three Rivers District Council v Governor and Company of the Bank of England* [2003] QB at 158:

> *'... the judge is making an assessment, not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the "bottom-line'' is what ultimately matters... The criterion which the judge has to apply under Part 24 is not one of probability, it is the absence of reality.'*

56. If an issue is raised (as it is here) about a potential defence of justification, the court will

also certainly have to consider the issue of meaning as well; and if there is a dispute as to that, the question for the court is whether a plea of justification is bound to succeed in respect of any reasonable defamatory meaning the words are capable of bearing in accordance with well-settled principles for reasons I explained in *Dee v Telegraph Group Ltd* [2010] EWHC 1414 (QB), [2010] EMLR 20 at 99.

57. Where a defendant seeks to show that the sting of a publication is substantially true for the purposes of a summary judgment application, the test for a defendant is a high one. The question for the court is whether a jury would be the perverse other than to conclude that the allegations the words were capable of bearing are substantially true see *Dee v Telegraph Media Group Ltd* [2010] EWHC 924 (QB); [2010] EMLR 20 at [60]; and *Azad Ali v Associated Newspapers Ltd* [2010] EWHC 100 (QB) at [8]-[14].

58. One final matter of law that it is necessary to deal with relates to the nature of the defence of justification itself. It used to be the case that defamatory words were treated as though they were an indictment, so that pleading and proof had to follow them more or less exactly. See *Gatley* at paragraph 11.11. But that is not the modern approach. The question is whether the words are substantially true, not whether they are absolutely accurate. The court looks to the substance for the reasons explained by Eady J in *Turcu v News Group Newspapers Ltd* [2005] EWHC 799 (QB) at paragraphs 109 and 111:

> *"...It becomes important in such a case to isolate the essential core of the libel and not to be distracted by inaccuracies around the edge — however extensive..."*
>
> *"…English law is generally able to accommodate the policy factors underlying the Article 10 jurisprudence by means of established common law principles; for example that a defamatory allegation need only be proved, on a balance of probabilities, to be substantially true. The court should not be too literal in its approach or insist upon proof of every detail where it is not essential to the sting of the article…."*
>
> *"...In deciding whether any given libel is substantially true, the court will have well in mind the requirement to allow for exaggeration, at the margins, and have regard in that context also to proportionality. In other words, one needs*

> *to consider whether the sting of a libel has been established having regard to its overall gravity and the relative significance of any elements of inaccuracy or exaggeration. Provided these criteria are applied, and the defence would otherwise succeed, it is no part of the court's function to penalise a defendant for sloppy journalism — still less for tastelessness of style. I must set all that to one side…and focus only on substance."*

59. What is the substance here? The essential nature of the Claimant's complaint is the allegation that he is an armed kidnapper. This much is clear from the words selected by the Claimant from each of the publications complained of, and from the way that the Claimant puts the matter himself, both in argument before me and in his skeleton argument for this application.

60. I say that notwithstanding the way the Claimant has pleaded his meanings. Though they are described as natural and ordinary meanings, they are obviously "innuendo" meanings given the recondite nature of the extrinsic facts to which they refer. It is to be noted that the Claimant has not identified, at least in his pleadings, any publishees who had the requisite knowledge, nor is this a case where it could conceivably be argued that extrinsic facts were sufficiently widely known for it not to be necessary for him to do so.

61. There is therefore presently no pleaded case nor is there any evidence that any relevant publishee had such knowledge, though I note that the Claimant says in his skeleton argument that several people who read the Amazon item understood the 'full meaning' by which I take it he means they knew the relevant statutory provisions, and that the publishees of the email Mr Trigg and Mrs Nagle "understood the meaning of the words published in the email" as well. Be all that, as it may, for present purposes I must look at the substance of what is being complained of here about which I have already expressed my opinion.

62. What the Claimant says about this in his skeleton argument is as follows:

> *'The Defendant's statements are that I have been convicted of a very specific offence, namely "armed kidnap" and that the conviction took place in New Zealand in 2003. It is not a defence for the Defendant to claim now that I have been convicted of some other less offence or that I am in some way a criminal or even dishonest. In order to provide a defence, the Defendant would have to prove that I was convicted of the substantive offence of kidnap and that I was armed with a gun or some other weapon at the time of the*

*kidnap and in order to carry out that kidnap, none of which is true.'*

63. He also said (at least initially) that he was not convicted of conspiring to kidnap either. Taking the latter point first, it is clear, not least from the judgment of the New Zealand Court of Appeal, that the Claimant was convicted of conspiracy to kidnap. Section 209 of the New Zealand Crime Offenders Act 1961 provides in part as follows:

> *'209. Kidnapping. Everyone is liable to imprisonment for a term not exceeding 14 years who unlawfully takes away or detains a person without his or her consent… with intent to cause him or her to be confined or imprisoned.'*
>
> (See also Section 310 of the same Act which sets out the offence of conspiracy in relation to substantial offences in the Act.)

64. The suggestion the Claimant also makes that the facts upon which the conspiracy conviction were based gave rise to an offence akin to one of false imprisonment does not merit serious consideration.

65. What then of the alternative case - which is that he was never convicted of armed kidnap, merely conspiracy to kidnap and actual unlawful possession of a firearm – i.e. he never carried out the kidnap whether armed or otherwise, and was not convicted of actual kidnap.

66. As a matter of substance for libel purposes, where the gist of the action is damage to reputation, in my view this is, as Mr Scherbel-Ball puts it, this is a distinction without a difference. The sting here is of the Claimant's propensity to commit that particular serious crime supported by the use of a firearm. In real terms there is nothing to distinguish between what an ordinary right-thinking individual would think of an 'armed kidnapper' on one hand and an 'armed kidnap plotter' foiled before he could put the plot into action on the other. In this respect, this case bears some similarities with the facts of *Turcu*.

67. The facts upon which the Claimant's convictions were based were established at his trial and were not in dispute. I have already referred, for example, to the fact that the Claimant

was involved in discussions concerning the kidnap of a named individual, that he was found by police in the vicinity of the individual's home, with all the relevant paraphernalia for a kidnap, including a sawn-off shotgun, balaclavas and the like, and that an underground bunker had been constructed in the manner described by the New Zealand Court of Appeal. The only additional matter that the Defendant relies on is the detail of what the Claimant was recorded as saying in conversations which were played at his trial, namely, '*Having a shot gun stuck up his nose should be enough to make him to do what he is told*'. The Defendant has the DVD of these conversations, which it has not been necessary to listen to since the Claimant does not dispute having said this.

68. In the light of those facts, I am satisfied it would be perverse for a jury to accept the Defendant's account that this was only a game. In my judgment, there is no room for any other conclusion than that the words complained of are substantially true and therefore the plea of justification in these civil proceedings, addressed to the substance and theunderlying sting of those words would be bound to succeed.

69. I turn finally therefore to the question of absolute privilege, which relates only to the first publication. The category of privilege into which the email is said fall, is that for documents created for the purpose of ongoing litigation.

70. Before turning to the authorities and argument, it is necessary to say something about the history which led to the email being sent. The Defendant says the email, that is the first publication, was published in the course of *inter parte* correspondence concerning ongoing litigation between the Defendant and his former wife, Elizabeth Nagle, which had been issued by the Defendant in Portugal (i.e. the Portuguese litigation) in the spring of 2011 and which concerned the running costs of the boat the *Liberte of Cowes*; and this argument is mounted by reference to the various documents in correspondence exhibited to the various witness statements before the court.

71. On the 3rd May 2011, Mr Trigg of Gill Turner Tucker wrote to the Defendant saying he was

instructed by Mrs Nagle in connection with the Portuguese litigation. There was subsequent email correspondence about the merits of the claim in early May 2011 between the Defendant, who was dealing with the conduct of the Portuguese litigation in person and Mr Trigg. Mrs Nagle entered a defence in the Portuguese litigation in mid May 2011.

72. On the 7th July 2011, the Defendant emailed Mr Trigg, stating that he had heard from another firm of solicitors in relation to other proceedings between the Defendant and Mrs Nagle and he enquired if Mr Trigg was '*still acting for [Mrs Nagle] in relation to the claim for running costs to Liberte of Cowes*.' Mr Trigg confirmed by email the next day that he was still instructed on behalf of Mrs Nagle '*with regard to your claim the running costs of Liberte of Cowes*'.

73. There was no further correspondence concerning the Portuguese litigation until a solicitor, Mr Pitt, who was acting for the Defendant in separate English county court proceedings against Mrs Nagle, wrote to Mrs Nagle on the 17th November 2011. That letter, sent on a'without prejudice' basis, offered a global settlement of all matters in dispute between the parties. Although Mr Pitt was not instructed in relation to the Portuguese litigation or the *Liberte of Cowes* matter, the global offer of settlement included reference to the *Liberte of Cowes* as part of the attempt to achieve a final and global settlement.

74. On the 19th November 2011, Mrs Nagle herself wrote two letters to Mr Pitt. Both letters solely concerned the *Liberte of Cowes*. The "open" letter stated that Mrs Nagle was "*still keen to resolve all the legal issues concerning this yacht, if possible without litigation* before threatening proceedings in the *"Admiralty Court" in accordance with Rule 61.2*". The "without prejudice save as to costs" letter proposed settlement terms which included that the Defendant "*will discontinue… has [sic] action concerning the yacht on the 30th November 2011"* and that "*each party will bear their own costs in the Portuguese matter"*. Neither letter referred to matters which were subject of the English county court proceedings in which Mr Pitt was instructed.

75. Mr Pitt was not instructed in relation to the *Liberte of Cowes* or the Portuguese litigation; albeit those matters had been mentioned by way of global settlement. He therefore wrote to Mrs Nagle informing her of this and he also passed his correspondence to the Defendant. It should be noted that in doing so he said this:

> *'Dear Colin,*
>
> *I am simply attaching two letters which Mrs Nagle sent to me over the weekend both dated the 19th November, one being an open letter and the other being without prejudice.*
>
> *Again, the hand of King/Burrett can be seen especially in the last paragraph of the open letter, where, to those experienced, a comment concerning an Admiralty action is a little off beat.*
>
> *Yours sincerely,*
>
> *Richard.'*

76. In the light of the earlier correspondence from Mr Trigg, the Defendant believed, not surprisingly, that Mr Trigg was still instructed concerning the Portuguese litigation and was therefore confused so it is submitted, to receive letters from Mrs Nagle directly in relation to the Portuguese litigation, but which obviously bore the hallmark of the Claimant (his address, his telephone number and the threat to "*commence proceedings in the Admiralty Court in accordance with Rule 61.2*". being key indicators).

77. (I should add here in parenthesis that although, as I understand it, the Claimant initially disputed the letters from Mrs Nagle which provoked the email complained of had anything to do with him, he accepted in the course of argument that he did play some part in assisting her and in their content, which I have to say is perfectly obvious when one looks at them).

78. In any event, it was in those circumstances that the Defendant sent the email complained of to Mr Trigg, enclosing the letters to Mrs Nagle, and enquiring whether he was still instructed by her and noting that "*some of the content* [of her letters] *conflicts with the statement to the court in Portimao"*.

79. The argument which is advanced by the Defendant is this. The rationale for the absolute

privilege accorded to documents brought into existence for the purpose of litigation before a court of justice is one of public policy. Its foundation is to allow the free and frank exchange of information to allow justice to be achieved and to avoid ancillary litigation arising out of documents existing for the conduct of the litigation. As such, the protection afforded to the content of such documents is necessarily wide for fear that otherwise the public policy behind absolute privilege would be undermined. The test is not one of strict relevance, but one of no reference at all to the subject matter of the proceedings. Any doubt should be resolved in favour of the litigant and litigants should not be penalised for misjudging the true ambit of the matters of dispute.

80. It is said that it is plain from its terms that the email complained of had reference of the Portuguese litigation and was directly relevant to the ongoing conduct of it. The Defendant emailed Mr Trigg whom he believed (because he had been told so twice) was acting for Mrs Nagle in the Portuguese Litigation (and I note that Mrs Nagle admits that Mr Trigg was instructed to act on her behalf in the Portuguese Litigation). The email asked Mr Trigg whether he was still acting in relation to the *Liberte of Cowes* - the subject of the Portuguese litigation - and it expressed the Defendant's concern at the Claimant's apparent involvement in these matters as he believed it to be. As Mr Scherbel-Ball put it, what the Defendant was saying in effect was this: why is this disbarred criminal acting in the litigation I thought you were in charge of?

81. Thus it is said that the email falls under the scope of litigation correspondence privilege, if I may so describe it, and, if there is any doubt about that, it should be resolved in favour of the Defendant.

82. The Claimant on the other hand says the plea of absolute privilege or even qualified privilege is bound to fail. His letter before action for example, as I have said, said that '*The defamatory statement made about me, made by the [Defendant] has no relevance whatsoever to the existing litigation between Mrs Nagle and Mr Grundon*.' In particular, he

says, whether or not he had been convicted of any crime in New Zealand in 2003 had no relevance whatsoever to a dispute between the Defendant and Mrs Nagle about the mooring fees of their yacht in Portugal. This was an extraneous statement made by the Defendant, for his own motives to Mrs Nagle's solicitor.

83. The legal foundation for the Defendant's argument is contained in the general principles referred to in the decision of His Honour Judge Parkes QC, sitting as a High Court Judge in *Iqbal v Mansoor & Ors* [2011] EWHC 2261 (QB) and which Mr Scherbel-Ball summarises as follows.

84. First, absolute privilege extends to all documents brought into existence for the purpose of proceedings before a court of justice starting with the document which institutes the proceedings: see *Lincoln v Daniels* [1962] QB 237 at 257/8 per Devlin LJ. Second, the contents of documents created for the purposes of litigation will be absolutely privileged unless they have no reference at all to the subject matter of the proceedings, and any doubt should be resolved in favour of the witness: see *Smeaton v Butcher* [2000] EMLR 985. Third, litigants should not be vulnerable to defamation claims if they misjudge, or lack the understanding to appreciate, the true ambit of the matter in dispute, and make allegations or include averments in the course of proceedings which are irrelevant to the issues but nonetheless have reference to the proceedings. Even malicious allegations must be protected, because otherwise honest witnesses would potentially be vulnerable to baseless litigation. Fourth, *inter partes* correspondence is protected by absolute privilege: see *Gatley on Libel Slander* (11th Edition) at paragraph 13:15 and *Wong Shuie Kee v Chu* [2002] HKEC 1570, HKCA. Fifth, the absolute privilege of *inter partes* correspondence necessarily extends to incidental publications to staff in the ordinary course of business.

85. It is further submitted that absolute privilege protects a litigant in person conducting his own case in person in a civil or criminal court as much as it would extend to an advocate or

lawyer instructed on his behalf: see *Gatley* at paragraph 13.16.

86. In *Iqbal*, as the judge noted at paragraph 29 and following the claimant (albeit it a solicitor) was in person and had conceded in the course of argument that the correspondence in question was in principle absolutely privileged insofar as it was published to the courts and the SRA. The judge also noted that it was not very satisfactory to have to proceed on the basis of a concession by a litigant in person, notwithstanding his professional qualification; though the judge went on to say that he would not necessarily have come to a different conclusion had the matter been argued out (referring in that context to what was said by the editors of *Gatley* at paragraph 13.15).

87. I am conscious, that as in *Iqbal*, the Claimant in this case is in person (albeit here a barrister, but not one who had any sort of specialist practice in defamation), that the matter had not been the subject of detailed legal argument and that there has been no concession by the Claimant akin to that given by Mr Iqbal, but I can see nothing in the arguments presented to me which persuades me or gives me any cause to doubt that the argument advanced by Mr Scherbel-Ball on this issue is bad in law; and I accept, for the reasons he advances, that the email complained of here falls within the protection of absolute privilege.

88. Mr Scherbel-Ball is right in my judgment to draw attention to the emphasis now placed under the Civil Procedure rules on the parties communicating with each other and co-operating in order to further the overriding objective. The benefits of their doing so are obvious. Correspondence can result for example in the narrowing of the issues the court has to decide, or in the resolution of the litigation itself. Hence the requirement to send letters in accordance with the pre-action protocol. It is an integral and necessary part of the litigation process therefore that there should be *inter parte* correspondence. Subject to the *Smeaton v Butcher* proviso, in my opinion it would substantially undermine the public policy imperative which lies behind the protection of statements made in the conduct of the litigation if such communications were not to be protected by absolute privilege.

89. In the result, there being no other reason why the case should be tried, I have concluded that the Defendant is entitled to the relief asked for.

90. I have in mind the open letter written by the Claimant on the 13th April 2012, in which he offered to settle the claim on terms of the payment to him of nominal damages, provided that the Defendant gave an undertaking not to repeat or further publish the same or similar words (noting that he also said that if the Defendant failed to accept that offer, it appeared, the case would have to be decided by a jury, whether in the High Court, or for costs reasons in the county court on a transfer).

91. Obviously this was an offer the Defendant could have accepted. But his failure to do so does not deprive him of the right to have his application considered on the merits, which concerned, fundamentally, the legitimacy of the action being brought at all. If, in other words, the court granted the relief being asked for, it follows he was entitled to refuse the offer and in particular to refuse to give the undertaking asked for.

92. In all the circumstances, there will be judgment for the Defendant on the claim.

**End of judgment.**

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