Neutral Citation Number: [2023] EWHC 627 (KB)

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**MEDIA AND COMMUNICATIONS LIST**

Claim No. QB-2021-002600

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 March 2023

**Before**:

**HIS HONOUR JUDGE LEWIS**
**(sitting as a Judge of the High Court)**

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**Between:**

**DR RICCARDO FRATI** Claimant

-and-

**KAREN BOWEN-CARTER** Defendant

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**David Sherborne** (instructed by **Brabners LLP**) for the **Claimant**
**John Stables** (instructed by **Shakespeare Martineau**) for the **Defendant**

Hearing date: 28 November 2022

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# Approved Judgment

This judgment was handed down remotely at 10:30am on 22 March 2023 by circulation to parties or their representatives by e-mail and release to the National Archives

HIS HONOUR JUDGE LEWIS

1. The claimant is a plastic surgeon practising mostly in London and Manchester. He features regularly in national broadcast and print media.

2. The defendant is an art dealer and gallery director. She was a patient of the claimant, having undergone plastic surgery procedures in London on 28 November 2020.

3. On 20 May 2021, the defendant posted a "Google Business Review" ("GBR") on the Google search website in respect of the claimant's Harley Street surgery ("the Review"). The words complained of by the claimant are shown in bold:

> "The worst experience of my entire life ! Mr Frati was late on my first consultation and spent the whole time scrolling through his phone while he left he silver tonged [sic] assistant to talk to me. At the hospital my operation was 4pm I was kept waiting from 12 noon until 9.30 at night with not even an apology. I was out of surgery at 2.30am! I have never felt so ill in my life, the hospital is not a private hospital it is run by National health staff mixed with private nurses. The nursing left a lot to be desired with many of them. Then you have to deal with a heavy handed Mr Frati which caused me anxiety every time I had to see him. After care with this practice is always met with waiting for up to an hour after your appointment on many occasions. My results are terrible I looked better before in many areas. I am now suing this surgeon as he doesn't seem to care less what he has done to me and communication is not one of his strong points that's for sure. I am disgusted with how I have been treated and **the whole 5 star rating is clearly fake as there is no way in the world this man can be called professional. Most are celebrities that have had a half price nose job or breast implants to post out and promote him. Gemma Collins brought him to my attention on a program I was watching, she clearly has no moral compass either!** I have written to her to inform her to be careful who she promotes as one day someone could die from being drawn in by people such as her. I could go on but I will leave it there!".

4. At 23.33 on Thursday 20 May 2021 the claimant received a notification that the Review had been posted on his Harley Street GBR.

5. On Monday 24 May 2021 at 09.55, the claimant's then solicitors sent the defendant a letter of claim. Later that day, the defendant changed the Review, removing the words complained of. She says she did this at 11.15. The claimant does not know if this is correct but accepts that the Review had been taken down by 12.45 that day.

6. On 6 July 2021, the claimant issued proceedings against the defendant for libel and harassment. The claimant seeks damages up to £100,000 and an injunction preventing republication of the words complained of, or similar words defamatory of the claimant. A claim for malicious falsehood is pleaded in the particulars of claim, but not in the

claim form. For the purposes of today, I have proceeded on the basis that if such a claim were viable, permission to amend the claim form would be granted.

7. The claimant says that he does not take issue with the defendant expressing negative opinions of the treatment she feels she received, whether unfounded or not. His complaint is that the Review included false and defamatory allegations of fact, namely that he had been perpetrating a fraudulent scam whereby he provided half price cosmetic surgical procedures to celebrities in exchange for them posting false social media reviews promoting his services to the general public.

8. The defence served in relation to the libel claim disputes the claimant's pleaded meaning and denies that what was published was defamatory at common law, or that it caused serious harm. The defendant does not rely on a defence of truth, and instead pleads a defence of honest opinion.

9. In respect of the harassment claim, the course of conduct is said to have started when the defendant sent emails to the claimant in which she threatened to talk to the media about her treatment if he did not refund her fees in full. The claimant applied for an injunction against the defendant to prevent further harassment. On 20 July 2021, Saini J accepted undertakings from the defendant that she will not communicate with or contact or attempt to contact the claimant, or other patients of the claimant, or to intimidate, harass or pester the claimant or his patients and staff. The claimant has brought committal proceedings against the defendant in respect of alleged breaches of those undertakings. Whilst the defendant admits some of the acts relied upon in support of the harassment claim, she says she acted reasonably and was entitled to exercise her right of freedom of expression by discussing her experience of the claimant with other members of the public. She denies that she pursued a course of conduct, or that what she did could be regarded as harassment, or likely to cause the claimant anxiety, alarm or distress.

The application

10. On 4 July 2022, the defendant issued an application form in which she applied for (i) a trial of a preliminary issue on meaning, and whether the meaning of the words complained of was defamatory at common law; and (ii) summary judgment on the libel and malicious falsehood claims, or alternatively for them to be struck out.

11. The applications for summary judgment and/or striking out were put on the following basis:

    a. "That summary judgment be entered for the defendant on the claimant's claim for libel, pursuant to CPR 24.2 on the basis that (a) the claimant has no real prospect of establishing that he has suffered serious harm to his reputation or that such harm is likely as a result of the publication sued upon (a requirement of the tort pursuant to s.1(1) of the Defamation Act 2013) and (b) there is no other compelling reason why this issue should be determined at trial; and/or

    b. That the claimants libel claim be struck out, pursuant to the court's discretion under CPR 3.4(2)(a), because the Particulars of Claim disclose no reasonable grounds for bringing the libel claim (again because the claimant will be unable

to establish that he has suffered serious harm to his reputation or that such harm is likely as a result of the publication sued upon); and

c. That summary judgment be entered for the defendant on the claimant's malicious falsehood claim on the grounds that the claimant's particulars of claim do not advance a reasonably arguable or properly particularised case under section 3(1) of the Defamation Act 1952, including that no mechanism of pecuniary loss is pleaded; and/or

d. That the claimant's libel and malicious falsehood claims be struck out because they are an abuse of the court's process and are otherwise likely to obstruct the just disposal of the proceedings, pursuant to the court's discretion under CPR 3.4(2)(b) and its *Jameel* jurisdiction (because any harm the claimant may have suffered is so trivial that proceedings would be disproportionate, ie no 'real and substantial' torts have been committed)".

12. On 5 July 2022, Nicklin J directed that the summary judgment and strike out applications should be determined first, after which the court would give directions in respect of the trial of the preliminary issue. The Judge noted that this may require the court to proceed on the basis of a determination of what meaning the words complained of are capable of bearing for the purposes of any assessment of serious harm.

13. On 22 November 2022, the defendant's solicitors confirmed to the court (and the claimant) that they would be limiting their application to the issues of summary judgment and/or strike out, and not pursuing their *Jameel* application (see ***Jameel v Dow Jones & Co Inc*, [2005] QB 946**). The defendant's solicitor also confirmed to the claimant's solicitor in writing that because of this change in position, there was no need for the claimant to serve any evidence in response to the *Jameel* application.

14. In Mr Stables' skeleton argument, and his submissions during the hearing, the scope of the application has been narrowed further. The application for summary judgment and/or to strike is now made on one ground: that the claimant's inferential case on publication does not allow for a finding of substantial publication, or indeed the likelihood of any publication whatsoever. Mr Stables confirmed that the application is now confined to issues of fact, and whether the facts put forward by the claimant provide a platform for there to be an inference of publication. Mr Stables confirmed that the strike out application does not add anything to his primary application for summary judgment.

15. The defendant does not pursue her application in respect of the libel claim on the basis that the claimant has no real prospect of establishing that he has suffered serious harm pursuant to s.1 of the Defamation Act 2013. Nor does she pursue her application in respect of the malicious falsehood claim on the basis that the particulars of claim do not advance a reasonably arguable or properly particularised case under section 3(1) of the Defamation Act 1952.

16. The defendant has not made any application to amend her application notice. In these circumstances, it could be said that the correct approach is simply to strike out the application, on the basis that it is not being pursued. The claimant has not asked me to

take this course, no doubt recognising that both parties are still able to deal with the reframed application at this hearing.

The law in respect of publication

17. The main principles relevant to this application are as follows:

    a. At trial, the claimant must prove that the words complained of were published to some person other than the claimant.

    b. A libel does not require publication to more than one person, per Lord Penzance in ***Capital and Counties Bank v Henty*** **(1882) 7 App Cas 741** at 765.

    c. There does, however, need to be a real and substantial tort. In ***Jameel***, the court struck out a libel claim as an abuse of process where there had been minimal publication and any damage to the claimant's reputation would have been insignificant. The term "substantial publication" is sometimes used as shorthand for there being sufficient publication to establish a real and substantial tort, or "sufficient readers… to justify judgment" per Gray J in ***Al Amoudi v Brisard*** **[2006] EWHC 1062** at [21].

    d. What is "sufficient" "cannot depend upon a numbers game, with the court fixing an arbitrary minimum according to the facts of the case", see Eady J in ***Mardas v New York Times Company*** **[2008] EWHC 3135 (QB)** at [15]. It is well established that very serious harm to reputation can be caused by publication to a small number of publishees: ***King v Grundon*** **[2012] EWHC 2719 [40]** per Sharp J.

    e. With internet publication, there is no presumption of law that there has been substantial publication, ***Al Amoudi*** (supra) at [37].

    f. A claimant may prove publication by calling evidence from a publishee as to having read the words complained of, or by pleading a platform of facts from which the court can infer the likelihood of substantial publication, ***Al Amoudi*** at [33].

    g. In pleading a platform of facts, there must be some evidence on which an inference can be drawn. Eady J noted in ***Carrie v Tolkien*** **[2009] EWHC 29 (QB)** at [18] that "it will not suffice merely to plead that the posting has been accessed "by a large but unquantifiable number of readers". There must be some solid basis for the inference".

The claimant, social media and GBRs

18. The claimant spends around £35,000 a year in respect of his online profile. He has 259,000 follows on Instagram, with his 24 hour stories typically receiving 8,000 views. He has a profile on Realself.com, a dedicated cosmetic surgery site, which received 59,000 views a year. His website received 13,688 visitors in May 2021, 10,418 of which were directed to the site from Google.

19. GBRs are paid for advertising services that appear alongside search results on the Google search and maps websites when relevant search terms relating to the business are entered into the search engine. They provide information about the business, including links to the business' social media profiles and website. On a desktop, the GBR appears on the right-hand side of the screen. The parties have not provided any evidence on how a GBR appears on different types, and size, of mobile device.

20. The GBR also includes "Google reviews", which comprise unverified comments from the public, together with star ratings. Typically, the GBR includes snippets from three reviews. If the user clicks on any of the snippets, they get to see the full review. Alternatively, the user can click on "View all Google reviews" to see all the reviews posted.

21. Owners of a GBR can access data on the number of times it has been "viewed", which means the number of times it has been displayed on a screen. The data provided is for "unique users" per day, and so a user viewing the same GBR multiple times on the same device (on the same day) will only be counted once.

22. The claimant pays for four separate GBRs covering his Manchester, London (Harley Street), Birmingham, and Highgate practices. The claimant has not provided the viewing figures for each of his four profiles. We do know, however, that as of July 2022, the Harley Street GBR had 40 reviews posted onto it, whereas the Manchester GBR had three and the other two GBRs had none, suggesting that the Harley Street GBR receives more user engagement than the others.

23. Owners of a GBR can also access data about the number of "interactions" that users have had with the GBR. Whilst the defendant has provided some material from the Google website about what this means, nobody has checked with Google whether a user clicking on a review, or "view all google reviews", would be included within the number of "interactions". The claimant says it would not. The evidence before the court from Google provides examples of the types of activity that would generate an "interaction" but engaging with reviews is not mentioned as being one of these.

Publication data

24. There is limited data available in respect of the Review, and it appears that the claimant (and his then solicitors) failed to capture the diagnostic data from Google at the time the Review was published.

25. The claimant's pleaded case is that his GBRs were viewed by over 8,000 unique users in the month leading up to 11 June 2021, or an average of 260 per day.

26. The claimant's particulars of claim were unclear whether this was a reference to all four of the claimant's GBRs, or just the London GBR. The claimant's Part 18 response clarified that it is a reference to the London GBR, pleading that the Review (and the words complained of) would have been seen by at least 1,000 people during a four-day period, which is a rough rounding down from 260 views per day.

27. During the hearing, Mr Sherborne also produced a printout from Google in Italian, which I was told had been created on 11 June 2021 and is the basis for the pleaded case.

This printout is not in evidence, nor has the defendant had an opportunity to consider it properly. This is something the defendant had asked for in advance of the hearing, and it is troubling that it was produced so late. If it is, in fact, accurate contemporaneous data, then it appears to show that for the London GBR, during the 28 days up to 11 June 2021, there were 8,329 views, with 6,976 coming from searches.

28. The claimant has served a witness statement from the contractor he engages to manage his website. This confirms the following:

    a. The claimant's GBRs received "an average" of 13,650 views in January 2022. The statement does not explain what has been averaged, for example whether the figure is the average for each GBR.

    b. The claimant's London GBR received 23,074 views between October 2021 and March 2022, and 3,251 interactions. The underlying data from the Google site has been provided and it appears that the data is in fact for a five-month period to the start of March 2022. It shows that 75% of the views were from mobile devices, and 25% from desktops. 95% of views were on Google Search, and 5% on Google Maps. The data also confirms that 8,651 searches triggered the London GBR, and it provides a list of the search terms used. Of these, around 4,822 included the claimant's name (without reference to plastic surgery), with the remainder being searches for various cosmetic surgery procedures, with or without the claimant's name.

    c. Data is not available in respect of views or interactions with the London GBR for the period 21 – 24 May 2021, which is when the Review was available online.

    d. During the period 20-24 May 2021, the claimant's website received a total of 2,347 views, 1,886 of which originated from Google searches.

<u>The defendant's case on the application</u>

29. The defendant's main points are as follows:

    a. The Review was online for just three days. The claimant has not produced any evidence of there being even a single publishee, and his case is wholly inferential.

    b. The default setting for GBRs provides for snippets of the three "most relevant" reviews to be displayed, rather than the three most recent. There is no evidence before the court of any user having seen the Review included within those snippets. In fact, the screenshots in evidence taken on 15 March 2022, 7 June 2022 and 17 November 2022 all show the same three snippets, two of which are three years old, and one of which is a year old.

    c. For a user to have seen the Review they would have had to have the GBR displayed in response to a search result, looked at the GBR (rather than the list of search results), clicked on the "View all Google reviews" button, and then scrolled through, or re-ordered, the reviews displayed.

d. If, contrary to the defendant's case, the Review had been included in the snippets, it is said that it is very long and there is no reason to think that the snippet used would have been taken from the words complained of.

e. It is for the claimant to prove publication and his (former) solicitors failed to capture the relevant data. There will not be further data available at trial, and so the court is in as good a position to determine the matter now. It is fanciful to think that a publishee will emerge.

f. The defendant's former solicitor has also produced evidence that 14 hours after being posted, nobody had "liked" the Review.

g. At its highest, the data suggests that the defendant's London GBR received 21 interactions per day, which would mean around 60 interactions over three days (calculated from the figure of 3,251 interactions over five months).

The claimant's case on the application

30. The claimant's main points are:

a. The claimant's pleaded case in his Part 18 response is that GBRs include snippets of the three most recent reviews, rather than the most relevant. His case is that people who viewed his GBR would, therefore, have read the words complained of.

b. There is more than a sufficient platform of facts from which to infer publication. The words complained of were published to a substantial (but unquantifiable) number of people in England & Wales. The London GBR was viewed by over 8000 users in the month leading up to 11 June 2021, which is approximately 250 or more unique users per day.

c. The claimant has a targeted online presence. Most users were viewing the claimant's profile for the purposes of considering whether to engage and/or continue with his services as a specialist medical consultant. They would have wanted to read the reviews. The number of reviews on the London GBR has increased from 28 (shown in the defendant's evidence from the time of publication) to 40, suggesting that this is an active feature. The claimant says in his statement that in his experience online reviews are the primary way potential patients decide whether to book his kind of surgery, and they are a major influence in the decision-making process. He has produced a witness statement from a member of his staff that says patients asked how came to clinic will "frequently mentioned (sic) review sites such as Googlereview, Realself and Trustpilot when they come in for consultations". He also accepts that "word of mouth" from patient to patient is a "significant factor" and seeks to amend his pleading to include re-publication via the grapevine.

d. He cannot identify potential customers who have been lost as a result of the Review, because he does not know who they are. However, his business dropped off following the Review and he has provided evidence he says shows

there was a significant dip after June 2021. Even one lost customer would be significant, given the average spend, and serious harm to reputation could be caused by a single publication.

e. There will never be actual data about who read the Review. The only data available is for views and interactions, and interactions do not include reviews.

The law on summary judgment

31. CPR rule 24.2 provides that the court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if:

"(a) it considers that—

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial".

32. The approach to be taken when considering a defendant's application for summary judgment applications was summarised by Lewison J in ***Easyair Limited (Trading As Openair) v Opal Telecom Limited*** **[2009] EWHC 339 (Ch)** at [15] (citations removed):

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.

iii) In reaching its conclusion the court must not conduct a "mini-trial".

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all

the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

Discussion – summary judgment

33. The defendant now seeks summary judgment on a very narrow basis, namely that there has been no publication, or alternatively no substantial publication.

34. There is no difficulty as a matter of principle with a defendant seeking summary judgment on the basis that there has been no publication whatsoever of the words complained of within this jurisdiction.

35. There is, however, a problem with the way in which the defendant also seeks to rely on there being no "substantial publication". As already noted, this is a concept that arises out of *Jameel:* the court is not simply looking at numbers, but whether there has been sufficient publication to constitute a real and substantial tort. The defendant has said, however, that she is not pursuing a *Jameel* application, even going so far as to tell the claimant's lawyers that they do not need to prepare evidence on this aspect.

36. This makes it difficult for the defendant to now seek to rely on cases in which the principles of Jameel were applied. For example, the defendant has drawn my attention to ***Webb v Jones*** **[2021] EWHC 1618 (QB)**, where it is said there was stronger evidence of publication online, but nevertheless the case failed on the basis of "substantial" publication. In *Webb*, however, the court was however looking very much at whether there has been "substantial" publication, within the context of *Jameel* (see [34] and [51]).

37. It would of course been open to the court to consider issues of publication in the context of a wider application for summary judgment/strike out in respect of s.1 (for the libel claim) and s.3(1) (for the malicious falsehood claim). The extent and nature of publication is usually a material factor to be considered as part of such applications. However, the application has not been pursued on this basis.

38. This is a summary judgment application. I am not making final findings of fact on the extent of publication. I am simply determining whether the defendant has established that the claimant does not have a realistic prospect of success on this issue. This does not require the same level of precision when considering the extent of publication, which is ultimately a matter for trial.

39. This is a case where it is unlikely that the claimant will be able to produce evidence of potential customers that have been lost because of the Review. Instead, he has been able to produce evidence on the number of times that the relevant GBR was viewed, from which it appears that during the relevant time the GBR would have been seen by a reasonably significant number of people. The claimant has produced evidence, which can be tested at trial, about the way in which he obtains business, and the importance of online reviews. It is not fanciful for him to say that a significant proportion of the people who saw the London GBR would have been online to find information about prospective plastic surgeons, and would have perused the online reviews, especially the negative ones.

40. I disagree with the defendant when it is said that there will not be further information available at trial. I accept there may not be more data from Google, or indeed any data on how the GBR reviews were accessed. There is, however, likely to be further evidence for trial about how reviews on GBR are used, and the reliance placed on them by the claimant's customers.

41. I am satisfied that the claimant has a realistic prospect of success in establishing a platform of facts on which to infer publication.

42. The application for summary judgment is, therefore, dismissed.

Pleading amendments

43. There is also a contested application by the claimant for permission to amend his Particulars of Claim. The application does not affect my decision in respect of summary judgment.

44. The application needs to be considered by reference to the overriding objective: ***Salt Ship Design AS v Prysmian Powerlink SRL*** **[2019] EWHC 2308 (Comm)**, [65]-[68], and will include consideration of the list of factors identified by Lambert J in ***Pearce v East and North Hertfordshire NHS Trust*** **[2020] EWHC 1504 (QB)** at [10].

45. This is an application made at an early stage in proceedings. Whilst pleadings have closed, Nicklin J has identified deficiencies with the Defence (which was not drafted by Mr Stables) and so it seems likely that this will be re-pleaded. Disclosure and inspection have not yet taken place, and a trial date has not been set. Allowing the amendments is unlikely to disrupt the timetable for these proceedings.

46. The claimant says he will be prejudiced if he is denied the opportunity to amend his pleadings. Mr Sherborne says that the court simply needs to be satisfied that the amendments disclose an arguable case, and it is not for the court to consider at this stage whether the amendments have a realistic prospect of success. He says that most of the amendments relate to the claimant's own alleged behaviour, and she will not be caused any prejudice or injustice if permission to amend is granted. The claimant will accept the usual order as to the costs of the amendments.

47. The dispute around amendment focusses primarily on a new section 4A of the Particulars of Claim, in the following terms:

"Republication or repetition of the sting of the words complained of

4A The claimant will contend that the defendant has repeated or republished the sting of the words complained of to a substantial (but as yet identified pending disclosure or the provision of further information by the defendant) number of other individuals with the same (or substantially the same) meaning as referred to in paragraph 4 above. The claimant will invite the court to infer this from the following facts and matters, as contained in the Fourth statement of the claimant dated 21 November 2022.

4A.1 On or about 11 October 2022 the Defendant repeated the sting of the words complained of to Ffyona McKeating the owner and director of the Consultant Clinic, which is a highly successful international chain of aesthetics clinics including in Manchester, London, Los Angeles, Miami, New York and Dubai. The claimant will refer to the fact that she had previously been contacted by the defendant's private investigator, Marzio D'Alessandro, who had told her that the defendant had been making accusations against the claimant and had been instructed to contact Ms McKeating in order to find out information about the claimant.

4A.2 On or about 27 October 2022 the Defendant repeated the sting of the words complained of to Antonella Mariconda, the founder of "Safety in Beauty" which is a highly influential organisation which gives accreditation to plastic surgeons and aesthetics practitioners. The claimant will refer in support of this contention to the fact that Ms Mariconda recognised the identity of the defendant through a newspaper article published in The Sun dated 18 September 2021 which specifically referred to the Defendant's allegation, as well as these proceedings that the claimant has brought against her".

4A.3 On or about 25 May 2021, the defendant sent an email to Gemma Collins (whose name is expressly referred to in the words complained of as a patient of the claimant who supposedly provided a fake review in return for half-priced medical treatment) in which she repeated the sting of the words complained of.

4A.4 Further, and for the avoidance of any doubt (as referred to in Response 6 to the defendant's request for further information dated 3 February 2022) the claimant also relies upon the "grapevine effect" namely the inherent and accepted probability of defamatory allegations to circulate far more widely that the original publishees, as a result of which the sting of the words complained of would have been and was repeated or republished".

48. If permission to amend is granted, these new paragraphs would be incorporated by reference into the existing pleaded particulars of harassment (paragraph 15.1) and the pleaded case in respect of general and aggravated damages (paragraph 12.1). The claimant also seeks permission to amend to rely on these new paragraphs in respect of malice at the time of publication (proposed new paragraph 9.13) and serious harm (proposed new paragraph 6.5).

49. The claimant has produced evidence in support of the proposed amendments in the form of a seven page statement from the claimant, setting out what he says Antonella Mariconda and Ffyona McKeating told him. In summary:

a. The claimant says he was contacted by Antonella Mariconda in October 2022 by WhatsApp. He says she emailed him a link to a photo of the defendant and an article in the Sun. They spoke and he claims that Antonella Mariconda said that the defendant had made "numerous allegations" against him in passing. She also reported that the defendant had made complaints about another company operated by Ffyona McKeating.

b. The claimant then contacted Ffyona McKeating who told him that she had similar problems with the defendant and was happy to assist. She said she had been contacted by the defendant's private investigator, who told her that the claimant was accused of "butchering" his patients. He reports that Ms McKeating told him that the defendant had also said that he paid celebrities to give false reviews.

c. Antonella Mariconda later wrote to the claimant to explain that her organisation was no longer endorsing his business. The email sets out concerns about the claimant having breached patient confidentiality, and that "many former patients" had been in touch to express concerns, including in the way in which complaints are handled. The email raised wider concerns about whether the claimant conducts himself in accordance with the standards expected by the GMC.

50. There is also a four-page statement from Antonella Mariconda, served by the defendant. This says that it was the claimant who kept calling her to discuss the defendant, and it was only through him that she came to have any understanding of who the defendant was. She refused to provide a statement to the claimant in support of his claim. She says the defendant has not repeated the words complained of to her. The decision to suspend an award to the claimant and remove his listing from her website was taken following complaints from other patients, not the defendant.

51. The claimant says that limbs 4A.1 – 4A.3 are relied upon as examples of repetition by the defendant of the sting of the words complained of. Mr Sherborne has clarified that these matters are not being pleaded as fresh causes of action. He says that they are relevant to the assessment of damages flowing from the original publication and so need to be particularised. He also says the pleaded examples are relevant to the issue of serious harm, malice, and the claim for harassment.

52. The defendant objects to these amendments on the basis that this is not a permissible form of pleading. Mr Stables points out that the three examples given of "repetition" are, in fact, separate publications, and are statute barred. Furthermore, he says that the claimant has not pleaded the examples with specific particularity, and that for the most part they do not evidence repetition of the words complained of, but instead contain other criticisms of the claimant.

53. The claimant says that Limb 4A.4 is not an example of repetition by the defendant, but instead relates to the likely percolation of the words complained of beyond the original publishees. The defendant objects to the inclusion of this limb on the basis that there is no evidence to support the claim pleaded.

Paragraph 4.A4

54. The legal basis for the pleading of a "Grapevine effect" was summarised by Nicklin J in ***Turley v Unite the Union and another*** **[2019] EWHC 3547(QB) "**In an appropriate case, a Claimant can also rely upon the likely 'percolation' or 'grapevine effect' of defamatory publications, which has been "immeasurably enhanced" by social media and modern methods of electronic communication: Cairns -v-Modi [2013] 1 WLR 1015 [26] per Lord Judge LCJ. In the memorable words of Bingham LJ in Slipper -v-British Broadcasting Corporation [1991] 1 QB 283, 300: "... the law would part company with the realities of life if it held that the damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs."

55. I am satisfied it is permissible for the claimant to amend to plead a case by reference to the "grapevine effect". This is potentially relevant to his claim on publication, in establishing serious harm. He will need to produce evidence in respect of such a claim, either of actual republication or of a platform of facts from which this can be inferred. No prejudice would be caused to the defendant by this amendment.

56. I do not, however, give permission for the pleading to be amended in the form in which it is currently drafted. Whilst there is no difficulty with the wording of sub-paragraph 4A.4 itself, it clearly does not fit with the overarching paragraph 4A, which relates to the defendant's repetition of the gist of the words complained of. Paragraph 4A.4 needs to be included as a standalone paragraph.

Repetition

57. The application for permission to amend to include paragraphs 4A and sub-paragraphs 4A.1 – 4A.3 is less straightforward.

58. As noted, the claimant is not seeking to plead the repetition as additional causes of action (which would in any event be statute barred). He is also not saying that the third parties identified read the Review, and then as a result repeated the words complained of to others. There is no causal link identified between the original publication of the Review, and the repetition by the defendant to third parties of the words complained of.

59. The claimant has chosen to sue on just part of the Review and his pleaded meaning is focussed on the article suggesting he had been responsible for a fraudulent scam by which he purchased positive reviews from celebrities. The matters upon which the claimant now seeks to complain (by way of repetition) are much wider and look at issues around the quality of the claimant's work and the way in which he handles complaints. These matters appear heavily contested.

60. It is slightly unusual to have a claimant who has been careful to limit the issues in the case seeking to broaden them out, and a defendant who has a lot to say about the wider issues, opposing the introduction of those amendments.

61. I need to consider this application by reference to the overriding objective. I note the requirement that cases are managed justly and at proportionate cost, which includes

ensuring that the parties are on an equal footing and can participate fully in proceedings, saving expense and dealing with the case in ways which are proportionate to the importance of the case and the complexity of the issues.

62. If I was solely looking at this in terms of aggravation of damage, then I would be concerned that these additional particulars might add to the issues in the case unnecessarily, particularly to the extent it might introduce a need to consider the adequacy of the services provided by the claimant. I think it would arguably be disproportionate to allow the case to be broadened in this way.

63. This material is not, however, just relied upon in respect of aggravation of damages. It is clearly relevant to the claim for harassment and so would need to be particularised. Within that claim, the court will already be having to consider the extent to which the defendant's actions were reasonable, which will in turn require some consideration of the defendant's wider views of the service she received from the claimant.

64. The claimant also seeks to rely on the repetition material, to the extent that it evidences malice on the part of the defendant at the time that the Review was published.

65. In these circumstances, the additional material will need to be before the court in some form in any event. It will not prejudice the defendant if I allow the proposed amendments, and it would be somewhat artificial to seek to consider aspects of the claimant's claim without this information being before the court. For these reasons, the amendments are allowed.

66. There is also a dispute in respect of paragraph 6.3

67. The claimant's pleaded meaning (paragraph 4) is "in their natural and ordinary meaning, and when taken in the context of the Post as a whole, the words or statement complained of meant and were understood to mean that the claimant had been perpetrating a fraudulent scam whereby he provides half price cosmetic surgical procedures to celebrities in exchange for them posting false social media reviews promoting his services to the general public".

68. The proposed amendment to 6.3 is: "the fact that, <u>as is relied upon by way of context for the meaning of the words complained of as referred to in paragraph 4 above</u>, the Post refers to the risk that these celebrities, such as Gemma Collins, who falsely promote his services (as alleged) are thereby "draw[ing] in people" who "could die" as a result.

69. The claimant says that there has been no attempt to strike out existing paragraph 6.3 and the proposed amendment is simply to make clear the basis upon which the case in paragraph 6.3 is put. The defendant takes issue with the proposed amendment, noting that the claimant has pleaded a meaning, and it is not possible to plead context by reference to words that are not complained of.

70. It seems that the defendant's real complaint is with the existing wording of the paragraph. The amendment simply clarifies what the claimant is saying, rather than adding to it in any material way. The amendment should be allowed on this basis.

71. There are no substantive objections to amendments to lead paragraph 6 and sub-paragraph 6.8 (particulars in respect of serious harm), paragraph 10 (tendency to cause pecuniary damage in respect of malicious falsehood), paragraph 15 (updating particulars in respect of harassment claim). Permission to amend is granted in respect of these.