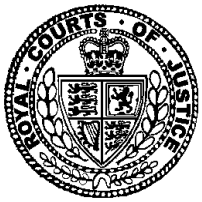

Neutral Citation Number: [2020] EWHC 2162 (QB)

Case No: QB-2019-000086

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

SANG YOUL KIM	**Claimant/ Respondent**
- and -	
SUNGMO LEE	**Defendant /Applicant**

- -
- -

Richard Roberts (instructed by **Andrew & Law Solicitors**) for the **Claimant/Respondent**
Christopher Jacobs (instructed by **Murray Hay Solicitors**) for the **Defendant/Applicant**

Hearing dates: 26 June 2020

- -

Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. In this claim the Claimant sues the Defendant for libel. There is before me an application by the Applicant/Defendant to strike out the claim under CPR r 3.4(2) and/or the Court's inherent jurisdiction. The Respondent/Claimant resists the application.

2. For clarity, in this judgment I will refer to the Applicant as the Defendant and to the Respondent as the Claimant. They are both Korean by birth, although the Claimant is now a British citizen.

3. At the relevant time the Claimant and the Defendant were based in England and worked as sports journalists covering, in particular, English Premier League football for South Korean media outlets. The Claimant was also a church pastor in New Malden, Surrey, which is an area with a significant Korean population. The Claimant and the Defendant covered stories that were of interest in South Korea, for example, the career of the Tottenham Hotspur striker and South Korean international Son Heung-min. They also covered Korean-related football stories in other countries.

4. The Claimant's claim relates to eight comments/stories posted on two social media accounts by the Defendant between 6 - 11 December 2018, to the effect that the Claimant is a serial cheat and fraudster. In summary, the Claimant's case is that the Defendant accused him (*inter alia*) of making up stories, or misrepresenting the true factual position (eg, that he was present at interviews, or had conducted interviews, when he had not and did not), and so alleged that he was guilty of misleading and defrauding readers.

5. The posts went on to allege that this was the third consecutive year that such activity had been undertaken by the Claimant. Other allegations were made, including that the Claimant had fraudulently obtained access for friends of his to press zones at English professional matches, and that the Claimant had lied to an English football official.

6. Among the defamatory pleaded meanings is that the Defendant's comments meant that the Claimant is a 'criminal' who 'cannot be trusted' and that he has written articles that are 'riddled with lies'. The Particulars of Claim make reference to words in Korean that are variously translated as 'accuse'/'accusation' or 'prosecute'/'prosecution' and suggest that the Defendant wrote that he would criminally prosecute the Claimant. Other defamatory meanings are also pleaded.

7. The Defence admits publications of four articles on each of two Korean social media platforms. There is a specific accusation that the Claimant wrote an article that made it appear he had been present when Mr Son was interviewed following a match when in fact the Claimant was not in the UK at the time.

8. The Defence takes issue with the Claimant's pleaded Particulars of Claim, including how certain words (including those I have mentioned) have been translated. Defamation is denied. Truth is pleaded (DA 2013, s 2), as well as honest opinion (s 3) and public interest (s 4). Serious harm is denied (DA 2013, s 1).

Procedural history

9. The Claim Form and Particulars of Claim were issued on 10 January 2019. The Defendant's address was given in London N12. The proceedings were served personally by the Claimant's solicitor on the Defendant in the UK. A Defence and a Reply were served thereafter. In April 2019 there was an application by the Defendant to strike out parts of the Claimant's Reply. A CCMC was held before Master Davison on 11 June 2019, at which directions were made for disclosure and witness statements. An order was also made for the joint instruction of a translator. These directions have been completed, save for joint instruction of a translator, in relation to which the parties have identified an appropriate translator to instruct, should the matter proceed to trial. The trial was listed for 15-18 June 2020, but that has now been adjourned. A new trial window has been set for 1 October – 13 November 2020.

10. The Defendant's application to strike out the claim was issued on 15 March 2020, approximately 15 months after the claim was served and only three months before the trial was originally listed. The application also sought other relief. These have been dealt with and so I am only concerned with the strike out application

The strike out application

The Defendant's submissions

11. The application is brought under CPR r.3.4(2) and/or the court's inherent jurisdiction, on the basis that the statement of case discloses no reasonable grounds for bringing the claim and/or because it is an abuse of process. Paragraph 1 of the Defendant's Skeleton Argument sets out four arguments in support of the application.

12. Firstly, the Defendant submits that he was not at the relevant time domiciled in the UK or in another (EU) Member state, or in a state which was for the time being a contracting party to the Lugano Convention. He further submits that England and Wales is not clearly the most appropriate place in which to bring a defamation action against the Defendant. Hence, he argues that by virtue of s 9 of the DA 2013, this Court has no jurisdiction to try the claim. I will call this 'The Section 9 Point'.

13. Second, he submits that the Claimant can achieve no worthwhile vindication in the proceedings as the Defendant has been publicly vindicated by the South Korean authorities ('The Public Vindication Point').

14. Third, he says that the action is an abuse of process because the Claimant reported the alleged libels to the authorities in South Korea who declined to take any action. He therefore says it is an abuse of process to allow the Claimant to bring his claim where the authorities in the natural forum have rejected it ('The Abuse of Process Point').

15. Fourth, he argues that the Claimant cannot establish a 'real and substantial tort' within the jurisdiction of England and Wales. The matter is a South Korean matter and has been dealt with by the prosecuting authorities in South Korea, the determination of which is in the public domain and has been published extensively in social media and in South Korean news articles. He says, in essence, that this claim is incapable of achieving anything of value for the Claimant and so is an abuse of process and he relies on *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946, [53], and *Ames v Spamhaus Project Ltd* [2015] 1 WLR 3409, [58] ('The *Jameel* Point').

16. The second, third and fourth arguments are interlinked.

The Claimant's submissions

17. The Claimant submits in response that there is clear evidence that the Defendant was domiciled in the UK at the date the proceedings were issued, or that it is at least arguable that that was so. He therefore says that s 9 does not apply. But even if the Defendant was not domiciled here, the Claimant submits that whether England and Wales is clearly the most appropriate venue is a matter for trial.

18. Second, the Claimant says that he has not been publicly vindicated in South Korea and that there is ongoing harm to his reputation in the UK.

19. Third, he says that what occurred in South Korea following his criminal complaint was sufficiently different that it has no bearing on the libel proceedings in the UK and does not render them an abuse of process.

20. Fourth, he maintains that he has suffered and will continue to suffer serious harm in the UK to his reputation because of the Defendant's allegations. A real and substantial tort has been committed here and the Defendant's publications were widely read among the Korean community. Among other things, he has been shunned by members of his church and by some of his journalist colleagues, he has lost his sports column, and has suffered harm within the jurisdiction.

The Defendant's evidence

21. On 23 June 2020 a second witness statement was served by the Defendant, in which he asserted, for the first time, that he was not domiciled in this jurisdiction at the time claim was issued in January 2019.

22. In [1(1)] of that statement he admitted that he was living in the UK at the time of publication, but denied being domiciled here. Later, at [9] he admitted having lived in the UK from 2015 to 2019. He said that he always worked with South Korean companies; frequently travelled there; never got permanent leave to remain here; and never applied for British citizenship. He also maintained that all the postings complained of on social media were aimed at Korean readers and that only a tiny minority (less than one per cent) of his followers who read them were in the UK. He said this is 'truly and fundamentally a South Korean case'. He pointed out that the Claimant has made three complaints in Korea (including a criminal case) which have not been taken up by the Korean authorities. He said the Claimant's appeal to the High Korean Prosecution Service had been rejected. He said this was evidence the Claimant regards Korea as the proper venue for his complaint. At [1(8)] he said he has obtained statements from Koreans living in the UK who are aware of the case. He says it is an abuse of process for the Claimant to have a 'second go' when, according to the Defendant, what he wrote has been determined in Korea not to be defamatory.

The Claimant's evidence

23. In summary, the Claimant's position in reply relation to the application in its most recent formulation is as follows:

    a. The evidence (including the Defendants' own witness statement) shows that the Defendant was domiciled in the UK when the claim was served. Furthermore, instead of challenging jurisdiction, he accepted it by serving his Defence.

    b. Section 9 of the 2013 Act is therefore of no application (but even if it did apply, the evidence shows that this jurisdiction is most appropriate).

    c. Insofar as it the application is also put on the alternative bases in the Defendant's first statement, it falls short of showing, with the clarity sufficient for strike out, that the claim is an abuse of process, whether on the grounds that the Claimant has no reputation to protect here, because he has suffered no serious harm and/or that no substantial tort has been committed. The Claimant and his solicitor have made witness statements explaining the various ways in which the Claimant has suffered harm including losing his sports column; being shunned by members of his church; as well as in other ways.

Discussion

The test to be applied on a strike out application

24. CPR r 3.4 provides:

> *"3.4 Power to strike out a statement of case*
>
> (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

25. The test to be applied is well understood and set out in the White Book 2020 in the notes to CPR r 3.4.

26. Statements of case which are suitable for striking out on CPR r 3.4(2)(a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (*Harris v Bolt Burdon* [2000] CP Rep. 70). A claim or defence may be struck out as not being a valid

claim or defence as a matter of law (*Price Meats Ltd v Barclays Bank Plc* [2000] 2 All ER (Comm) 346, Ch D). However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (*Farah v British Airways*, *The Times*, 26 January 2000, *CA* referring to *Barrett v Enfield BC* [1989] 3 WLR 83). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown*, 19 January 2000, unrep., CA). An application to strike out should not be granted unless the court is certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004] EWCA Civ 266*;* (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts)).

27. Ground (c) covers cases where the abuse lies not in the statement of case itself but in the way the claim or defence (as the case may be) has been conducted.

28. *Gatley on Libel and Slander* (12th Edn), [30.38], says that when considering a strike out application in a libel case:

> ",,, the court will assume the truth of facts which appear from the pleadings to be common ground, but in the case of facts which are in dispute, the court must act on the assumption that the facts are correctly stated in the statement of case which is under attack."

29. In *Ames*, supra, [23], [27]-[34] Warby J summarised the *Jameel* abuse of process jurisdiction as follows

> *"*23. The defendants' application was issued the day after service of the claimants' Further Information. The application to strike out the libel claims as an abuse is made pursuant to CPR 3.4 and/or the inherent jurisdiction in reliance on the principles first established in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946. The grounds stated in the application notice are that:
>
> > "(a) the claimants have no significant connection to this jurisdiction and do not have a substantial reputation to protect here, and therefore cannot establish a real and substantial tort within this jurisdiction …
> >
> > (c) the claim in libel is otherwise an abuse of process as it does not serve the legitimate purpose of protecting the claimants' reputations and/or there is no realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources".
>
> …..
>
> *The* Jameel *jurisdiction*

27. In *Jameel* a serious accusation, that two people were funding terrorists, appeared on a US website for some 4 days after which it was archived and later removed altogether. The claimant, who was from outside England and Wales, sued the US-based publisher for libel. The claim was in respect of publication in this jurisdiction only. It was later discovered that only five people here had ever accessed the website while it was live. Three of these were "in the claimant's camp", one being his solicitor. The defendants were able to contact the other two, neither of whom knew the claimant or could recall reading his name. The Court of Appeal held that the claim should be struck out as an abuse of process.

28. The court held that the principles relevant to an application to set aside permission to serve out of the jurisdiction were also relevant to the jurisdiction to strike out a claim as an abuse. The question of whether "a real and substantial tort had been committed within the jurisdiction" had been identified as a threshold criterion in the former context, but was also relevant to an application to strike a claim out as an abuse. Hence the wording of paragraph (a) of the defendants' application notice. The court identified the CPR as one development which had made the court readier to strike out a libel action as an abuse, and the Human Rights Act 1998, s 6, as the source of a duty to do so where the claim represented an unwarranted interference with the Convention right under Article 10. At [55] Lord Phillips MR said that:-

> "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."

It is these concluding words that are the source of the first part of para (c) of the defendants' application notice.

29. Other relevant and well-known formulations of the test for striking out defamation proceedings as an abuse of process, cited with approval by the Court of Appeal in *Jameel* at [57] and *Cammish v Hughes* [2012] EWCA Civ 1655 at [56], are those of Eady J in *Schellenberg v BBC* [2000] EMLR 296. He identified the relevant questions as whether "the game was worth the candle" or whether "there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court

resources." The latter is the source of the wording in the second part of paragraph (c) of the defendants' application notice. At the heart of this formulation and that of the Court of Appeal in *Jameel* at [55] are the familiar notion of proportionality and the need to balance competing rights and interests.

30. To test whether the claim in *Jameel* was an abuse according to these criteria the Court of Appeal examined the extent to which continued pursuit of the action could be justified as a vehicle for obtaining vindication of the claimant's reputation, or on the grounds that an injunction to prevent repetition was required. Vindication is an important purpose of a libel action and the court accepted at [59] that vindication was the claimant's purpose. However, it held at [69] that it was not legitimate to use a claim in respect of publication here as a means of achieving wider vindication. The costs of obtaining such minimal vindication in respect of publication here as the claimant might achieve at a trial were out of all proportion to the value of such vindication. Permission to serve proceedings outside the jurisdiction would have been refused, and for the same reason the claim represented an abuse.

31. The court dealt with the injunction issue at [72]-[76]. It was common ground that the only injunction that could be sought was one prohibiting publication in this jurisdiction. The court held that where minimal publication had occurred but there was "a threat or real risk" of wider publication there might be a justification for pursuing proceedings to obtain an injunction against republication. However, the court did not see any risk that the same or similar publication would recur and found it difficult on the facts of the case to envisage how a court might formulate an injunction of value at trial.

32. The question of what threshold test must be satisfied in order to justify the grant of an injunction received further consideration by the Court of Appeal in *Citation plc v Ellis Whittam Ltd* [2013] EWCA Civ 155, where the court approved tests of good ground to fear, or good ground to infer, that unless a satisfactory undertaking was given the statements would be made again: see [18] and [30].

33. The *Jameel* jurisdiction has been exercised quite frequently in libel actions. Recent examples referred to by the parties on this application include *Subotic v Knezevic* [2013] EWHC 3011 (QB) and *Karpov v Browder* [2013] EWHC 3071 (QB), [2014] EMLR 8. The jurisdiction is however exceptional; the assessment of whether a real and substantial tort has been committed is not a "numbers game"; even publication to a single individual can be highly damaging and make a substantial and costly libel action proportionate: *Haji-Ioannou v Dixon* [2009] EWHC 178 (QB), [30]-[31] (Sharp J). A tweet published to 65 people can justify a substantial five figure award of damages: *Cairns v Modi* [2013] 1

WLR 1015, CA. Similarly, internet publication to 550 people: *Times Newspapers Ltd v Flood* [2014] EWCA Civ 1574.

34. The *Jameel* principles are not solely applicable to claims in libel but are of general application: see *Sullivan v Bristol Film Studios Ltd* [2012] EWCA Civ 570, where a claim for infringement of copyright was dismissed. *Sullivan* also serves as a reminder, however, of why the jurisdiction is exceptional: it is a strong thing for a court to strike out a claim on proportionality grounds if it has at least arguable merit, and the court must be alive to the risk that it might unjustifiably deprive a claimant of access to justice. The claim in *Sullivan* could have been allocated to the Patents County Court had its true value been recognised in time. As Lewison LJ observed at [29] and [35] (with the agreement of Etherton and Ward LJJ):-

> "29. ….The mere fact that a claim is small should not automatically result in a court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process.
>
> … When in future a judge is confronted by an application to strike out a claim on the ground that the game is not worth the candle he or she should consider carefully whether there is a means by which the claim can be adjudicated without disproportionate expenditure."

30. Nicklin J recently summarised the relevant principles on *Jameel* abuse in *Alsaifi v Trinity Mirror Plc* [2019] EMLR 1, [36]-[38] and [44]-[45]:

> "36. The Court has jurisdiction to stay or strike out a claim where no real or substantial wrong has been committed and litigating the claim will yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and use of court procedures: in other words, 'the game is not worth the candle': *Jameel* [69]–[70] per Lord Phillips MR and *Schellenberg v BBC* [2000] EMLR 296, 319 per Eady J. The jurisdiction is useful where a claim 'is obviously pointless or wasteful': *Vidal-Hall v Google Inc* [2016] QB 1003 [136] per Lord Dyson MR.
>
> 37. Striking out is a draconian power and it should only be used in exceptional cases: *Stelios Haji-Ioannou v Dixon* [2009] EWHC 178 (QB) [30] per Sharp J.

> 38. It is not appropriate to carry out a detailed assessment of the merits of the claim. Unless obvious that it has very little prospect of success, the claim should be taken at face value: *Ansari v Knowles* [204] EWCA Civ 1448 [17] per Moore-Bick LJ and [27] per Vos LJ.
>
> …
>
> 44. At the heart of any assessment of whether a claim is *Jameel* abusive is an assessment of two things: (1) what is the value of what is legitimately sought to be obtained by the proceedings; and (2) what is the likely cost of achieving it?
>
> 45. … it is clear … that this cannot be a mechanical assessment. The Court cannot strike out a claim for £50 debt simply because, assessed against the costs of the claim, it is not 'worth' pursuing. Inherent in the value of any legitimate claim is the right to have a legal wrong redressed. The value of vindicating legal rights – as part of the rule of law – goes beyond the worth of the claim. The fair resolution of legal disputes benefits not only the individual litigants but society as a whole."

The Section 9 Point

31. The relevant parts of DA 2013, s 9, provide:

> "(1) This section applies to an action for defamation against a person who is not domiciled -
>
> (a) in the United Kingdom;
>
> (b) in another Member State; or
>
> (c) in a state which is for the time being a contracting party to the Lugano Convention.
>
> (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.
>
> …
>
> (4) For the purposes of this section-
>
> (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation …".

32. The Brussels Regulation' and 'the Lugano Convention' are defined in s 9(5), to which the reader is referred.

33. Paragraph 9(1)(2) of Sch 1 to the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929) (the Jurisdiction Order) provides that a person is domiciled in the UK for the purposes of the Brussels Regulation if and only if:

    a. he is resident in the UK; and

    b. the nature and circumstances of his residence indicate that he has a substantial connection with the UK.

34. The relevant date at which domicile needs to be established pursuant to s 9(1) is the date the claim was issued: see *High-Tec International v Deripaska* [2007] EMLR 15, [5]; *JSC BTA Bank v Ablyazov* [2016] 3 WLR 659, [31].

35. The Defendant maintains that he was not domiciled in the UK at the time the claim was issued, and that England and Wales is not clearly the most appropriate place to bring an action. Hence, he says that I should strike out the claim on the basis the Court lacks jurisdiction.

36. I disagree. The evidence at least arguably supports the contention that the Defendant was domiciled in the UK on the relevant date. In fact, I would go further and say that it very strongly, if not conclusively, demonstrates that that was the case. Hence, at the very least, whether this Court lacks jurisdiction under s 9 is a matter for trial.

37. In his Skeleton Argument the Defendant cites cases such as *Udny v Udny* (1869) LR1 Sc& Div 441, 458, where Lord Westbury stated:

> "Domicile of choice … must be a residence not for a limited period or particular purpose, but general and indefinite in its contemplation."

38. Reliance on such authorities is misplaced. As I have said, the question of domicile for the purposes of s 9 of the DA 2013 is a statutory test as set out in [9] of the Jurisdiction Order. Cases from 1869 on the question of what domicile meant then are accordingly of no assistance.

39. I reviewed the law on domicile in relation to s 9 in *Al-Sadik v Sadik* [2019] EWHC 2717 (Admin), [61] et seq. My summary was gratefully adapted from the judgment of Carr J in *Tugushev v Orlov* [2019] EWHC 645 (Comm), [116]-[126].

40. The first issue arising under [9] of the Jurisdiction Order is that of 'residence'. That is an ordinary English word and should be given its ordinary meaning: *Cherney v Deripaska* [2007] EWHC 965 (Comm), [19]; *Bestolov v Povarenkin* [2017] EWHC 1968 (Comm), [36].

41. In *Levene v Commissioners of Inland Revenue* [1928] AC 217 (in the context of assessing residence for tax purposes), Viscount Cave LC defined 'residence' as follows (at p222-3):

> "My Lords, the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place."… In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure… Similarly a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here … But a man may reside in more than one place. Just as a man may have two homes – one in London and the other in the country – so he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country."

42. In *Dubai Bank Ltd v Abbas* [1997] ILPr 308, Saville LJ cited *Levene* as the appropriate authority for assessing residence in the jurisdiction context (at [10]-[11]):

> "[10] … On the basis of *Levene* it seems to me that a person is resident for the purposes of section 41(3) in a particular part of the United Kingdom if that part is for him a settled or usual place of abode.
>
> [11] A settled or usual place of abode of course connotes some degree of permanence or continuity. In his judgment Potter J said that section 41(6) suggested that the threshold for residence under the 1982 Act was low. With respect, I do not find any such suggestion in this sub-section. It is true that the sub-section provides a rebuttable presumption of "substantial connection" if the residence has lasted for the last three months or more, but it provides no guidance on the question whether or not the person has become resident. Depending on the circumstances of the particular case time may or may not play an important part in determining residence. For example, a person who comes to this country to retire and who buys a house for that purpose and moves into it, selling all his foreign possessions and cutting all his foreign ties, would to my mind be likely to be held to have become immediately resident here. In other cases it may be necessary to look at how long the person concerned has been here and to balance that factor with his connections abroad. Since the answer to the question depends on the circumstances of each case, I did not find the other authorities cited to us of any real assistance."

43. In *Varsani v Relfo Ltd* [2010] EWCA Civ 560, the Court of Appeal considered the question of residence in circumstances where the defendant claimed to be domiciled in

Kenya (the location of his business) but came to stay for four to eight weeks a year at a London address where his wife, children, parents and sister lived. Etherton LJ stated at [27]-[29]:

> "27. Whether a defendant's use of a property characterises it as his or her 'residence', that is to say the defendant can fairly be described as residing there, is a question of fact and degree ... In the present case, the Edgware house is owned by the defendant and his wife, and is the place where his wife, children, mother, father and sister permanently live. It is the place which the defendant has affirmed in court proceedings is not only his 'residence' but his 'home'. While such affirmation is not conclusive, it is plainly highly material. The defendant visits that home every year to see his family, staying for not inconsiderable periods of time, as and when his work in Kenya permits him to do so. It is, in an obvious and very real sense, his "family home". Taking those facts together, it seems to me quite impossible to contend that the defendant does not reside at the Edgware house at all …
>
> 28. The deputy judge was also entitled, and indeed correct, to conclude that the Edgware house was the defendant's 'usual' residence for the purposes of CPR r 6.9. As I have said, Mr Jacob conceded that it is possible to have more than one "usual" residence. That is also borne out by the distinction between 'usual residence' and 'principal' place of business and 'principal' office in CPR r 6.9 which, contrary to Mr Jacob's submission, I consider the deputy judge was right to take into account.
>
> 29. I do not accept Mr Jacob's submission that, in determining whether a residence is a 'usual' residence within CPR r 6.9, the test to be applied is essentially one of merely comparing the duration of periods of occupation, taking little account of the nature or 'quality' of use of the premises, and ignoring altogether that the premises are occupied permanently by the defendant's family and that the premises can fairly be described as the family home. Mr Jacob's suggested approach is too narrow and artificial. I agree with Mr Peter Shaw, counsel for Relfo, that the critical test is the defendant's pattern of life. In *Levene v Inland Revenue Comrs* [1928] AC 217 the House of Lords considered whether the taxpayer was "ordinarily resident" for the purposes of income tax. …"

44. A useful summary of the relevant principles is set out in *Bestolov*, supra, at [44]:

> "(1) It is possible for a defendant to reside in more than one jurisdiction at the same time.
>
> (2) It is possible for England to be a jurisdiction in which a defendant resides even if it is not his principal place of residence (ie even if he spends most of the year in another jurisdiction).

> (3) A person will be resident in England if England is for him a settled or usual place of abode. A settled or usual place of abode connotes some degree of permanence or continuity.
>
> (4) Residence is not to be judged according to a 'numbers game' and it is appropriate to address the quality and nature of a defendant's visits to the jurisdiction.
>
> (5) Whether a defendant's use of a property characterises it as his or her 'residence', that is to say the defendant can fairly be described as residing there, is a question of fact and degree.
>
> (6) In deciding whether a defendant is resident here, regard should be had to any settled pattern of the defendant's life in terms of his presence in England and the reasons for the same.
>
> (7) If a defendant visits a property in England on a regular basis for not inconsiderable periods of time, where his wife and children live, in order to see his wife and children (including where the centre of the defendant's relationship with his children is England), such property has the potential to be regarded as the family home or his home when in England, which itself is evidence which may go towards supporting the conclusion that England is for him a settled or usual place of abode, and that he is resident in England, albeit that ultimately it is a question of fact and degree whether he is resident here or not, having regard to all the facts of the case including any discernible settled pattern of the defendant's life or as it has also been put according to the way in which a man's life is usually ordered."

45. *R v Barnet LBC ex parte Shah* [1983] 2 AC 309 was decided in the context of student appeals against local authorities' refusals to grant awards under the Education Acts 1962 and 1980. The House of Lords adopted the approach taken in *Levene*, supra, as to the meaning of 'ordinary residence' (at pp340F-342B). At p343G-H Lord Scarman stated:

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."

46. At p344C-D he said:

> "And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the 'propositus' intends to stay where he is indefinitely;

> indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.
>
> The legal advantage of adopting the natural and ordinary meaning, as accepted by the House of Lords in 1928 and recognised by Lord Denning MR in this case, is that it results in the proof of ordinary residence, which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind. Templeman LJ emphasised in the Court of Appeal the need for a simple test for local education authorities to apply: and I agree with him. The ordinary and natural meaning of the words supplies one. For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose."

47. Lord Scarman (at p348G) rejected the submission (recorded at p345A) that 'ordinarily resident' denotes the place where the student 'has his home permanently or indefinitely, ie his permanent base or centre adopted for general purposes, eg family or career. This is the 'real home test': it necessarily means that a person has at any one time only one ordinary residence, viz his 'real home'. He also stated (at pp347H-348B):

> "My Lords, the basic error of law in the judgments below was the failure by all the judges, save Lord Denning MR, to appreciate the authoritative guidance by this House in *Levene v. Inland Revenue Commissioners* [1928] AC 217 and *Inland Revenue Commissioners v. Lysaght* [1928] AC 234 as to the natural and ordinary meaning of the words 'ordinarily resident.' They attached too much importance to the particular purpose of the residence; and too little to the evidence of a regular mode of life adopted voluntarily and for a settled purpose, whatever it be, whether study, business, work or pleasure. In so doing, they were influenced by their own view of policy and by the immigration status of the students."

48. Lord Scarman concluded (at p349C) that the relevant question for local authorities to ask is:

> "…has the applicant shown that he has habitually and normally resided in the United Kingdom from choice and for a settled purpose throughout the prescribed period, apart from temporary or occasional absences ?"

49. In *Tugushev,* supra, [125], Carr J broadly agreed with the submission that the search for residence looks for an abode that is part of the individual's regular order of life for the

time being, for a settled purpose, whether of short or long duration. It does not matter what that settled purpose is. It is not necessary to have a family home in the jurisdiction in order to be resident here, although the existence of a family home may readily demonstrate a settled purpose. But she also said that the existence of a family home (or the absence of a family home for someone with immediate family) in the jurisdiction may be a relevant factor. Ultimately, she concluded, as is correct (with respect) that the question of residence is all about the facts. This is emphasised in numerous authorities: see, eg, *Cherney v Deripaska*, supra, [17]; and *Shulman v Kolomoisky* [2018] EWHC 160 (Ch), [29].

50. Having established the principles, I turn to the evidence. As I have said, this at least arguably shows that the Defendant was resident in the UK as at January 2019 and that the nature and the nature and circumstances of his residence indicate that he had a substantial connection with the UK. In other words, it is arguable that he was domiciled here.

51. As I pointed out earlier, the Claim Form was addressed to the Defendant at his home address in London. The evidence shows that service was effected on the Defendant personally (at his request) at Wembley Stadium by the Claimant's solicitor in January 2019. The Defendant was thereafter represented by English solicitors, but it was not until March 2020 that a challenge was made to this Court's jurisdiction pursuant to s 9 of the DA 2013. There was an attempt to strike out parts of the Claimant's Reply to the Defence in April 2019 but there was no attempt at that stage to challenge this Court's jurisdiction under s 9 on the basis of alleged lack of domicile on the part of the Defendant.

52. I turn to the pleadings. Paragraph 2 of the Particulars of Claim dated 10 January 2019 asserts:

> 'The Defendant is a Korean football reporter and journalist who is resident in the UK.'

53. Paragraph 2 of the Defence dated 5 February 2019 avers in response (sic):

> 'Paragraph 2 to is admitted. In addition, the Defendant is also the author of 4 books on the topic of football, and he is the translator of 18 books in South Korea'.

54. The Defence was drafted by the Defendant's solicitor and is verified by a statement of truth. It admits the Defendant was resident in the UK at the relevant time. This admission is conclusive on the question of the Defendant's residence.

55. But the evidence does not stop there. The Defendant's own evidence contradicts the argument that he was not resident in the UK at the relevant time. Paragraph 1 of his Second Witness Statement states:

> "I was living in the UK at the time of this incident began, but I was never domiciled in the UK at all."(sic)

56. He goes on at [9]:

> "At the time of the postings and the bringing of the claim against me, I lived in the UK from 2015 to 2019, and in that period I stayed in some flats on a 1 year lease."

57. The question of domicile is an objective one, to be judged according to the test in [9] of the Jurisdiction Order, and so the Defendant's subjective belief about where he was domiciled is neither here nor there. It is plainly self-serving in any event. He has admitted in his Defence being resident in the UK at the relevant time, and in my judgment the nature and circumstances of his residence (the second part of the test in [9]) indicate that he had, at that time, a substantial connection with the UK. That is because he was living here with his family, and had been for a considerable period, and his work involved covering events in the UK in the English Premier League.

58. The witness statement of Andrew King, the Claimant's solicitor, dated 23 June 2020, also contains some relevant evidence on this issue. At [18] Mr King quotes an email which he received from the Defendant in December 2018 when Mr King was checking the Defendant's address for the service of proceedings:

> "5. Finally, my address is as follows. Currently, my wife and young daughter feel threatened by the other party knowing our address, so please contact our address only within the boundaries set by law, and in no case should anyone involved in this matter come directly to my house.
> [Address given]
> Sungmo Lee"

59. Mr King also produces as an exhibit photographs posted online by the Defendant of his family life in the UK.

60. At [19] Mr King quotes an Instagram post by the Defendant from 21 July 2016:

> "The ID was made when I started writing soccer articles in 2013, and "It was a name that I made for the goal of going to London (not Korea) in 2015 to write about football. Since then, I have quit my job, devoted myself to writing football articles, and tried to find a company in [London] for local activities, and finally came to London from September 2015 to write articles and columns."

61. The Defendant makes a number of points in his witness statements about only having worked for Korean companies, returning to Korea often, owning property there, and never having applied for indefinite leave to remain in the UK or British citizenship. He also emphasises that he was writing for a South Korean audience. I acknowledge these points, and do not doubt them, but in my judgment they are of marginal relevance given the facts overall. I agree with the Claimant's submission that the evidence demonstrates that there was clearly a settled patten to the Defendant's life here, with a significant degree of permanence and continuity to his residence by the time the claim was issued in January 2019. Evidence which I will address later shows that there was a not insubstantial readership for the Claimant's and Defendant's articles in the UK.

62. The unequivocal position is that at that point the Defendant had been living and working in the UK with his family for well over three years, covering events in England. The substantial nature of the Defendant's ties with the UK is demonstrated by the fact that although he left the UK in 2019 on the expiry of his visa and went to work in Spain, his evidence is that he would have preferred to have stayed here. At [14] of his Second Witness Statement he wrote:

> "I would not reject that if I could, I would stay in the UK longer for my work as a football journalist as Tottenham's Heung-min Son is getting whole nation's interest at the moment, but, in any case, I never had any plan to get a UK citizenship, and give up my 'domicile' status in South Korea.'

63. Whether the Defendant was domiciled in the UK at the relevant time, and so whether s 9(2) applies to require the Claimant to show that England and Wales is clearly the most appropriate venue in which to bring the action is plainly a matter for trial, and the attempt to strike the claim out on the basis of s 9 therefore fails.

64. But even if I am wrong about that, and the Defendant was not domiciled here, so that the Claimant must satisfy the test in s 9(2), then I agree with the Claimant that it is at least arguable, and so again a matter for trial, that England and Wales is clearly the appropriate venue. That is because, in summary, both the Claimant and Defendant were resident in this jurisdiction at the relevant time, and had been for some time. Whilst the Claimant was writing in Korean, as was the Defendant, they were both writing primarily about events happening in England in the English Premier League. The allegedly defamatory posts contained allegations about wrongful conduct by the Claimant in this jurisdiction. In relation to witnesses attending trial, the key witnesses are the Claimant, who still lives here, and the Defendant, who has now moved to Spain but can return to the UK once normal international travel resumes.

65. The Defendant emphasised that there will be issues at trial concerning the exact meaning of the articles, and that there will be difficult issues about their correct translation. That might be right. But there has been an order for the joint instruction of a translator, which the parties have begun to comply with, and in any event the High Court is well used to dealing with issues such as this. Set against all the other factors, potential translation difficulties do not provide a reason for concluding that England and Wales is definitely not clearly the appropriate venue.

66. Whilst readership of the Defendant's articles is more extensive in South Korea than here, the evidence (which I will discuss in more detail later) shows that there was a not insubstantial readership in the UK, and that the Defendant's allegations about the Claimant are known to a significant number of people living in the UK. The Claimant's evidence is that they have had a serious impact upon him. For reasons I will develop, there is evidence of significant damage to the Claimant's reputation in this country.

67. Finally, I note the Claimant's argument that the Defendant submitted to the jurisdiction when he filed his Defence. I discussed this issue in *Al-Sadik*, supra, [55], and held that jurisdiction under s 9 cannot be conferred by waiver, submission or consent. I would not therefore hold that the Defendant submitted to the jurisdiction by filing a Defence.

68. The Section 9 Point therefore fails.

The Public Vindication Point/The Abuse of Process Point/The Jameel *point*

69. I can take these three points together as they are inter-linked, as I have already observed. This was the approach of Simon J in *Karpov v Browder* [2013] EWHC 3071 (QB), a case heavily relied upon by the Defendant, which I will discuss in a moment.

70. The background to these issues is that the Claimant made a criminal complaint to the prosecuting authorities in South Korea about the Defendant's posts. On 8 October 2019 a prosecutor in the Seoul Central District Prosecutor's Office decided there would be no prosecution. The record of his/her decision is in evidence. The charges were 'Violation of the laws regarding the promotion of information and communication network use and protection of information (Defamation)' and 'Threat'. The 'Principal Sentence' is recorded as being 'The suspect [ie, the Defendant] is cleared of suspicion for lack of evidence.' Later on, it is said that ',,, it cannot be concluded that that the suspect intended to damage the plaintiff's reputation [ie, that of the Claimant] while knowing the falsity of the post.' The document concludes, 'This case is not prosecuted due to lack of evidence.'

71. There is material, also in evidence, which suggests that the Defendant was interviewed by the police in Seoul as part of their investigation.

72. An appeal against this non-prosecution decision was dismissed by the Seoul High Prosecutors' Office on 10 December 2019.

73. In his first witness statement in support of the application, the Defendant relies upon *Karpov*, supra. In that case Mr Karpov was a former policeman in Russia. He sued Mr Browder (and linked corporate vehicles) in England for libel arising from material published on a website maintained by the Defendants in English and Russian. In broad terms Mr Karpov complained that he was accused of involvement in the torture and death in a Russian prison of a man called Sergei Magnitsky in 2009, as well as other wrongdoing. Mr Karpov made criminal complaints of defamation in Russia which were rejected. He also took civil proceedings in Russia. The Defendants sought to have the English libel proceedings struck out as an abuse of process. The grounds for the application are summarised at [40] of the judgment of Simon J. They were that:

    a. Mr Karpov could not show that he had any significant connection with England or a reputation to protect here, and therefore could not establish 'a real and substantial tort' within this jurisdiction. The Claimant's contention, that the publication of the Defendants' allegations within this jurisdiction during the limitation period both created and destroyed a sufficient reputation in this country, was wrong in law.

    b. Mr Karpov could not achieve any worthwhile vindication in the proceedings given the torrent of international condemnation of the Russian officials (including Mr Karpov) who were alleged to have been involved in Sergei Magnitsky's death. There had, in particular, been special legislation enacted in the United States about the case and publication of the 'Magnitsky List' of those said to have been involved, including Mr Karpov. The Defendants argued that the English court could not restrain the continued publication of reports condemning the Claimant's

conduct or direct the removal of his name from the Magnitsky List; and any limited vindication that the Claimant might achieve would be wholly disproportionate to the cost of the exercise and the burden on the court's time.

c. Russia was the obvious place to bring the Claimant's claims; and the English court should not allow the Claimant to bring claims here when the court of the natural forum has rejected them.

d. The Claimant had no real prospect of showing that any loss that he might be able to establish was caused by actionable publication of the Defendants' allegations (within the jurisdiction and the limitation period) rather than publications which were not actionable (since they occurred outside the jurisdiction and the limitation period).

e. One of the Claimant's expressed purposes for pursuing the claim was to attack his inclusion on the Magnitsky List; but this was not an appropriate use of the process of the court. The purpose reflected a political objective of the Russian Federation; and is brought by an individual Russian public official who refused to identify the source of his funding for the claim.

74. For the cumulative reasons which the judge gave at [138]-[145] of his judgment the judge struck out the Claimant's claim as abuse of process. He said:

> "138. In the light of the evidence I have seen, the submissions I have heard and the views that I have already expressed on some of the issues, I have reached the following overall conclusions.
>
> 139. First, the Claimant cannot establish a reputation within this jurisdiction sufficient to establish a real and substantial tort. His connection with this country is exiguous and, although he can point to the continuing publication in this country, there is 'a degree of artificiality' about his seeking to protect his reputation in this country. This is an important, but not determinative, consideration on the Defendants' application to strike out the claim.
>
> 140. Secondly, if the case were to proceed and the Claimant achieved a judgment in his favour, it would provide a degree of vindication and, if an injunction were granted, it would prevent further dissemination of the libel by the Defendants. This again is a relevant factor. However, there are countervailing considerations. The impact of any such judgment and order would be unlikely to assist (let alone achieve) the most important of the Claimant's stated objectives: his removal from the Magnitsky list. This is because the libel action is necessarily directed to the confined pleaded issues and the trial will be based on material disclosed by the parties. The issues which would be determined at trial would not deal with other damaging allegations that have been made against the Claimant, let alone significantly affect views based on different material, which led to legislation enacted by the United States Congress.

> 141. Thirdly, the Claimant has achieved a measure of vindication as a result of the views I have expressed on his application. The Defendants are not in a position to justify the allegations that he caused, or was party to, the torture and death of Sergei Magnitsky, or would continue to commit, or be party to, covering up crimes. To use the expression in Olswang's letter of 1 August 2012, the record, at least in so far as it is presently set out in the pleadings, has been 'set straight'. I recognise that this will not prevent a repetition of the libel, which an order of the Court would do, at least in this jurisdiction; however, nothing in this judgment is intended to suggest that, if the Defendants were to continue to publish unjustified defamatory material about the Claimant, the Court would be powerless to act. I have used the expression 'presently set out in the pleadings' because I have not overlooked the possibility of an application to amend the particulars of the plea of justification to rely on participation in a broad conspiracy and/or joint enterprise.
>
> 142. Fourthly, I take into account the fact that the Claimant tried to bring proceedings to vindicate his reputation in the Russian Federation. This was the natural forum for such a claim. The connection with this country is limited to the presence of some of the parties and it being the place where some of the defamatory material was, and continues to be, published. These points are also relevant to my first conclusion.
>
> 143. Fifthly, it is material that, if the case were to proceed, the Court would be faced with a difficult causation issue arising from the delay in bringing proceedings, and the fact that much of the damage to the Claimant's reputation occurred before that date, outside the jurisdiction and not as a consequence of the defamatory publications.
>
> 144. Finally, there is also the matter of the costs of a trial. The fact that 14 bundles of documents were thought necessary for the disposal of these applications, before disclosure has been given, is an indication of the likely costs which would be incurred and court time which would be required for a trial.
>
> 145. Taking all these matters into account and applying the ultimate 'proportionality' or 'balancing' test, to which I have referred above, I have concluded that these proceedings should be struck out as abuse of the process and/or under the inherent jurisdiction."

75. While there are some superficial similarities between the *Karpov* case and the case before me, there are obvious and important differences. First, Mr Karpov admitted that until the publications complained of, he had no reputation in this country: see at [70], where the judge quoted Mr Karpov's witness statement:

> "70. I turn then to the evidence. In §46 of his witness statement the Claimant says,
>
> > I entirely accept that I did not have a substantial reputation in England and Wales before the Defendants' campaigns started ... I have previously travelled to England on five or so occasions and I have some friends who live here, including former classmates from school and a former girlfriend with whom I am still in contact.
>
> 71. This is plainly not a sufficient basis for finding a real and substantial tort within the jurisdiction."

76. In contrast, the evidence on behalf of the Claimant in the present case which, as I have said, I have to accept on this application, is that he does have a substantial reputation in this country which the Defendant's publications have harmed. The witness statement of the Claimant's solicitor makes the following points: there are about 50 000 Koreans living in the UK, about half of whom reside in and around New Malden; the community is close knit and the Claimant is a prominent member of it; the Claimant has lived in the UK for 15 years and 'has a well-established reputation' here; he has children at school and university here; he is well-known as a church pastor and the church plays an important role in the community; the Claimant is well known as a sports journalist; and the Claimant's life has been ruined by the publications which have harmed his reputation among the Korean community in the UK and he has lost his position as pastor at the Church (or it is in jeopardy). The publications in question had a substantial readership in this country.

77. The Claimant says in his witness statement of 23 June 2020 that his position as a pastor has been harmed by the Defendant's articles and that church attendance has decreased significantly. His work with various Korean organisations in the UK has also been adversely affected, as has his work within football. He describes being shunned by the Korean community and regarded as a fraudster and liar.

78. Finally on this point, I note the Defendant's own acceptance that the Claimant has a reputation in this country (first witness statement, [12]).

79. Next, unlike in the *Karpov* case, where the judge found that even a judgment in the claimant's favour would not remove his name from the Magnitsky List and would not affect the legislation in the United States, I find that in the present case a judgment in the Claimant's case would go a very substantial distance towards vindicating and restoring his reputation for truth and honesty. It can be readily anticipated that the judgment will be widely reported in the Korean community including, in particular, in the New Malden area where the Claimant lives. The Claimant's evidence makes clear that there are some within the Korean community who are waiting on the outcome of the case before reaching a final conclusion on his honesty. I accept the Claimant's submission that should he succeed he will be entitled to more than nominal damages and that he will achieve the vindication of his reputation and the restoration to his position as a prominent and respected member of the South Korean community in this country.

80. Third, whereas in *Karpov* Simon J said that observations he had made during the hearing had provided a measure of vindication for Mr Karpov, the same is not true in the present case. Only a judgment on the claim is capable of giving the Claimant what he is seeking.

81. The fourth point is the Claimant's criminal complaint in South Korea which, as I have explained, did not result in any proceedings being brought. The Defendant placed particular reliance on this. He submitted that the matter has been resolved in South Korea and that the Claimant cannot achieve any worthwhile vindication in the UK courts in circumstances where the relevant authorities in South Korea have determined that the posts were not defamatory.

82. In *Karpov,* supra, [91]-[96] Simon J dealt with the issue in this way:

> "*(3) Whether the English court should allow the Claimant to bring his claim here when the court of the natural forum has rejected them ?*
>
> 91. The Defendants submit that it is an inherent abuse of the Court's process to bring proceedings here when he has not been permitted to proceed in the Court of the natural forum: the Russian Federation.
>
> 92. Mr White accepts that that the dismissal of the Claimant's criminal and civil defamation complaints does not create an estoppel under the domestic law doctrine of *res judicata* or issue estoppel. However he submits that the Courts of this country have been willing to strike out as abusive claims brought in England which seek to re-litigate matters decided adversely in a foreign court; and that such cases are not limited to cases where the prior foreign litigation involved the same parties. The important question is whether the claimant in the new proceedings had an opportunity to participate in the foreign proceedings which were determined against him, see for example *House of Spring Gardens Ltd v Waite* [1991] 1 QB p.241, 251H-252A and 254E-255D, where it was held that to re-litigate in England a claim on which the claimant had failed in proceedings before the Irish court, which was the forum chosen by the claimant and the natural forum, was an abuse of process, see Dicey, Morris & Collins on the Conflict of Laws (15th edition, 2012) §§ 14-033 and 14-142.
>
> 93. On this basis the Court should consider whether justice requires a further investigation of a claim which has been dismissed by the foreign court (see *Owens Bank Ltd v Etoile Commerciale SA* at 51A-C, per Lord Templeman).
>
> 94. Mr White further submits that in the present case there is no good reason why the Claimant, having tried and failed to bring criminal and civil defamation claims before the Russian Courts (which were both his chosen forum and the natural forum), should be allowed to pursue what are essentially the same claims here.

> *Consideration of issue (3)*
>
> 95. The relevance of the Claimant's attempts to bring proceedings in Russia is that it demonstrates, what would have been clear in any event, that Russia is plainly the natural forum for bringing proceedings intended to vindicate the Claimant's reputation. He is a Russian citizen, who was employed to carry out public duties in Russia. All the relevant events took place in Russia, involved other Russian citizens; and much of the relevant underlying material on which a trial would be based is in Russia.
>
> 96. The relevance of these matters is not that they create estoppels or quasi estoppels (as Mr White contended), but that they throw light on issue (1), as Mr Caldecott conceded."

83. I do not consider this factor can bear the weight which the Defendant sought to place on it. It is not the case that there have been civil defamation proceedings in South Korea which ended in the Defendant's favour; if that had been the case then the Defendant might have been on stronger ground: cf *House of Spring Gardens Ltd v Waite* [1991] 1 QB p.241, 251H-252A and 254E-255D, where it was held that to re-litigate in England a claim on which the claimant had failed in proceedings before the Irish court, which was the forum chosen by the claimant and the natural forum, was an abuse of process. The process in South Korea was a criminal one which culminated in the prosecution authorities there declining to take any action for reasons for reasons which are not wholly clear, other than a general assertion of lack of evidence. What the elements of the offences were; what standard of proof was applied; and what test the prosecutors applied are all unknown.

84. In these circumstances I do not find that it is an abuse of process for the Claimant to pursue civil defamation proceedings in England merely because of the failed Korean criminal complaint. That is all the more so because there are significant links with this jurisdiction. As I have already said, the events in question occurred in England; both parties were resident here at the relevant time; and there has been substantial damage done to the Claimant's reputation in this country where he has lived for many years now.

Conclusions

85. I turn to my overall conclusions on these three inter-linked grounds of challenge. Since *Jameel*, supra, was decided s 1 of the DA 2013 has come into force, whereby a statement will be treated as non-defamatory unless its publication has caused or is likely to cause 'serious' harm to the reputation of the claimant: see *Lachaux v Independent Print Limited* [2019] 3 WLR 18.

86. In *Ames*, supra, [48]-[50], Warby J considered the inter-relationship between s 1 and the *Jameel*, supra, requirement that there be a real and substantial tort:

> "49. This wording [in s 1] does not abolish the principles discussed above. It introduces an additional requirement. The use of the word "serious" obviously distinguishes the statutory test from the common law as stated in *Thornton.* The threshold identified

in *Thornton* was that the statement should "substantially" affect attitudes in an adverse way, or have a tendency to do so. The *Jameel* test also requires a tort to be "substantial". As Bean J noted in *Cooke v MGN Ltd* [2014] EWHC 2831 (QB), [2014] EMLR 31 [37], examination of the Parliamentary history of the section shows that the word "serious" was chosen deliberately in place of the word "substantial". It follows that the seriousness provision raises the bar over which a claimant must jump, as compared with the position established in the two cases mentioned. These points are spelled out in the Explanatory Notes to the section:-

> "The section builds on the consideration given by the courts in a series of cases to the question of what is sufficient to establish that a statement is defamatory. A recent example is *Thornton v Telegraph Media Group Ltd* in which a decision of the House of Lords in *Sim v Stretch* was identified as authority for the existence of a "threshold of seriousness" in what is defamatory. There is also currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In *Jameel v Dow Jones & Co* it was established that there needs to be a real and substantial tort. The section raises the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation can be brought".

Put another way, it is no longer enough to establish a tendency to have a substantial impact and amount to a real and substantial tort; there is now no tort unless and until "serious harm to reputation" has either been caused or "is likely to" be caused by the publication.

50. In these circumstances it seems to me that an assessment of whether a defamation claim in respect of publication on or after 1 January 2014 should be dismissed on the grounds that the actual or likely harm to reputation is too slight to justify the claim, or grounds that include this proposition, should normally start with consideration of the "serious harm" requirements in s 1. The court should ask itself whether one of those requirements is satisfied or, as appropriate, is arguably, or has a real prospect of being, satisfied. If the answer is no, then there is no tort at all and the claim will inevitably be dismissed. If the answer is yes, it may be hard to establish that the tort alleged fails the "real and substantial tort" test."

87. For the reasons I have essentially already set out, I am quite satisfied that it is arguable both that the Claimant has suffered serious harm in this jurisdiction for the purposes of s 1, and also that he has established the existence of a real and substantial tort. An accusation of dishonesty against any professional person is plainly potentially seriously harmful; repeated accusations against a journalist, who must be able to rely upon his or

her reputation for accuracy and reliability, all the more so. And it hardly goes without saying that the harm is seriously further exacerbated where the journalist is also a church pastor to whom parishioners look for moral leadership and guidance.

88. Conducting the requisite balancing exercise (see *Karpov*, supra, [145]) I decline to strike out the Claimant's claim as an abuse of process. The factors I have discussed resoundingly come down in favour of this claim having been properly brought within this jurisdiction. I therefore refuse the Defendant's application.

89. The Defendant applied for evidence of the Korean criminal complaint to be admitted in the event the claim was not struck out. It seems to me that that must be a matter for the trial judge. I invite the parties to agree an order for the efficient resolution of this issue.