Neutral Citation Number: [2020] EWHC 2975 (QB)

Case No: QB-2018-000981

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 06/11/2020

Before :

THE HONOURABLE MR JUSTICE SAINI

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Between :

QATAR AIRWAYS GROUP Q.C.S.C.	**Claimant**
- and –	
(1) MIDDLE EAST NEWS FZ LLC	
(2) MIDDLE EAST NEWS UK LIMITED	
(3) MBC FZ LLC	**Defendants**
(4) AL ARABIYA NEWS CHANNEL FZ LLC	

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Thomas Raphael QC and **Sam Goodman** (instructed by **Osborne Clarke LLP**) for the **Claimant**
Antony White QC and **Edward Craven** (instructed by **Wiggin LLP**) for the **Defendants**

Hearing dates: 14 – 16 October 2020

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JUDGMENT

MR JUSTICE SAINI :

This judgment is in 12 main parts as follows:

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I. Overview

1. This is a jurisdiction challenge. The context in which the proceedings arise is the economic blockade (the "Blockade") imposed upon Qatar in June 2017 by Saudi Arabia, the United Arab Emirates ("UAE"), Bahrain and Egypt (together, the "Blockade States").

2. The Blockade involved these states cutting off all relationships with Qatar and the imposition of a land, sea and air blockade upon Qatar. The air blockade is the focus of these proceedings. In broad terms, by that measure the Blockade States sought to prevent Qatari registered aircraft from traversing their territorial airspace, although they were permitted to fly in and out of Qatar via permitted air corridors.

3. The Claimant ("QAG") owns and operates Qatar's flag air carrier, the well-known international airline Qatar Airways. The Defendants are said by QAG to be connected with the Arabic news channel *Al Arabiya*. The nature of such connections is one of the issues before me.

4. QAG also argues that *Al Arabiya* is closely connected to, and controlled by, the Saudi royal family and government. QAG says that in the context of the Gulf crisis, *Al Arabiya* serves the political purposes of the Blockade States.

5. On 9 August 2017, *Al Arabiya* made a live TV broadcast of a short 2 minute animated film concerning the air blockade (the "Video"). The Video was also made available internationally through its own website, YouTube, and social media channels. These transmissions of the Video give rise to the proceedings.

6. I will need to consider the nature and contents of the Video in more detail. I have appended to this judgment as Annexe I a frame by frame screen-shot version of the Video with subtitles, as published on the *Al Arabiya* website, and on *Al Arabiya's* YouTube, Twitter and Facebook channels.

7. Although reading that Annexe is not a substitute for the way in which the Video would have presented itself visually to a viewer, it provides a reader of this judgment with the basic textual and visual content.

8. QAG's case is that the Video was, intentionally and foreseeably, damaging to QAG because it deliberately conveyed false and misleading messages (using what it argues were several false and misleading statements). In summary, it says the nub of the falsity was that even though QAG flights would be lawfully passing along permitted air corridors, there was a real danger that QAG flights in the Middle East might legitimately (under international law) be shot down or forced down by threat of force, including by use of missiles. It also says the Video suggested that passengers and crew on QAG flights which were forced down would be subject to "harsh treatment" by the Blockade States when their planes were grounded.

9. QAG argues that, as intended by *Al Arabiya*, the Video discouraged many among QAG's potential customers from taking flights with it, thereby causing large scale losses. QAG argues that its loss was suffered worldwide but in particular in the UK and MENA (Middle East North Africa) regions.

10. Given the claimed connections of *Al Arabiya* with the Saudi royal family and government, QAG says that it can be inferred that the key motivations for the Video were harming Qatar Airways, as the Qatari state-owned national flag carrier, and interfering with air services to/from Qatar when (in large part due to international pressure) the air blockade was incomplete.

11. QAG contends that the Video amounts to malicious falsehood, unlawful interference with its business, and also that it was made and issued pursuant to a conspiracy between the Defendants and others aimed at harming QAG.

12. QAG obtained permission from the Master to serve these proceedings out of the jurisdiction on the First, Third and Fourth Defendants on 31 December 2018. The Second Defendant ("MEN UK") is a UK company.

13. By an Application Notice dated 29 August 2019, the Defendants seek to set aside the Master's order for service out of the jurisdiction. They also apply (by Application Notice dated 16 July 2020) to strike out/for summary judgment in respect of the claim against MEN UK. By these applications, they mount a root and branch attack on QAG's case.

14. By way of high level summary of the Defendants' position, they say the Video was the work of a single journalist, Ms Rawabdeh, working for the Fourth Defendant.

Their evidence is that the Video is an informational and journalistic piece which Ms Rawabdeh created in good faith to explain the air blockade in simple terms at a time of public confusion. Ms Rawabdeh says she conducted research in order to create the Video and acted under the supervision of her commissioning producer (Mr Rawashdeh). The Defendants argue the conspiracy theory is fanciful and no entity or other persons were involved. They say the Video was in all respects accurate.

15. Accordingly, they submit that that there is no "serious issue to be tried" on the merits as to the meaning of the Video, claimed falsity and malice. They also attack the claim relying on pleading deficiencies in respect of malice/fraud, the lack of jurisdiction of English courts in respect of overseas publications of the Video, limitation points, as well as arguing the lack of any real and substantial tort in England. They run seven distinct points in all on the "serious issue to be tried" question.

16. In addition, they argue the jurisdictional gateways within paragraph 3 of CPR PD 6B are not satisfied. Finally, they make a classic *forum non conveniens* challenge, arguing that the UAE is clearly the appropriate forum, and that QAG has not adduced cogent evidence of a real risk of substantial injustice there.

17. Independently of this submission, they say that permission should be set aside by reason of serious failures to make full and frank disclosure to the Master when obtaining permission to serve out.

18. In order to head off certain of the pleading complaints made by the Defendants in their skeleton argument, QAG served draft amended Particulars of Claim at 9.40am on the morning of the first day of the hearing before me.

19. I will call this "POC3" (there having been the original POC and POC2, a draft from April 2020). POC3 is the subject of an Application Notice dated 14 October 2020 seeking permission to amend. The claims in final form are for malicious falsehood and a number of additional tort claims: "unlawful" and "lawful" means conspiracy, joint tortfeasorship, and interference with business.

20. When I refer to "the other tort claims" in this judgment, I intend to refer to those tort claims apart from malicious falsehood (which has been the focus of the arguments before me). For completeness, I should identify that the "unlawful means" relied upon in support of that aspect of the conspiracy claims are malicious falsehood, common law deceit and breach of the Communications Act 2003.

21. Of particular relevance is the fact that in POC3, QAG identified for the first time in pleaded form the names of the persons within the Defendant companies said to have been actuated by malice or to have acted with relevant fraudulent intent/bad faith for each of the torts.

22. Before turning to the first of the issues in dispute, I need to register a mild concern as to the way in which the jurisdiction application before me was prepared and argued.

23. Despite repeated judicial statements as to the need to approach applications of the present type with considerations of proportionality firmly in mind, I was presented with a body of evidence, authorities and argument which would not have been out of place at a substantive trial. I refer to the observations by Lord Briggs, speaking for the

Supreme Court, in Lungowe v Vedanta Resources plc [2019] UKSC 20; [2018] 2 WLR 1015 at [6]-[11].

24. There were 11 witness statements (with about 1500 pages of exhibits), expert reports (and responsive reports) from two firms of forensic consultants (Digitalis and Duff & Phelps), as well as expert evidence as to UAE law from each side. The parties relied upon case law in excess of 170 authorities and served over of 200 pages of written submissions, supplemented by notes following the hearing to deal with points raised and which could not be fully addressed during the 3 days of oral argument.

25. As appears below, there are clearly some important points of law raised in this application, and I was given substantial assistance by the cogent and well-structured submissions of Counsel for the parties. The issues of law clearly required detailed oral and written arguments (including additional legal arguments on points I had raised during the hearing).

26. However, full blown oral and written argument on *factual* disputes was not of real assistance in what was principally a jurisdiction dispute. The witness statements consisted very largely of arguments and not evidence.

27. The parties are clearly substantial and well-resourced companies and they were perhaps each guilty (in varying respects) of not allowing any point made by an opposing party in a witness statement, spreadsheet, or expert report to be left unanswered and uncontradicted. Who was responsible for this is a matter for costs.

28. As will be obvious, a judge will not be assisted in an interlocutory hearing of the present nature by such an approach. Advisers need to exercise judgement as to what may be a "killer point" (adopting the language in Erste Group Bank v JSC (VMZ Red October) [2013] EWHC 2926 (Comm) at [11]-[12]), and those points which merely further expand the range of serious issues to be tried.

29. Before I turn to the next section of this judgment in relation to the facts, I should record what may be obvious. My summary is not intended to reflect any findings but merely the facts as they appear to be on the evidence at this early stage.

30. Where I understand matters to be common ground, I have identified that fact. However, where there are disputes, I have asked myself whether QAG has set out a case with a reasonable prospect of success to support its contentions. For the avoidance of doubt when I use the term "arguable", I intend to refer to a matter as being arguable with a realistic prospect of success, as opposed to being merely fanciful.

31. I will not address the issues in the same order as the parties in their submissions. It seems to me to be best to start with a detailed exposition of the facts and allegations concerning the Video, before turning to the jurisdictional issues.

32. The facts have to be addressed in some detail because, as I have indicated above, the main arguments of the Defendants are based on full-frontal attack on the merits of the claims.

33. Finally, by way of introduction, my references in this judgment to "Dicey" are to Dicey, Morris & Collins on the Conflict of Laws (15th Edition) , references to "Gatley" are to Gatley on Libel and Slander (12th Edition), and those editions, as supplemented. References to "Briggs" are to Civil Jurisdiction and Judgments (6th Edition).

II. Factual Background

34. It is common ground that on 5 June 2017 the Blockade States (acting together with the Maldives and Yemen), cut off relationships with Qatar and imposed a land, sea and air blockade. The Blockade was a dramatic event, causing problems for Qatar, and obviously raised tension in the Gulf region.

35. QAG says that the air blockade caused it serious difficulties, as the Flight Information Regions ("FIRs") of the Blockade States, and in particular that of Bahrain, surround Qatar. The Blockade States initially denied *any* Qatar-registered aircraft the right to traverse their FIRs. That meant all QAG flights had to be cancelled on 6 June 2017. But early on this was modified and Bahrain allowed the use of a limited number of air corridors over international waters within its FIR.

36. The evidence before me suggests that international pressure led to relaxations. Thus, the number of air corridors whose use was permitted increased so that, by 7 August 2017, there were nine airspace corridors over the Blockading States' FIRs which QAG was permitted to use.

37. It is important that I note that none of these corridors went *over* the Blockading States' territorial airspace (a point said to be relevant to what is said in the Video). Rather, as I understand the evidence, they went through the FIRs onto the high seas and then outwards. That is, the planes could loop back, with some diversion, to reach destinations to the west and north.

38. I accept that it is likely that these hindrances to QAG were serious, as this caused considerable diversion of its aircraft. It seems clear however that the position had been partly mitigated, and QAG was soon able to operate scheduled international air services using these corridors. QAG services into or across the territory of the Blockading States remained and remain banned.

39. The evidence before me is that (to those informed in relation to matters of international air passage) the position with regard to the corridors would have been clear from what are called "NOTAMs" (official Notices To Airmen - perhaps wording which needs some modernisation) and statements of the International Civil Aviation Organisation ("ICAO"). But there was some public confusion.

40. QAG says that *Al Arabiya* is a Saudi-owned and controlled news network and channel that has a relation of some form with each of the Defendants (I will not at this stage draw any distinctions but refer generally to *Al Arabiya* and assume the Defendants are responsible for its output and the Video).

41. The claimed Saudi control of the channel is an issue for trial but I accept that there is a plausible basis for QAG's contention. The evidence before me indicates that *Al Arabiya* and the companies operating it may be ultimately owned by and/or owned for

the benefit of, the Saudi state/Saudi royal family and a Mr Waleed bin Ibrahim Al Ibrahim and his associates. He is a prominent Saudi businessman who appears to be closely linked to the Saudi royal family.

42. QAG argues that Mr Al Ibrahim has had considerable practical control over *Al Arabiya* but it was and is also considerably controlled by the Saudi state. It relies upon what it calls the "political interconnectedness" of the Saudi state and *Al Arabiya*.

43. QAG has referred me to the role of Mr. Turki Al-Dakhil, a senior Saudi political figure said to be close to Prince Mohammed bin Salman (the Crown Prince and effective ruler of Saudi Arabia). Mr Al-Dakhil was *Al Arabiya's* General Manager between 2015 and the end of August 2017. He was in post at the time of the Video. He is said to have succeeded a Dr Altoraifi who immediately thereafter became Saudi Minister of Culture. Mr Al-Dakhil in turn became Saudi Ambassador to the UAE on leaving *Al Arabiya*. QAG contend that Mr Al-Dakhil played an important role in relation to the Video. He is a pleaded individual in POC3.

44. QAG say that *Al Arabiya's* news coverage is controlled or influenced by the Saudi state to serve Saudi political purposes and convey the "Saudi case". It argues that during the Gulf crisis *Al Arabiya* repeatedly served as the mouthpiece of the Saudi state and the Blockading States against Qatar. In the evidence before me, I note that The Financial Times, for instance, reported that *Al Arabiya* has been used by Riyadh, since around 2015 "more aggressively to counter the influence of Al Jazeera, the network owned by Qatar, Saudi Arabia's Gulf rival".

45. Without making any findings, I am satisfied at this interlocutory stage that there is plausible evidential basis as to this theory of arguable "interconnectedness" between *Al Arabyia* and the Saudi state, and QAG's contention in its evidence that the channel is perceived as an "arm" of Saudi foreign policy.

46. These matters are relevant because they are in principle capable of supporting the argument made by QAG as to motive, and opportunity, and means. That is, there is a reason why the Blockading States might want to take steps in the information sphere (such as issuing the Video) to harm QAG's operations in the Middle East. It arguably shows how there was an opportunity to do so, by creating a media story about whether QAG flights in the corridors would be safe. It also arguably indicates that the Blockading States and in particular Saudi Arabia could use *Al Arabiya* to create such a media story.

47. Before considering the Video itself, it is important to identify certain aspects of the international law framework. This framework is at the core of QAG's case on falsity and malice in relation to the Video.

III. International Aviation Law

48. States have territorial sovereignty in respect of the airspace over their territory and the territorial sea, but not the airspace over the high seas (UN Convention on the Law of the Sea, Art 2).

49. Scheduled international air services require permission from the overflown state (Chicago Convention 1944, Art 6). The evidence is that such permission has been

granted: under the International Air Services Transit Agreement 1944 ("IASTA"), to which Qatar and all the Blockading States save Saudi Arabia are party, the contracting states granted each other the right of overflight for scheduled international air services (Art 1); and the Bilateral Air Services Agreement ("BASA") between Qatar and Saudi Arabia does the same *inter se*.

50. Further, the effect of Arts 9, 11 and 12 of the Chicago Convention is that while states can restrict or prohibit overflight in defined cases such as for reasons of public safety, this must be done without discrimination on grounds of nationality; and while prohibited areas may be declared for reasons of military necessity or public safety, they must be publicly declared to the ICAO, be of reasonable extent only, so as not to interfere unnecessarily with air navigation, and again must be applied without discrimination on grounds of nationality.

51. Article 22 also provides that the contracting states must take all reasonable measures to facilitate air navigation between the territories of contracting states.

52. Relying on these instruments, it is QAG's position that the air blockade was unlawful. It says that there was a clear breach of the right of overflight, Articles 9 and 11 of the Chicago Convention were not satisfied, and Article 22 was also breached. I do not need to decide this.

53. However, of more direct relevance to the claim, is QAG's submission that irrespective of the rights and wrongs of the air blockade, it is clear that international aviation law and policy strongly militates against the use of force against civil airliners. It referred me to the fact that in 1984 the Chicago Convention was amended to include Article 3bis (which it contends reflects customary international law).

54. That provision is in the following terms:

> "Article 3bis
>
> a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.
>
> b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft."

55. By way of exception, QAG submitted that states retain the power to use force in self-defence against civil airliners under Article 2(4) UN Charter – for example in a 9/11 scenario – but that power is extremely limited. At most, it can only be used proportionately and as a last resort. Those submissions seem to me to be clearly correct. I accept that the right could not be used against a civil airliner going about its business normally. Indeed, that much did not seem to be disputed by Leading Counsel for the Defendants.

56. So far as concerns interception, there is substantial force in the argument that it could not apply to a QAG airliner on a normal service flying in a designated corridor, where (a) it would be flying with authority (not least under IASTA and/or the Qatar-Saudi BASA, for the purposes of air passenger traffic, consistently with the purposes of the Chicago Convention); and (b) would be specifically permitted to fly by the specific permissions granted by the Blockading States to use such corridors.

57. Further, I note that ICAO's Annex II to the Chicago Convention; "Rules of the Air", addresses interception more specifically, and provides at Appendix 2 that:

> "1. Principles to be observed by States.
>
> To achieve the uniformity in regulations which is necessary for the safety of navigation of civil aircraft due regard shall be had by contracting states to the following principles when developing regulations and administrative directives: a) interception of civil aircraft will be undertaken only as a last resort; b) if undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome."

58. I was also taken to Attachment A to Appendix 5 of the Convention which provides at §2.2: "To eliminate or reduce the need for interception of civil aircraft, it is important that a) all possible efforts be made … to issue any appropriate instructions or advice to such aircraft, through the appropriate air traffic services units. …".

59. Finally, I note that §§3.1 to 3.4 of this document provides for any interception to be conducted in a safe and non-aggressive manner "in order to avoid any hazard to the intercepted aircraft".

60. Overall, I accept that any legitimate national regulations governing interception could not permit unnecessary and aggressive interceptions in the defined air corridors. Indeed, the Defendants rightly did not argue to the contrary.

61. This largely uncontroversial legal framework is relevant because it is the starting point of QAG's case that anyone who had taken steps to inform themselves of the legal position would have known that contrary to what (it argues) is the message of the Video, there was no real risk of any internationally legitimate interception, still less legitimate shooting at or down, of a QAG scheduled service in flight along one of the defined air corridors. I turn next to the meaning of the Video.

IV. <u>The Video: Meaning and Falsity</u>

62. At the heart of each of QAG's causes of action (in POCs1-3) is the allegation that the Video had a pleaded meaning (or impliedly contained statements in the terms of these meanings), and that these meanings/statements were false.

63. Although I will need to consider the pleaded causes of action in more detail below, it is convenient at this stage to consider the Video and these claimed meanings/statements.

64. The following three statements are asserted to arise from the Video in the case on meaning in the Particulars of Claim:

    i) That, if people chose to fly with Qatar Airways in and around the Middle East there was a serious risk that their aircraft would be shot down and they would be killed.

    ii) That, if people chose to fly with Qatar Airways in and around the Middle East there was a serious risk that their aircraft would be intercepted by a fighter jet and forced to land, after which they would be subject to extremely hostile treatment, including being arrested and prosecuted.

    iii) That if a Qatar Airways aircraft crossed the airspace of any of the Blockade States international law fully justified either such action.

    (I note that these statements are also the basis for the deceit claim).

65. Although this is an interim hearing, and my task is consider the arguability of QAG's case as to meaning, this is an area where I can form a relatively clear view on meaning. I can do that by viewing the Video and applying well-established principles which govern the position when there are a potentially large number of unidentified publishees. In that situation, it is ultimately a matter of impression and identification of what meaning(s) a substantial number of people who watched the Video would reasonably have understood the words/images complained of to bear. I refer to the helpful guidance of Nicklin J in reviewing the law of malicious falsehood in <u>Peck -v- Williams Trade Supplies Limited</u> [2020] EWHC 966 (QB) at [12]-[18].

66. As stated above, I have attached as Annexe A a frame by frame screen shot version of the Video with subtitles, as published on the *Al Arabiya* website, and *Al Arabiya's* YouTube, Twitter and Facebook channels.

67. The Defendants argue that QAG has no realistic prospect of establishing its pleaded case as to meaning. They argue that the Video was not only accurate in international law but that it did not mean, as argued by QAG, that "if people chose to fly with Qatar Airways in and around the Middle East there was a serious risk that" either "their aircraft would be shot down and they would be killed" or "that their aircraft would be intercepted by a fighter jet and forced to land, after which they would be subject to extremely hostile treatment, including being arrested and prosecuted".

68. The Defendants further argue that the Video made it clear that a commercial aircraft would only be intercepted in the event that it violated the sovereign airspace of a blockading country in a non-emergency situation. They say that the Video stated that in the event that a commercial aircraft was intercepted for violating the sovereign airspace of a blockading country in a non-emergency situation, only the aircrew responsible for the unauthorised incursion would be liable to arrest and prosecution. It did not contain any suggestion that there was a "serious risk" (or indeed any risk) that any passengers would be subject to any hostile treatment or arrest/prosecution.

69. Finally, the Defendants argue that the Video made it clear that an aircraft which violated the sovereign airspace of a blockading country in a non-emergency situation could only be shot down if it was positively identified as an enemy or hostile target. They say the Video did not suggest there was any risk that a commercial Qatar Airways aircraft would be so identified.

70. In this regard, they rely upon the fact that the portion of the Video that depicted a missile being fired at a hostile aircraft deliberately showed a "generic" fighter plane and a "generic" aeroplane bearing no logo. I was referred to the fact that it did not depict a Saudi fighter jet or a Qatar Airways airliner. It was argued that this was intended by the journalist to underscore (and would have been understood as underscoring) that this portion of the Video was addressing an entirely hypothetical generic scenario, not a scenario involving a Qatar Airways jet.

71. Having considered the Video myself, it is arguable in my judgment that the overall impression conveyed to a reasonable viewer of the Video was as follows:

   i) passengers flying on Qatar Airways planes in and around the Middle East were potentially at risk of being shot down, and at some risk of interception by fighter jet, a forced landing, and negative treatment when they landed; and

   ii) these actions were permitted by international law.

72. My own view does not go perhaps as far as the pleaded meanings but is close enough. I also consider the Video is not as dramatic and threatening as Leading Counsel for QAG argued. It is at points amateurish and hard to follow (and somewhat tedious towards the end). But it does convey, at least, the meanings I have set out above.

73. My reasons for my own conclusions as to meaning are based on the following statements and images in the Video:

   (a) the Video begins with the figure of what is clearly a Qatar Airways aircraft;

   (b) the statements that the Blockading States had banned access to their airspace, and that in that context under international law a state that imposes a ban on overflight has the "right to deal with any aircraft";

   (c) that options include forcing down the aircraft, but that international law also provides that states can shoot down "any plane entering its atmosphere which is identified as an enemy target";

   (d) the arguable implication of this is that a Qatari plane is an enemy and a target;

(e) that implication also arises from the reference to the Blockading States as the "countries calling for countering terrorism", combined with the statements that the nine corridors were for emergency use only, such as mechanical failure and thus, it was arguably implied, they could <u>not</u> be used safely for normal scheduled services;

(f) the arguable implication was that this danger was a relevant applicable danger, applicable to normal QAG scheduled services;

(g) these statements together with the striking graphic of fighter planes flying close and firing Air-to-Air missiles at the airliner create an overall impression that is threatening.

74. I would add (in relation to the risk of being forced down, adverse treatment and the suggestion that this was justifiable under international law) this arguable implication arises from the statements that "choices in this case usually include". It being, again, implied that "this case" was the application of the airspace ban to scheduled services flying in the corridors. The words "despatching fighter planes to force it down", suggested a risk of being intercepted and forced down was a real risk for normal scheduled flights, flying in the corridors.

75. A threat of additional harsh treatment on the ground was also created in particular by the combination of "its members may be prosecuted for several crimes" and the picture of what do seem to be passengers surrounded by men with guns. The Arabic appears to have said "crew members", but the English does not, and the picture does not seem to support this.

76. Although the views above are my own, I was referred to similar impressions that the Video created in the minds of others who concluded that the striking images suggested a real threat to QAG planes: The Independent (*"*overt threat" and *"*threatening videos"); The Daily Mail ("chilling warning"); and Gary Leff, aviation commentator ("threatening to shoot down").

77. Of the substantial materials before me concerning reaction to the Video, I found most helpful an independent article on 18 August 2017 by Kevin Jon Heller (Professor of International Law and Security at the University of Copenhagen and Professor of Law at the Australian National University) on <u>Opiniojuris.org</u>.

78. Professor Heller observed:

> "…but what is truly horrifying is the accompany voiceover, which intones the following:
>
> > *International law permits states to shoot down any aircraft that violates a state's airspace, classing it as a legitimate target, especially if flying over a military area.*
>
> No, it doesn't. This is wrong on so many levels...
>
> We need to be clear about what the video represents. Quite simply, Saudi Arabia is threatening to engage in state terrorism — the use of violence to spread panic among Qatari civilians in order to persuade

the Qatari government to supposedly stop supporting terrorist groups. (Something the Saudis know more than a little about…"

79. I have also concluded that it is arguable that what was being said was false and misleading. As noted above, in fact the air corridors were permitted for use by QAG planes by the Blockading States. On the material before me, there was nothing to suggest that use of them was unsafe; and nothing to suggest that QAG airplanes would stray from the corridors. It also seems to me that there was no basis to suggest that the use of force against them (or forcing them down) could be legitimate.

80. I consider that in the international law context, and in terms of practical reality, this meant that it was most unlikely that force might be used either to shoot down or to intercept and force down QAG airliners flying in the corridors. Indeed, the Blockading States had never suggested they would do anything of the sort, nor did the Defendants' Leading Counsel argue this.

81. Accordingly, QAG's specific submissions on falsity raise an arguable case which I would put in summary form as follows:

1) The idea that the corridors were for emergency use only was false. As specified by the NOTAMs and the ICAO and the Blockading States themselves they were for normal scheduled services.

2) The international law right of self-defence could not come close to justifying the statements in the Video. It is hard to see how that right could ever in any normal situation apply to a scheduled air service going about its normal business, but the Video's threats of dangers did not make themselves conditional on any use of civil airplanes for terrorism or other attack and were arguably conveyed to create the impression they applied to basic scheduled services of QAG. This is inconsistent with the strict restrictions on any use of force against civil airliners reflected in international law.

3) So far as concerns interception, there was no realistic right, nor plausible risk, of interception, especially within the corridors, where QAG airplanes would be flying.

4) The picture of how an interception might, legitimately, unfold was also wrong and misleading. The use of fighter planes in the threatening way identified in p.6 is inconsistent with any realistic legitimate approach to the proportionate use of force, and indeed the careful restrictions on any interception.

5) Nor was there any basis to imply a legitimate right to adverse treatment of passengers on the ground: imposing sanctions against crew and passengers without any basis at all, would be contrary to international law.

6) The statement that "Choices in this case usually include either despatching fighter planes to force it down sending fighter-jets forcing the plane to land …. which is usually how commercial airlines are handled" (pp. 4-6) is inconsistent with the reality that even were any plane to stray (accidentally) from the corridors, the only legitimate and proportionate approach would be for air traffic control to redirect it.

7) Finally, the statement that "international law also gives each state the right to bring down any plane entering its atmosphere which is identified as an enemy target especially in military bases, where air defence is unrestricted." (pp. 7-8) is arguably inconsistent with the narrow scope of the right of self-defence in international law.

82. Before leaving the issue of the Video, I need to address a particular point relied upon by the Defendants, which I summarised above. They say that the Video does not depict a Saudi fighter plane shooting down a QAG airplane. They rely on the lack of markings of the target plane. They rely upon evidence from the authors of the Video (evidence I will need to consider in another context) to the effect that their intentions in removing the QAG logo in these frames was "to make clear that this was a hypothetical scenario" and that these frames "concerned fictional/theoretical events", and were just a "hypothetical example of what could happen if an aircraft was deemed a threat".

83. In my judgment, it is arguable that the Video gives the impression that there is a risk of a Blockading State fighter plane shooting at, and shooting down, a QAG airliner. The press coverage supports this impression, but it is my own view. The press widely understood the fighter plane to be a Saudi jet.

84. I have briefly referred to a number of articles above, but it is worth looking at two UK pieces in major English publications which seem to me to be representative:

1) On 16 August 2017, The Daily Mail featured an article entitled "Saudi Arabia issues chilling warning that it could blast a Qatari passenger plane out of the sky with an animated simulation of a missile-strike on state-owned TV" posted on the website of the UK newspaper. The Daily Mail Article states that "a voiceover says that 'according to international law, a state that bans flights from entering its airspace has the right to deal with the violating plane in any way it wishes"; "The message carried on Al Arabiya has been widely condemned internationally"; and "Now on Twitter the Al Arabiya video is being widely condemned for suggesting violence against civilian passengers". One of the reproduced frames from the Video is captioned with "Saudi Arabia has threatened to shoot down Qatar-owned passenger planes which fly over its territory".

2) On 18 August 2017, The Independent published an article entitled "Fears grow as video shows Saudi fighter jet firing missile at a Qatari civilian aircraft" posted on the website of the UK newspaper. The Independent Article contains an embedded version of the Video. Amongst other things, it states that "In an apparent overt threat to the fellow Arab nation, a voiceover in the graphic animation says that the Saudi authorities have the "right to shoot down" any aircraft that enters their airspace"; "Viewers believe the simulated video of the fighter jet downing a Qatar Airways civilian plane is "beyond provocative" and is meant to scare off would-be passengers from flying with the country's national airline". The article goes on to state that aviation analyst Alex Macheras said, "the video was full of inaccuracies".

85. I consider to be of significance that although the QAG logo is not present on the visible side of the aircraft in the three frames where the plane is shot at, the QAG logo

otherwise goes throughout the Video (before and after this section) and the reasonable viewer would arguably have viewed it as a continuum.

86. QAG's Leading Counsel argues that this is an example of "slippery framing to allow some formal deniability while preserving the essential real threat". I express no view as to this point at this stage (save as to say this is arguable), but I note that the press coverage interprets these frames of the Video as threatening QAG.

87. I note that a leading aviation analyst, Gary Leff, of ViewfromtheWing observed: "When showing the plane that's being brought down by a missile in this illustration, Qatar Airways markings have been removed, however the implication is clear".

88. I pause at this stage to record that in my judgment, QAG has made out an arguable case as to meaning and falsity. That however does not in itself establish that it has complete and viable causes of action and I now turn to consider the issue of publication, where there was also a substantial dispute.

V. Publication

89. The following chronology of the dates of publication of the Video is not materially in dispute at this stage of the proceedings (and QAG reserves its rights as to the dates):

    1) The Video was broadcast on the *Al Arabiya* Arabic language television news channel on the evening of 9 August 2017, with a newsreader reading the voiceover script (and without the English subtitles).

    2) On 10 August 2017, the Video was published on the channel's social media platforms (YouTube, Facebook and Twitter) and on its Arabic language UAE Website with Ms Rawabdeh reading the voiceover script.

    3) On 13 August 2017, the Video was published on the channel's English language UAE Website with English subtitles.

    4) On 19 August 2017, the channel published an article on the English and Arabic language UAE Websites (responding to an article in another publication, The Independent) which contained an embedded copy of the Video ("the Independent Response Article"). I have referred above to The Independent's article of 18 August 2017.

    5) On 3 January 2019, the Video was removed from *Al Arabiya's* English and Arabic language UAE Websites. It is no longer available on any of its websites or social media channels.

90. On the issue of the nature and extent of publication, I remind myself that I am seeking to identify whether on the material before me and bearing in mind the limitations of the interlocutory process, QAG's case that there was significant publication (both original publication and republication) is arguable, to the serious issue to be tried standard.

91. It is common ground that in malicious falsehood, publication for the purposes of the tort via internet websites occurs <u>not</u> when and where content is posted on a website but instead when and where that content is accessed by a reader/viewer: <u>Al Amoudi v</u>

Brisard [2007] 1 WLR 113, [32]-[33]; Richardson v Schwarzenegger [2004] EWHC 2422 (QB), [19]. Where actual special pecuniary loss is claimed, the cause of action for malicious falsehood is not completed by publication but by the consequential loss (Gatley, §19-17). Where section 3 of the Defamation Act is relied on, the cause of action for malicious falsehood is completed by publication.

92. There was both factual and expert evidence on the publication issue.

93. As to the latter, both parties submitted forensic expert evidence seeking to evaluate the extent to which the Video was published and shared online. I have considered the detail of the reports and responsive evidence of Digitalis for QAG and Duff & Phelps for the Defendants. I have also considered the points made in submission as to whether specific assumptions in terms of data and analysis made by the experts were sound. I am not in a position for obvious reasons to make any concluded findings on these issues, but I will set out below such conclusions as I feel able to arrive at on the material before me.

94. Beginning with the factual evidence, the following matters are established either as common ground or are in my judgment arguable (where disputed):

i) *Al Arabiya* is one of the two major Middle Eastern news networks with worldwide coverage, the other being *Al Jazeera*. I can infer that its coverage may have a worldwide impact.

ii) The Video was published, and published again, on *Al Arabiya's* Website, YouTube account, and social media feeds. It was then widely republished along with (on occasion) what can fairly be called dramatic commentary on websites online, and on social media worldwide including in the UK (as a whole and in some cases edited).

iii) More generally, the evidence before me shows that there was substantial contemporaneous discussion of the Video in the press in particular in the UK. Although I would not use this language, Counsel for QAG was entitled to say there was what he called "a media storm".

iv) The Digitalis 1st report lists 31 third party websites, which commented on the Video and on occasion republished it by way of embedding or links. Of those websites, the evidence before me shows a number of important sites are UK websites, including the independent.co.uk (which had a page embedding the Video), mail.co.uk (which had a page with a link to the Video), and theweek.co.uk (which had a page with a link to the Video). I accept that The Independent and the Daily Mail have large audiences in the UK.

v) Further, the UK-based aviation analyst Alex Macheras also included an embedded copy in an article he authored on thepointsguy.com website and also tweeted a clip of the Video from his @AlexInAir account.

vi) Mr Al Baker (QAG's CEO) states "the publication and re-publication of the Video in the UK was particularly significant" and I accept this is plausible, in particular because of the publication on the influential Independent and Daily Mail websites, with their large UK audiences.

vii) I note, in passing, that seems consistent to me with the point (discussed further below) that of the websites listed at Appendix 1 to Digitalis' 2nd Report the UK accounts for an estimated 18.8% (323,801) of the worldwide (1,722,259) audience of third party web pages on which viewers were exposed to the Video or discussion of it.

viii) It is also significant in my view that when *Al Arabiya* wanted to engage with part of the press coverage in their second article (the Independent Response Article), they chose to respond to an English publication, The Independent, which then itself replied. The channel clearly regarded this UK media outlet as deserving of a special response.

95. Turning to the expert evidence, QAG has obtained a report from Digitalis which estimates figures for exposure to the Video. Certain aspects of that were challenged in a report from Duff & Phelps. Digitalis have produced a second report. QAG argues that for jurisdictional purposes the figures in the later report establish its case on significant publication and republication (and indeed they argue that the true figures are likely to be higher).

96. I accept the substance of this submission by QAG and I would summarise the material points as follows:

i) There were a total of 270,807 worldwide and 17,481 UK views of the Video on *Al Arabiya's* websites and social media channels.

ii) 1,722,259 worldwide and 323,801 UK viewers were exposed to the Video on third party news websites, that is viewed a third party news webpage where the video was embedded, linked to or referred to.

iii) I accept that by the nature of things, this does not give a figure as to actual views of the Video worldwide/UK, but it can be inferred that a substantial number of those who went to the page with the Video would have viewed the Video. It is arguable that an estimate of 50% (by inference) is appropriate. That would give 647,356/154,004 extra views Worldwide/UK. Such inferences are now commonplace in libel claims and it is a matter for the judge to assess by way of inference whether web viewers will follow embedded links.

iv) Further, even those who did not click to <u>view</u> the Video would have been exposed to its <u>content</u> by the press reporting which discussed the Video in striking terms and often set out key pictures within the article text – including the QAG planes being shot at.

v) There were 237,913 (Worldwide) and 15,700 (UK) <u>views</u> on third party social media.

vi) A global total, therefore, of exposure of 2,230,979 (Worldwide) and 356,982 (UK) (16%), with an estimated views figure (using the 50% estimate for viewing from third party news pages embedding and linking to the Video above) of 1,156,076 (Worldwide) and 187,185 (UK) (16%).

vii) I agree that these are substantial figures and significant percentages on a worldwide scale. I also accept that potential customers of QAG would be more likely than others to be interested in the Video and so would be disproportionately represented.

97. I have not ignored the detail of the Duff & Phelps report and its challenge to the Digitalis 1st Report. I agree however with QAG that deciding these issues in dispute is disproportionate. There are debates about each expert's figures, but QAG has made out a sufficient and triable case at this stage, and where necessary a good arguable case.

98. I was in addition taken to a helpful annexe provided by QAG which provides comparative calculations from Duff & Phelps' evidence. I will not add to the length of this judgment by going through that in detail, but it broadly shows that Duff & Phelps seem to support an 8-10% range for UK views of the English *Al Arabiya* website and about 7% of their YouTube channel. It is also important to note that the number of views of the Video in the UAE are about a third or a half (depending on whose figures one prefers) of UK views. This is a point on which QAG places reliance in respect of the forum issues.

99. In my view, Digitalis' figures are also consistent with the non-numerical evidence which I have summarised above, and with the inherent probabilities. Qatar Airways has a major business worldwide and the UK is its numerically most numerous flight destination outside Qatar. The Video was in some respects dramatic as is evidenced by the way it was discussed in the press coverage.

100. It can readily be inferred that it would have significant exposure and viewership worldwide. As to the UK, given its importance to Qatar Airways and the fact that the story was picked up and discussed in serious terms by major UK websites (and was embedded/linked), it stands to reason that the Video would have significant exposure and viewership in the UK.

101. Finally, while it is established that, on the internet, there is no presumption of publication in the sense of viewership, the case law shows that if there is sufficient contextual evidence the court is ready and willing to infer from posting on the internet that a page or link has been substantially viewed. I refer here to Trumm v Norman [2008] EWHC 116 (QB) [35]-[36] and Al Amoudi v Brisard [2007] 1 WLR 113, [33]-[35]). Here there is ample evidence going far beyond the merely contextual to support the inference.

VI. Loss

102. In respect of each of its causes of action, QAG's case as to loss is the same and relatively simple. It pleads that prospective customers refrained from booking flights with Qatar Airways including within the jurisdiction and throughout the MENA region following publication and republication of the Video. It also seeks damages in respect of expenses to remedy the position and relies on s.3 of the Defamation Act 1952.

103. This quantum case is supported by witness statements from QAG's CEO, Mr Al-Baker and its Solicitor, Mr Bartlett. This aspect of the case is also strongly challenged by the Defendants so needs to be addressed in more detail.

104. QAG says that sales in the UK and MENA region fell 13% in the 30 day period following the Video compared to the week prior to the Video. It accepts that other factors could be in play but not the Blockade in itself which had already been imposed then loosened by the time of the Video. It submitted that going forward much more detailed factual and expert analysis will be required, but these provide useful indicative figures to work with at this stage.

105. Turning to the evidence, Mr Al-Baker explains "a major part" of the loss would be suffered in the UK given that the UK is a major part of QAG's network, with the top number of flights outside Qatar and publication and republication in the UK was particularly significant.

106. Further, QAG submits that it would suffer loss in the UK in two ways: first because of losses at the point of sale when sales were lost, and second when revenues were paid into QAG's UK bank accounts.

107. As to the first, it argues that the point of sale loss in the UK can be inferred to be large because QAG's point of sale sales in the UK for August 2017 were US$33.9m. As to the second, the great bulk of worldwide E-commerce revenue is paid into QAG's bank account in England, and of this $100.2m was deposited in England in August 2017. It submits that any attempt at this stage to determine the actual loss can only be indicative and involves obvious oversimplifications. However, it says it is plain that the UK's share of global revenue is and was very significant in absolute and relative terms and it is reasonable to assume that the UK's share of loss will be the same.

108. It was emphasised that these loss figures are for one month only and QAG has not engaged in figures for later months, but it can be inferred that loss, although likely to have diminished over time, would have continued to occur.

109. As to the position of the Defendants, they say that QAG has not identified any specific prospective third party customer who was a lost sale, or any more specific details of lost sales than the 13% fall in sales volume over the 30 days following the Video compared to prior sales.

110. But this ignores in my view that we are at the jurisdiction stage. As Mr Bartlett for QAG rightly says, it would be entirely unrealistic and disproportionate to go into detail at this stage, with such details being a matter for factual and expert evidence at trial.

111. Further, I note that QAG's loss is not limited to the 13% – it pleads "substantial losses" for which this is only an initial partial figure. The inference from the sales fall, combined with loss being the natural consequence of the Video, is sufficient at this stage, and meets the standard of a serious issue to be tried and a good arguable case.

112. A further point taken by the Defendants is that UK Point of Sale loss of US$3.68m would only be 10% of the total UK plus MENA loss (over the first month). But that does not in my view change the fact that loss in the UK was significant and

substantial in absolute terms (and it is only a rough estimate at this stage). Further, in my judgment 10% is a significant relative proportion of overall losses suffered in many countries (I note that QAG derives revenue from 113 states).

113. It remains the case, therefore, in my view that it is arguable that a disproportionately significant proportion of the loss was suffered in the UK; and the UK has the highest identified loss figure (other than Qatar) as stated in evidence. This is so, even leaving aside E-commerce revenue. Once E-commerce is added in, the UK is clearly the largest outside Qatar.

114. Finally, in my judgment even if (contrary to my views above) QAG could not make out a sufficient case at this stage for actual pecuniary loss, then, so far as concerns malicious falsehood, QAG can make out a sufficient case to pass the threshold of a serious issue to be tried, by reference to the Defamation Act 1952, section 3. It is clearly arguable that the Video was "calculated to cause pecuniary damage" to QAG. This is an objective, not a subjective test; it means "likely" or "probable" or perhaps "more likely than not": see IBM v Web-Sphere [2004] FSR 39, [74] and Tesla Motors Ltd v BBC [2013] EWCA Civ 152, [27].

115. Thus, QAG has made out a real prospect of success of showing substantial losses, in the UK and worldwide.

VII. The Defendants

116. I have summarised above the nature of the Video, claimed falsity and losses said to flow from publication. I have not thus far addressed the role of each Defendant. QAG needs to show a serious issue to be tried as to relevant involvement in the torts and I also have before me a distinct application by MEN UK for dismissal of the claim under Part 24 or striking out (Application Notice of 16 July 2020).

117. QAG's position in its skeleton is put in the broad terms that it wishes to sue each of the "Al Arabiya/MBC companies" that was responsible for the publication of the Video, as well as those companies who were involved in, or combined to procure, its creation and publication. This reflects its essential case which seeks relief against those directly involved in publication and those behind the alleged conspiracy torts relied upon (and the interference with business tort).

118. QAG says that given the opaque nature of the companies involved it has been difficult to work out who to sue. This also explains, it submits, why it omitted to sue the Fourth Defendant (AAN FZ) and added it on 27 November 2018 once it was mentioned for the first time by the Defendants. QAG also argued that the Defendants have been "evasive" as to ownership and control structure. I do not consider this last criticism to be well-founded but will turn to the more important issues of substance.

119. QAG's pleaded case is that all the Defendants are companies within the "MBC Group" which is describes as a substantial private media group based in Dubai, and that the "output" of the group includes *Al Arabiya*. It also says that some of the operating companies of MBC Group are owned by News 24 Holding Limited, a BVI company whose ultimate beneficial owners "reportedly" include the Government of Saudi Arabia and Mr Waleed bin Ibrahim Al Ibrahim (a person I referred to above).

120. I note that it is not in dispute that the First Defendant (MEN FZ) is a media and broadcasting company based in Dubai, the Second Defendant (MEN UK) is a broadcasting company registered in the UK, the Third Defendant (MBC FZ) is a media and broadcasting company registered in the UAE and the Fourth Defendant (AAN FZ) is a broadcaster registered in the UAE.

121. The Defendants' case as to the creation of the Video is that it was the work of Ms Zaineh Rawabdeh, a journalist based in the UAE and employed by MEN FZ to produce topical news content for AAN FZ. This journalist has provided a witness statement explaining that she was asked by one of AAN FZ's producers, Mr Mahmoud Rawashdeh (also employed by MEN FZ) to produce an item on the air blockade. She explains that she conducted some research on aviation law including a short consultation with an expert. She then presented the script to Mr Rawashdeh and the Shift Programme Editor, Mr Mohammed Abdelrouf, who approved the script. Ms Rawabdeh says that nobody else played a role in the creation. Mr Rawashdeh gives a statement to the same effect. Both confirm MEN UK played no role.

122. Before turning to the other Defendants, I can relatively briefly address the issue of MEN UK's involvement. It has submitted a Defence and asserts it had no involvement in the Video and acts merely as a foreign news bureau which provides broadcasting services in the form of local news reports concerning UK events to AAN FZ. This Defence is confirmed by a statement of truth. The Defendants argue that the sole basis for MEN UK's joinder is the claimed "inference" that it would have produced material for the Video including a likely involvement in the subtitles.

123. QAG submitted that MEN UK's involvement is to be inferred from common alleged board membership and senior management. QAG also says that "MEN UK is a good candidate for being involved in the creation of the Video" in its skeleton and makes allegations that MEN UK has made false or inaccurate statements in its Defence as to News 24's relationship with the MBC Group and the Third and Fourth Defendants.

124. I was referred to part of a US District Court costs decision which appears to suggest that the Defence may be inaccurate in this regard. QAG also prays in aid the fact that where a case involves covert action and conspiracy a court should not shut out a triable claim based on assertions of a Defendant.

125. I am wholly unconvinced as to the sustainability of the case against MEN UK. It has no realistic prospect of success on the facts, even bearing in mind the early stage of this claim. The causes of action against MEN UK are all premised on the allegation that it was actively involved in the creation and publication of the Video. The fact that the corporate relationships may be misdescribed does not establish that it somehow had some hidden involvement. Even if the evidence of Ms Rawabdeh and Mr Rawashdeh may be subject to other challenges at trial (as to who knew what in relation to the making of the Video), QAG have not satisfied me that there would be any more than fanciful argument supporting involvement of an overseas news bureau in the Video.

126. As Mr Whitehead and the Defendants' solicitor explain in their sworn witness statements, MEN UK is an overseas news bureau whose sole business activity is to provide local news reports and interviews regarding events in the UK only. Further, they say MEN UK exercises no editorial control over content published by AAN FZ

or any other entity. I accept that evidence. I see no basis for an inference that it is mistaken or based on dishonest instructions. I am also not impressed by the submission that no documents have been produced to show non-involvement: there are unlikely to be documents showing a lack of involvement.

127. The case against MEN UK is purely speculative and indeed the latest iteration of the Particulars of Claim, POC3, produced on the morning of the first day of the hearing supports the suggestion that its joinder is based on wild speculation.

128. I will strike out the claim against MEN UK and also grant its Part 24 application. There is no realistic prospect of success of any of the claims against MEN UK.

129. I now turn to the other Defendants. Limiting myself to the issue of involvement in the planning and making of the Video, I am satisfied that there is a sufficient factual case in relation to each of the other Defendants and will express my reasons briefly.

130. As to MEN FZ, the Defendants admit that those immediately working on the Video, said to be Mr Rawashdeh, Ms Rawabdeh, and Mr Abdelrouf, as well as any other staff within "Al Arabiya" directly involved, were <u>employees</u> of MEN FZ. Further, MEN FZ controls all relevant contractual rights for AAN FZ and owns/controls the Website and the social media channels. These facts are sufficient to establish potential responsibility.

131. As to MBC FZ, there is an arguable case as to its involvement and responsibility for what was on the website. There is evidence suggesting that this is the main operating company in the broader "MBC" group. That group appears to include MEN FZ, AAN FZ, and MEN UK. Those three companies are said to form an "Al Arabiya" business unit within MBC but are controlled and owned by and through MBC FZ. This is supported by certain documentary evidence, including (i) the MBC Group's Website which lists the *Al Arabiya* website as one of MBC's online platforms; (ii) public statements by MBC referring to *Al Arabiya* as part of their channels and Al Arabiya and MBC's own Wikipedia pages stating that *Al Arabiya* is part of the MBC Group; (iii) press reporting stating that the *Al Arabiya* channels are part of the MBC group; (iv) the costs judgment of the US court in other proceedings involving MBC FZ showing that MBC FZ's witness apparently testified that MBC FZ owned *Al Arabiya* and controlled its licencing (I referred to this above in relation to MEN UK); (v) evidence before me from press reporting of MBC FZ and in particular its Chairman, Waleed bin Ibrahim Al Ibrahim, controlling *Al Arabiya's* operations; and (vi) the fact that MBC FZ shares premises and addresses with MEN FZ and AAN FZ.

132. QAG's case is that that it is to be "inferred that those higher up" will have been involved in the instigation and approval of the Video and/or its creation or publication or at least the higher direction thereof. It is arguable that it is also to be inferred that this higher direction would have passed through MBC FZ, given the significance of *Al Arabiya* as MBC's FZ news channel; the significance and sensitivity of the Video suggesting that the main corporate entity MBC FZ would have been involved, and the arguable point that Saudi Royal control would likely involve Waleed bin Ibrahim Al Ibrahim, MBC FZ's chairman.

133. As to AAN FZ, this Defendant admits its responsibility for the Video. I note that the evidence suggests that it seems to have no little or no substantial existence otherwise

than through MEN FZ, and given that (arguably) MEN FZ controls the means of publication, I accept QAG's submission that there is an arguable inference that it coordinated and combined with, at the least, MEN FZ, in relation to the creation and publication of the Video.

134. I will now turn to the next main headline issue, jurisdiction. Certain of my conclusions above in relation to the facts (or, rather, arguable facts) will provide answers to some of the questions that arise in relation to jurisdiction.

Jurisdiction

135. As regards MEN FZ, MBC FZ and AAN FZ (the First, Third and Fourth Defendants, respectively), which are entities domiciled in the UAE, QAG must show:

1) To the standard of a "good arguable case", that the claims fall within one (or more) of the gateways in CPR PD 6B §3.1;

2) That there is a serious issue to be tried on the merits. A "serious issue to be tried" means there has to be a "real, as opposed to a fanciful, prospect of success on the claim": VTB Capital v Nutritek [2013] AC 337, [164]. This is the same as the test for summary judgment: Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804, [82]. The underlying rationale is that the Court should not subject a foreign litigant to proceedings which are liable to be summarily dismissed: White Book (2020) Vol 1 para 6.37.15. In applying this test, it is important to bear in mind that "jurisdiction is founded on a properly arguable cause of action and not on what may (or may not) become a properly arguable cause of action" HRH Okpabi v Royal Dutch Shell [2018] Bus LR 1022 per Simon LJ at [122]; and

3) That England is the appropriate forum for the trial of the dispute, or in the words of CPR 6.37, "the proper place to bring the claim"; and that the Court ought to exercise its discretion to permit service out of the jurisdiction: VTB Capital v Nutritek, [164].

136. I will summarise below some further uncontroversial principles governing the approach to the first and second questions.

VIII. Serious Issue to be Tried

137. Although neither party referred me to the case law on Part 24, in my judgment it is useful have to have the governing principles in mind given the nature and scope of the submissions on the facts made to me.

138. In my summary below, I have drawn on the judgment of Hamblen LJ in Global Asset Capital Inc v Aabar Block SARL [2017] EWCA Civ 37; [2017] 4 WLR 163, a case in which reference was made to the now well-known judgment of Lewison J in Easyair Limited v Opal Telecom Limited [2009] EWHC 339 Ch at [15], as well as a number of other cases.

139. I would summarise the Part 24 approach as follows (highlighting points of specific relevance to the application before me) in six propositions as follows:

i) First, the court must consider whether the opposing party (here, QAG) has a "realistic", as opposed to a "fanciful", prospect of success.

ii) Second, the court must avoid conducting a "mini-trial" without the benefit of disclosure and oral evidence and should avoid being drawn into an attempt to determine conflicts of fact which are normally resolved by a trial process.

iii) Third, the last point only goes so far because a court is not obliged to accept factual assertions which are contradicted by contemporaneous documents. There must be real substance to factual assertions.

iv) Fourth, where a party invites the court to draw inferences of arguable wrongdoing and arguable loss, there must be a sufficient factual foundation supporting such inferences. That foundation might come, for example, from expert evidence, even if in draft form prior to formal permission under CPR 35. The foundation for an inference might also come from the inherent probabilities that certain events would have followed upon other events which have been established as arguable by evidence. Naturally, a court will be less willing to draw an inference that there was arguable serious wrongdoing involving, for example, acts of dishonesty, concealment or bad faith than more neutral conclusions.

v) Fifth, in reaching its interlocutory conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment but the evidence that can reasonably be expected to be available at trial. Again, this point only goes so far and should not be interpreted as a charter to plead a factual case which it is said may become sustainable when disclosure is given. See HRH Okpabi, referred to above.

vi) Sixth, some disputes on the law are suitable for summary determination. Generally, if the application gives rise to a point of law, and the court is satisfied that it has before it all the evidence necessary for the proper determination of the question, the court can and should determine the point. In this case, as appears below, certain of the disputes between the parties concern points of law which I have been able to resolve.

140. I would add that point (i) of my summary above is well-reflected in the case law in the area of jurisdictional challenge. Thus, the Courts have emphasised that it is important to avoid "over analysis of the facts at the stage of a jurisdictional challenge" - unless the respondents have some "killer point…the expending of so much time and energy on a full-scale evidential challenge is a fruitless exercise. All it succeeds in doing is demonstrating that [the Claimant] has raised serious issues to be tried": Erste Group Bank (AG) v JSC (VMZ Red October) & Ors [2013] EWHC 2926 (Comm) at [11]–[12].

Good arguable case: principles

141. On "good arguable case", as explained in Kaefer v AMS [2019] 1 WLR 3514 (CA), [61]-[80], the correct approach to this test was summarised by Lord Sumption in Goldman Sachs v Novo Banco [2018] 1 WLR 3683, [9]:

> "For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had 'the better of the argument' on the facts going to jurisdiction. In Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192 , para 7, this court reformulated the effect of that test as follows: '(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.' It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced".

142. This seems to be lower than balance of probabilities and is a *sui generis* test developed for the purposes of jurisdictional assessments. It is clearly intended to be applied with relative flexibility and pragmatism.

143. The following additional propositions are established by the authorities:

1) The question of the appropriateness of service out is to be assessed (at least in relation to gateways) by reference to the situation at the time of the application for service out, not the date of the hearing to challenge it: Erste Group Bank (AG) v JSC (VMZ Red October) [2015] 1 CLC 706 (CA), [44]-[45]; Mohammed v Bank of Kuwait [1996] 1 WLR 1493 (CA), 1492-1493. Whether this principle applies just to satisfaction of a gateway, or more widely, is in dispute between the parties. I will return to this issue in the context of the injunction gateway which is the context in which the dispute arose.

2) Older statements about how service out is exorbitant and to be undertaken with caution are no longer the law in modern times. Instead the decision is a pragmatic one in the interests of efficient conduct of the litigation in the appropriate forum: Abela v Baadarani [2013] 1 WLR 2043, [83]; Al-Jaber v Al Ibrahim [2016] EWHC 1989 (Comm), [21].

144. The Defendants advanced seven distinct arguments as to why there was no serious issue to be tried. I will address each in turn.

1) Failure to plead proper particulars of malice and dishonesty against any of the Defendants

145. The Defendants argue that each of the causes of action pleaded against them requires proof of some form of malice, dishonesty or malign intention. They say that the Particulars of Claim fail to meet basic pleading requirements in this regard.

146. They are correct to submit that POC1 (at para. 23) merely asserted at the highest level of generality that the Defendants "knew that the [statements in the Video] were false" and were published "maliciously…with the express motive of harming the Claimant",

and this plea was made without the identification of the person who is said to have had these states of mind. This plea was in relation to malicious falsehood but was also relied upon as the bedrock of the unlawful means conspiracy plea (which relied on malicious falsehood and common law deceit) and the lawful means conspiracy plea. It is also relied on for the purposes of the new claims for interference with business and breach of the Communications Act 2003 (which QAG sought to add by way of draft amended pleading of 30 April 2020).

147. In my judgment, there is real force in the Defendants' submissions to the effect that this was a defective pleading bearing in mind the established principles and case law to which I will make reference in a moment.

148. However, as I have indicated above, QAG produced a draft amended pleading, POC3, on the morning of the hearing before me. I will consider that pleading in more detail below, but it does in my judgment satisfy the basic pleading requirements, although it is far from perfect and easy to follow. I will first explain in brief terms why I consider certain of the Defendants' objections to the original pleadings were fair.

149. First, it is well-established that "there are stringent requirements imposed" on the pleading of malice. This is "because malice is recognised as being tantamount to an accusation of fraud or dishonesty and must not be made on a merely formulaic basis" (Khader v Dowd [2009] EWHC 2027 (QB) per Eady J at [31]). Accordingly, the mere assertion of dishonestly/malice (as in para. 23 of the Particulars of Claim before me) "will not do", per Eady J in Seray-Wurie v Charity Commission [2008] EWHC 870 (QB) at [35]:

> "A claimant may not proceed simply in the hope that something will turn up if the defendant chooses to go into the witness box, or that he will make an admission in cross-examination: see e.g. Gatley on Libel & Slander (10th edn) at 34.18, and also the remarks made by Lord Hobhouse in *Three Rivers DC v Bank of England* [2001] 2 All ER 513, 569 at [160]: 'Where an allegation of dishonesty is being made as part of the cause of action of the plaintiff, there is no reason why the rule should not apply that the plaintiff must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross-examination of a witness at the trial does not suffice.'"

150. Second, where malice is alleged against a corporate defendant it is necessary to identify in the pleading the individual(s) who is/are responsible for the publication of the words complained of and had the relevant state of mind. Neither was done in para. 23. In Monks v Warwick District Council [2009] EWHC 959 (QB) at [23]-[24], Sharp J explained:

> "[T]he Claimant must give particulars of the person or persons through whom it is intended to fix the corporation with the necessary malicious intent, as well as pleading the facts from which malice is to be inferred."

151. In HRH Duchess of Sussex v Associated Newspapers Limited [2020] EMLR 21 Warby J cited Monks and emphasised (at [49]) that:

> "It is trite that dishonesty or malice cannot be established against a corporation by aggregating the conduct of one employee with the state of mind of another. Fairness requires the identification of the individual(s) said to have behaved dishonestly."

152. To similar effect, in Zinda v ARK Academies (Schools) [2011] EWHC 3394 (QB) Eady J stated (at [34]):

> "It is necessary also to remember that, where the Defendant is a corporate entity, the Claimant will need to plead and prove the relevant state of mind against a particular individual or individuals. It will not suffice to make vague allegations of malice against the corporate entity in general."

153. Third, it is no answer that particulars have not been requested (HRH Duchess of Sussex at [50]), or cannot be provided until after disclosure: "the suggestion…that particulars cannot be provided or should not be expected until after disclosure is contrary to the long-standing principle that a party alleging misconduct must give particulars before obtaining disclosure (see, for instance, Zierenberg v Labouchere [1893] 2 Q.B. 183, 188 (Lord Esher MR) ; HRH Duchess of Sussex at [59]).

154. I emphasise that the principles above are not concerned solely with some arcane aspect of the law of malicious falsehood. They apply much more widely as regards any allegations of knowing and deliberate wrongdoing in the nature of fraud/malice or dishonesty. This general application is clear from the terms of the Chancery Guide referred to by Warby J in the HRH Duchess of Sussex case. In short, procedural rules require a claimant who wishes to rely in support of his claim on any allegation of "fraud", "misrepresentation" or "wilful default" to set out the details in the Particulars of Claim. See PD16, para.8.2.

155. The Particulars of Claim in POC1 and POC2 do not provide any particulars of the person/s through whom it is intended to fix the four corporate Defendants with malicious intent (and the like mental elements for the other torts).

156. I am not persuaded by the argument that QAG was unable to meet this requirement because it did not know the names of any of the individuals involved. In fact, the name of the journalist who produced and narrated the Video was included in the Video itself. There is also discussion of relevant actors throughout the evidence before me. I have not lost sight of the fact that conspiracies are by their nature often secret and an inability to particularise is not unusual, particularly at the jurisdiction stage: AstraZeneca UK Ltd. v Albemarle International Corporation [2010] EWHC 1028 (Comm) at [77]-[79]. But in this case, as POC3 shows, QAG was able to meet this pleading requirement. Indeed, QAG's own application notice seeking permission to amend to rely upon POC3 accepts as much. It says that both the identification and malice case is clear to the Defendants by reason of the evidence already filed.

157. The one area where I do not agree with the Defendants is in relation to the particulars of malice in para. 23 of POC1. I consider that they make a sufficient inferential case that malice and intention to harm was the purpose of those who published the Video. True it is that one of those particulars is the mere fact of alleged falsity of the statements in the Video (which is consistent with negligence) but they do contain

clear averments which are consistent only with malice (such as deliberate desire to harm QAG by instilling fear in passengers).

158. I say nothing further on this overall pleading issue because it seems to me that the current new pleading POC3 (addressed below) does meet these pleading requirements. It would be wrong to strike out a claim if it could be cured by amendment and we are at an early stage in these proceedings (White Book, Vol.1, para.3.4.2, citing Soo Kim v Youg [2011] EWHC 1781 (QB)). The same principle must apply in the present jurisdictional context. There is no prejudice to the Defendants because the identification of the relevant alleged wrongdoers (the individuals) had been provided in the evidence, even if it had not been pleaded.

159. As to POC3, at the start of the hearing Leading Counsel for QAG informed me that he and his junior had considered the evidence and the Defendants' pleading complaints in their skeleton argument overnight said to have been raised for the first time. They considered, as one would expect, the professional obligations in respect of pleading fraud and he explained that they had settled a pleading overnight (POC3) which identified specific persons (or persons who would have had certain roles) and alleged against them malice and relevant dishonesty (and cognate mental elements/mens rea for the purposes of each of the other tort claims). QAG did not accept that they were obliged to do this but for reasons given above, I consider it was necessary.

160. The amendments to the pleading as they now appear in POC3 are not the easiest to follow. But in my judgment, it meets the pleading objections both as to identification of claimed wrongdoers and the inferential case as to why they are alleged to have acted with the requisite mental states.

161. Rather than attempting to summarise the new pleaded case in this regard, I will set out the material additional paragraphs of POC3:

> "23A (While the Claimant's knowledge as to exact involvement of individuals is necessarily limited at this stage, it pleads as follows without prejudice to its right to plead further in due course). The following employees or officers or persons connected with the Defendants (or many of them, and including individuals working for each Defendant in positions of responsibility, for whose acts each Defendant is liable), performed, took part in, assisted with or facilitated, and/or procured or incited the creation, making, publication and continued publication of the Video, and the Conspiracy, did so in combination, concert and/or agreement with each other (or many of each other, and including individuals working for each Defendant, for whose acts each Defendant is liable), and did so with the malicious intention, intention to injure, predominant purpose to injure, intentions, including fraudulent intentions, purposes and knowledge and *mens rea* pleaded at paragraphs 17-18, 20, 22-23, 26-28, 28.3, 29, 30, 30A, 32.1 and 32.3 herein, and with a common design in respect of the aforesaid:
>
> 23A.1 Mahmoud Rawashdeh, Zainab Rawabdeh, Mohamed Abdelrouf, Turki Al-Dakhil, Waleed Al-Ibrahim.

23A.2 Those individuals who played a significant conceptual role in the aforesaid.

23A.3 Those individuals part of or connected to the senior management, editorial committee, or Board of the First and Fourth Defendants and/or the Al Arabiya News Channel responsible for taking management/high level decisions in relation to the aforesaid.

23A.4 Those working within, with, or for the Second Defendant who were engaged in significant conceptual work on the Video, and if the Second Defendant did the subtitles, whoever did significant work on those.

23A.5 Those individuals in the senior management of the Third Defendant who played a significant role in the aforesaid.

23B This is to be inferred from the matters pleaded hereinabove and below and further from the following matters: (i) the patently false, threatening and harmful nature of the Video (including the false implication that the Claimant's customers would be at risk of death) means that those who played a significant role in high level decision making or conceptual work as to the Video (or some of them, and including individuals working for each Defendant in positions of responsibility, for whose acts each Defendant is liable) must have been aware of its false, threatening and harmful nature, and so must have intended that it cause harm and known that it was likely to cause harm, and had a predominant purpose that it cause harm; and that it would be widely republished and commented on; (ii) the careful crafting of the misleading impression created by the Video; (iii) the Defendants' response to press criticism in the second article of 18 August 2017 which did not defuse the sting of the Video and defended it in obviously implausible terms designed to ensure the threatening impression was not removed; (iv) it is asserted that Mr Rawashdeh, Ms Rawabdeh and Mr Abdelrouf were directly involved in the decisions to make and put out the Video, but the sensational nature of the Video means that it is implausible that it would have created and put out to the world by Mr Rawashdeh and/or Mr Rawabdeh and/or Mr Abdelrouf alone; they must have had instigation and/or approval from persons higher up including, it is to be inferred, (directly or indirectly) Turki Al Dakhil and/or Waleed bin Ibrahim and/or the persons within 23A.3 and 23A.5 (or some of them, and including individuals working for or responsible for each of the First, Third and Fourth Defendants who are liable for them); (v) something of this significance would have been approved at a high level within the First, Third and Fourth Defendants; (vi) the First, Second and Fourth Defendants have a common board/editorial committee/senior management members of whom, it is to be inferred, were knowingly involved, and in the context of which, it is to be inferred that those Defendants combined, concerted and or agreed with each other in relation to the Video; (vii) as is evident from the content of the news coverage of the Gulf crisis by the Al Arabiya News Channel, the Defendants are under the

political influence of, and/or shape their coverage to serve the political ends of, the Saudi state whose goals include harm to the Claimant, and it is to be inferred this influence has been exercised though *inter alia* the persons identified under (iv) above; (viii) the Fourth Defendant could not have committed such of the acts complained of as it committed without the assistance and involvement of the individuals involved from the First Defendant; (ix) the Fourth Defendant (apparently) holds the broadcasting licence and the First Defendant owns and controls the website and social media channels and they would have combined or concerted or agreed with each other in respect of their use; (x) neither the Defendants nor those working for them have ever given a credible apology for the Video or sought to correct it; (xi) as to those working within, with, or for the Second Defendant, it is to be inferred that they assisted and/or combined and/or agreed with the others involved, as the Defendants' English arm, engaged in broadcasting support, likely to be involved in English language matters, and likely not least to be involved in the subtitles; (xii) the explanations given by the Defendants in response to this action are false and implausible which is indicative of guilty intent".

162. So, in terms of express identification the following are named as persons against whom bad faith is alleged: Mahmoud Rawashdeh, Zainab Rawabdeh, Mohamed Abdelrouf, Turki Al-Dakhil, Waleed Al-Ibrahim. Each of these persons appears in my narrative of events earlier in this judgment.

163. For the avoidance of doubt, I have considered these amendments in relation to the case against MEN UK and they do not alter my decision to dismiss the claim against that Defendant for the reasons I have given above. If anything, the speculative nature of the claim against MEN UK is emphasised in even stronger terms by the amendment where it is said "as the Defendants' English arm, engaged in broadcasting support, [MEN UK] is likely to be involved in English language matters, and likely not least to be involved in the subtitles".

2) **<u>Applicable law and failure to plead foreign law</u>**

164. The Defendants' second objection is that a failure to plead foreign law is fatal to QAG's claim which seeks relief in respect of publication and losses on a worldwide basis. The starting point is to consider the issue of applicable law as regards each of the tort claims.

165. I proceed on the assumption, sufficient for present purposes, that neither the Rome II Regulation ("Rome II") nor the Private International Law (Miscellaneous Provisions) Act 1995 apply to claims for malicious falsehood. Instead, the applicable law is to be determined by reference to English common law rules. Under those rules, an act done in a foreign country is only actionable here if both (a) it would be actionable as a malicious falsehood if done in England; and (b) it is actionable under the law of the foreign country where it was done (see <u>Dicey</u>, Rule 256).

166. In passing, I should observe that I consider there is a powerful argument that malicious falsehood falls within Rome II. Art 1.2(g) of Rome II provides that it does not apply to "*non-contractual obligations arising out of violations of privacy and*

rights relating to personality, including defamation". Malicious falsehood is not a claim for defamation, and what is sought to be protected is not Qatar Airways' reputation or privacy rights, but its economic interests. This matter does not need to be resolved in order to determine the jurisdiction application.

167. There is an issue which I will need to address in due course as to whether there exists a principle of English law that a court will not grant permission to serve out in respect of a malicious falsehood claim concerning publications outside England. Putting that matter aside for a moment, the Defendants say that in respect of the "foreign" aspects of QAG's malicious falsehood claim, it would need to establish <u>both</u> that the foreign publications were actionable under the law of the countries where the Video was published (i.e. viewed) and under the law of England. There is accordingly an issue as to whether QAG was obliged to plead relevant provisions of foreign law and whether that failure means it has not established a serious issue to be tried.

168. The claim for conspiracy falls within the scope of Rome II. Accordingly, pursuant to Article 4(1) of Rome II the law applicable to the conspiracy claim is "the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred".

169. In <u>MX1 Ltd v Farahzad</u> [2018] 1 WLR 5553 Marcus Smith J held that this means that "where damage occurs across several jurisdictions, there will be several applicable laws" ([44]). I understand it to be common ground for present purposes that, in the present case, "damage" for the purposes of Article 4(1) of Rome II would be said to have been suffered in the place where the third parties (that is, potential passengers) failed to enter into contracts with QAG (which they otherwise would have done) as a result of the Video, at least for POS losses. The Defendants say that the conspiracy claim (and all the other tort claims) are subject to many different applicable laws and again the issue is whether QAG was obliged to plead such laws. QAG reserved its position on applicable law for later, but was content to proceed for present purposes on the basis that foreign law could potentially apply in principle to significant parts of the claim, if relied upon, and shown to be different.

170. There was detailed argument on this issue and reference to a broad range of case law. I will not repeat the detail of the arguments but will seek to identify the main submissions, as well as the main authorities (but not every case cited to me).

171. Ultimately, I consider the answer to this objection on the part of the Defendants to be straightforward. In short, in my judgment QAG is entitled to rely upon the evidential presumption that foreign law is the same as English law such that unless and until it is shown that foreign law applies to part of the claim, and is materially different, the concepts of English law will be sufficient to show that that part of the claim is civilly actionable under any applicable foreign laws. It follows that the question of a real prospect of success can be assessed by reference to English law concepts. I refer here to Dicey Rule 25(2).

172. The starting point is that the Particulars of Claim (including the amended versions) plead claims for the worldwide tort claims by reference to English law principles without pleading the content of foreign law. In my view, that this was QAG's approach is obvious: it pleaded English law causes of action in respect of worldwide

tort claims. Had this not been clear it can be made clear and QAG has made express averments in §17A of POC3 which says as follows:

> "The Claimant claims in respect of publication worldwide. The Claimant relies upon the presumption that foreign law (to the extent applicable) is the same as the law of England & Wales. (And so (if it is necessary so to plead) those parts of the claims subject to foreign law are civilly actionable under such law on the basis of the presumption)."

173. The Defendants say this is the wrong approach, and that there is a formal requirement on QAG to plead, and prove, the tort laws of all the world (or at least main countries relied upon), at the jurisdiction stage. I note that in argument the Defendants did not say they will rely on foreign law at trial, nor was it contended that there would be no real prospects of success under any foreign law which might potentially be applicable to parts of the claim. The only foreign law referred to was identified in general terms by the Defendants' Leading Counsel. That was US First Amendment law which might preclude a malicious falsehood claim but even in that regard it is established that speech torts of the type in issue, which involve bad faith, can in certain circumstances be actionable in the US.

174. Nor did the Defendants argue that this is one of the cases where the substantive nature of the legal issues means that one of the exceptions to the presumption might apply. Instead, their argument is that it is inappropriate in principle to rely on the presumption, and that since QAG has not pleaded and proved the tort laws of each country in the world (or at least the main countries) where there was publication and loss, there is no serious issue to be tried.

175. Before turning to the case law, I should observe that I do not regard this in principle as an attractive position. That is for the simple reason that it would make the pursuit of claims for torts causing damage worldwide impractical, even where there is a gateway and England is the appropriate forum; and even where the defendant does not rely on any foreign law which it says to be different.

176. I not only consider this submission unattractive at the level of principle, but it is even more questionable in the context of the present case. That is because if QAG's factual case is made out, then there has been a malicious publication of a knowingly false and misleading Video with a deliberate, indeed predominant, intention to cause harm by the false impression created and the fear and discouragement thereby created among customers (and not for legitimate journalistic purposes). And harm had foreseeably resulted.

177. I would infer, without more, that there is a real prospect that such facts would make out a broadly equivalent cause of action under *any* legal system. This was the approach taken by McCombe LJ in Cairo v Brownlie [2020] EWCA Civ 996 [62]. I do not consider there to be a real difference of substance between an accident/personal injury claim (in issue in that appeal) and an economic tort case of the type before me.

178. I also note that there is evidence from QAG (not challenged) which considers the position in relation to the common law and the civil law, as well as Middle Eastern systems specifically. Without going into that evidence at length it satisfies me of the

following: (i) that in common law countries their law is likely to be similar to English law (as I can infer); (ii) with regard to the civil law, there is an equivalent cause of action (for "denigration") under French law which would apply on the basis of the pleaded facts here (I am content to regard French law as typical of civil law systems, so there is good basis to infer that other civil systems will also have equivalent causes of action); and (iii) equivalent causes of action exist under both UAE and Qatari law (and, it can be inferred, other Middle Eastern systems of law).

179. In my judgment, it is sufficiently proved in fact, that if the case is sound according to English law tests, QAG has real prospects of success of showing it is likely to be civilly actionable in the vast majority of relevant states where there may have been publication.

180. However, for reasons I will set out below, in my judgment QAG does not need to prove this. I consider it is right to argue the presumption is sufficient.

181. In my judgment, the current state of the law and practice (in Rome II and common law cases) may be summarised in the following propositions which I have drawn from a number of Court of Appeal and first instance decisions:

(a) In a case where foreign law would apply in principle it is enough to establish a serious issue to be tried to justify service if: (i) the claimant relies on the presumption and does not plead the content of foreign law; (ii) there are real prospects of success applying English law concepts; and (iii) the defendant does not contend, or provide evidence, that any potentially applicable foreign law is different in a way that would mean that there are no real prospects of success.

(b) In accordance with the overriding objective, and if they become relevant following pleadings, the foreign law aspects of a claim should be managed in a proportionate manner at a CMC. Like other areas of potential factual disputes, issues of foreign law cannot in most cases be dealt with practically or justly at the jurisdiction stage.

(c) This general rule is subject to departure in exceptional situations or where the nature of the substantive issues makes it inappropriate to apply the presumption at the jurisdiction stage. The classic example is infringement of foreign intellectual property rights. Another example is illustrated by Shaker v Al Bedrawi [2003] Ch 350, [29], [32], [64]-[72], where it was inappropriate to rely on the presumption to presume that US companies would be regulated by technical aspects of European companies law. There may be other situations.

182. I was referred to a substantial body of case law which supports these general propositions. I consider the main Court of Appeal authorities to be PT Pan Indonesia Bank TBK v Marconi Communications International Ltd [2005] EWCA Civ 422, [70]; Kuwait Oil Tanker v Al Bader [2000] 2 All ER (Comm) 271, [184]; Erste Group Bank AG (London) v JSC (VMZ Red October) [2015] 1 CLC 706, [109]-[112]; OPO v MLA [2015] EMLR 4 (CA), [108]-[111]. To this I would add the first instance decisions in Iranian Offshore [2019] 1 WLR 82 at [11] and Performing Right Society Ltd v Qatar Airways Group [2020] EWHC 1872 (Ch) [72] (I refer further to this case below).

183. However, I also consider that the most relevant recent case, Cairo v Brownlie [2020] EWCA Civ 996, also supports these propositions. I refer in this regard to the judgment of the majority: Underhill LJ at [169]-[199], [210] and McCombe LJ at [57]-[67] (and also the judgment of Nicol J [2019] EWHC 2533, [126] which the Court of Appeal upheld).

184. The Defendants' submissions were based largely upon the correctness of Arnold LJ's approach in Cairo v Brownlie. I reject that approach because I respectfully consider that it fails to reflect substantial earlier authority which is cited in and explained in the judgment of Underhill LJ.

185. As explained by Underhill LJ in Cairo v Brownlie, the approach of the majority is not just based on authority, but it is a sound and practical approach:

> "[175] although observations can be found in some of the cases which refer to the rule [the presumption] with disfavour, as representing an outdated and parochial assumption of the superiority of English law, I do not share that view. On the contrary, in those cases where its application is not inappropriate it seems to me to represent a sensible and just way of avoiding the expense and complication of the parties having to investigate and prove foreign law. That is most obviously sensible where the likelihood is that the effect of the applicable law will be substantially the same as that of English law (typically, though not only, where the law in question is that of a common law jurisdiction). But it may also be attractive to the parties in cases where it is recognised that the foreign law in question is very different in its sources and structure, so that it is entirely conceivable that it might produce a different substantive outcome from English law; even in such a case the trouble and expense of establishing whether that is so may be viewed by the parties as disproportionate. It is important not to lose sight of the fact that the rule only applies if both parties are content that it should: either can ensure that the relevant foreign law is applied substantively as well as nominally by pleading and proving its content. Once it is appreciated that that is the purpose of the rule, many of the criticisms sometimes made of it fall away. In cases where it is applied the court is not wilfully shutting its eyes to the obvious fact that (say) the Egyptian law of contract does not look like anything in Chitty. Rather, it is proceeding, for good pragmatic reasons, on the assumed basis that Egyptian law will be, in the relevant respects, to substantially the same effect as English law, whatever the differences in its structure or formulation. That will sometimes be contrary to the actual facts, but to regard that as an objection misses the point that the whole object of the exercise is not to have to go to the trouble of finding out what the facts are. It is for the same reason no objection to say that the exercise is "artificial": in one sense artificiality is necessarily inherent in the default rule.
>
> [187] I can see no basis in principle why the sequence of evidence in the context of a jurisdictional challenge should be any different from the sequence of pleading in a case where no jurisdictional issue arises, as expounded above. I of course accept that, as Arnold LJ says, the

> burden is on the claimant seeking permission to serve out to show that the claim has a real prospect of success. But I do not see why that burden cannot be discharged by relying on the default rule unless and until the defendant adduces substantive evidence of the applicable foreign law: it is the production of such evidence that disapplies the default rule, not merely a party registering an objection to its application, as Arnold LJ suggests at the beginning of para. 138. To characterise that approach as "reversing the burden of proof" is tendentious. The effect of the default rule is – inevitably – that the burden of pleading (and, in the service out context, proving) the content of foreign law is on the party who wishes to contend that it is different from English law."

186. I note that on this aspect of the appeal, McCombe LJ took a different approach to Underhill LJ at [57]-[67]. He did not directly resolve the question of the formal application of the presumption, but he concluded that the relevant question at the jurisdiction stage, when assessing a serious issue to be tried, was to assess evidence, pleading and the possible application of Dicey Rule 25 together in making a "common sense" assessment of whether there were real prospects of success. He said the question of how foreign law was to be pleaded and proved was a matter of future procedural management. Where therefore it could be expected that a cause of action existed under the foreign law, even if not proved by the claimant (but the contrary had not been proved by the defendant), that was sufficient to establish a serious issue to be tried at the jurisdiction stage, irrespective of the application of the presumption.

187. Were it necessary, I would adopt this as an alternative route to the same result I reached in applying the propositions I summarised earlier. As explained above, I am satisfied that this is a case where on the facts it is to be expected that an equivalent cause of action would exist under the foreign laws if and when they become an issue. I agree with QAG that applying McCombe LJ's logic, the evidence, pleadings and the possible future application of the presumption confirm that there is a serious issue to be tried here.

188. Accordingly, I conclude on either approach of the majority, Cairo v Brownlie supports QAG's case. QAG sought to persuade me that on the approach in Arnold LJ's minority judgment they also succeed. I do not need to resolve that question.

189. Performing Right Society v Qatar Airways Group [2020] EWHC 1872 (Ch) is instructive. In that case, Birss J dealt with an application to stay on forum grounds a claim that put in play a possible mosaic of the tort/copyright laws of the world ([10(iii)], [45]). It would seem that there was no pleading of the contents of those laws. It was argued that all the foreign law claims should be stayed ([71]). Birss J refused, concluding that England was the appropriate forum for the whole claim. He explained that in accordance with the overriding objective, the foreign law aspects of the claim would and could be managed in a proportionate manner in due course at a CMC on the merits. He explained one option would be to choose representative jurisdictions and to require pleading of the content of foreign law on those only (assuming, which may not be the case, the alleged different content of foreign law was raised by the defendant): see [72-74]. This is consistent with the reasoning of the majority in Cairo v Brownlie (CA), [223]-[224], [59], as well as Arnold LJ at [121].

190. Finally, I should make clear that I agree with QAG that the case of Belhaj v Straw [2015] 2 WLR 1105, on which the Defendants relied heavily, is not on point. As held by Underhill LJ in Cairo [191]-[196] and explained in clear and convincing terms by Andrew Baker J in Iranian Offshore [2018] EWHC 2759 at [13]-[21], it is merely a case management decision. There is force in the submission of QAG that it was *per incuriam* as prior Court of Appeal authority including OPO v MLA [2015] EMLR 4 (CA) was not cited.

3) **No realistic prospect of QAG establishing falsity, malice and dishonesty on the facts**

191. This third point is a direct merits attack in which the Defendants argue that QAG cannot establish the basic ingredients of a malicious falsehood claim. No separate argument was addressed to me in respect of the conspiracy and other tort claims. I apprehend that was probably because the Defendants contend that knocking out malicious falsehood also leads to dismissal of those claims (as being essentially parasitic).

192. I will begin by describing the basic features of the malicious falsehood tort before considering the evidence as to the Video (most of which I have already set out above). I will proceed on the basis that the claim being challenged is that in the latest version of the Particulars of Claim, POC3.

193. Malicious falsehood is made out if the defendant publishes to third parties words or images which : (1) are false (Gatley, §3.1; Tesla Motors v BBC [2013] EWCA Civ 152, [4]-[5], [18]); (2) refer to, or concern, the claimant or his business, which can include indirect references, and also includes statements that are likely to cause pecuniary damage to a business (Niche Products Ltd v McDermid Offshore Solutions LLC [2014] EMLR 9, §32); (3) were published maliciously; and (4) caused special damage (Gatley, with supplement, §§21.1, §21.4).

194. The requirement of special damage is removed where the tort is committed in writing and the words are calculated (i.e., likely) to cause pecuniary damage: Defamation Act 1952, s .3.

195. There is no single meaning rule, and the claimant is entitled to recover in respect of any meaning or meanings that a substantial number of readers would understand the words to bear (Gatley, §§21.3, 21.5) provided that there was an intention to convey the damaging meaning (§21.5).

196. Malice is made out if the defendant is actuated by some improper motive; knowledge or recklessness as to the falsity of the statement will be virtually conclusive as to malice (Gatley, §21.8), and will suffice where it is known the statement is likely to injure, or if it is intended to injure. “A statement made by a man who knows that it is likely to injure and knows that it is false is made maliciously. So also if he knows that it is likely to injure and has no belief whether it is a true or false and makes it recklessly, not caring whether it is true or false”: Shapiro v La Morta (1923) TLR 201, 203. Falsity is made out where the words are directly false or where they convey a false or misleading impression: McDonalds Hamburgers Ltd v BurgerKing (UK) Ltd [1986] FSR 45, 59.

197. A defendant will also be liable for republication by others if he is actually aware that what he says or does is likely to be reported or if a reasonable person in his position should have appreciated that there was a significant risk that what he said would be repeated in whole or in part and that would increase the damage caused by what he said: Gatley §6.52.

198. I have already considered the nature and "message" of the Video above and the international law context. There is a substantial dispute of fact between the parties as to the circumstances in which the Video came to be made. The Defendants say that I can resolve that dispute now.

199. Leading Counsel for the Defendants made powerful submissions that the evidence before the Court demonstrates that the Video was commissioned, produced and broadcast in the honest belief that its contents were true and accurate and without any intention of harming QAG. He relies on the fact that the producer who commissioned the Video, Mr Rawashdeh, has provided a witness statement which provides a detailed explanation of the process by which the Video was commissioned, produced and broadcast. His evidence is clear: "I did not intend to create anything that was misleading or untrue when I commissioned the creation of the Video. The sole purpose of the Video was to inform the public about the blockade and its effect. I did not intend to cause harm or damage to [QAG]."

200. The Defendant's Leading Counsel also relied upon the fact that the journalist who created and narrated the Video, Ms Rawabdeh, has likewise provided a detailed witness statement explaining her role and the steps she took to ensure that the content of the Video was accurate. He submitted that her evidence is equally clear as to intentions: "When researching and creating the Video I had absolutely no intention to create anything which was in anyway untrue…the Video's sole purpose was to inform the general public about the consequences of the Blockade and the new air corridors in simple terms. I believed I had done a good job of providing useful and verified information to our viewers." Ms Rawabdeh says she "did not have any intention of causing harm to [the Claimant]" and that "[d]uring the course of creating the videowall presentation and the Video there was no discussion of causing harm or damage to Qatar Airways."

201. Leading Counsel for QAG does not shrink from making the submission that this evidence is simply untruthful and relies upon a number of inferential matters to support his argument that the truth will only really emerge following disclosure and cross-examination.

202. I will set out in summary why QAG says there is a triable issue in this regard. The starting point is the nature of the Video itself (where I have accepted as arguable QAG's broad case on meaning and falsity).

203. QAG says that it can be inferred that *Al Arabiya*, those controlling it, and the persons directly involved as well as the "higher-ups" who were instigating/approving what was being done, would have been well aware that this was the impression created. It is said that they would also be well aware that the Video would be widely viewed, republished and commented on, and would create what QAG describe as a "media storm". These matters, it is argued, would be known to harm Qatar Airways' business by discouraging customers. QAG says that was its purpose and it is what happened.

204. QAG argues that the account in the witness statements from Mr Rawashdeh and Ms Rawabdeh, which suggests that the Video was an attempt to convey a neutral factual explanation of the international law position addressing various hypothetical scenarios (and that there was no intention to harm) QAG, is not plausible. It relies upon a number of matters in this regard.

205. The first is that this account does not fit the "slippery" crafting of the Video, whose language and framing is not consistent with attempting neutral factual and legal analysis. This is apparent, they say overall, but also taking some specific points. First, the inclusion of the passage where the aircraft is shot at is gratuitous. Mr Rawashdeh himself says it deals with a "fictional/theoretical situation" but if so, why include it? If this was meant to be a neutral account of the operation of the blockade and the corridors, then the emphasis of the Video is wrong, as it starts with, and focusses on, the threatening impression of aeroplanes being forced or shot down. The press did not perceive it as a neutral factual analysis.

206. Leading Counsel for QAG also emphasised that so far as concerns international law, the inaccuracies are too great to be consistent with sincere attempt to get it right. He gave me some specific examples as illustrations: (i) it is unlikely that an institution with *Al Arabiya's* resources and trying to get this right would have missed Article 3bis or the many materials suggesting how limited any legitimate use of force must be, particularly where they had consulted with an expert; but any attempt to reflect them would have produced a totally different story; (ii) it is difficult to see how any serious attempt to get things right would have described the air corridors as for emergency use only when, by 13 August 2017, it was clear on any serious investigation that these were for general scheduled use as recorded in multiple public documents like the NOTAMs and ICAO documents and this had been identified by multiple press outlets.

207. QAG also argued that Ms Rawabdeh's account has various implausible excuses: so she says she consulted "a variety of websites" to conduct online research but cannot recall which; and that she called and spoke to an "expert" on aviation law for 15 minutes, but cannot recall who this person was (nor can she locate any records to assist). It relies on that fact that no research notes or emails are produced and what the expert said is not recorded. No attempt is made to match the information supposedly obtained to the statements made and justify how they could have been intended as a neutral/factual account of what she had supposedly learned. Not a single internal document is produced although such must exist. The immediate reaction of international aviation experts to the proposition in the Video was that it was nonsense.

208. QAG also argues that it is not credible to suggest that, as the Video was intended to be factual, Mr Rawashdeh did not believe it would be controversial and so thought it would not require higher-up approval. Nor is it credible, says QAG, as Mr Rawashdeh's evidence seeks to give the impression, that it was all his own idea, and that there was no higher-up involvement apart from it being cleared by the Shift Program Editor, Mr Abdelrouf.

209. Overall, QAG submits that looking at the Video, it was obvious that it would produce a storm. It is unlikely it would have been created and published by a low-level producer like Mr Rawashdeh (or Mr Abdelrouf) on a frolic of his/her own and it is to be inferred that it was cleared, and driven, at higher levels. They also stress what

QAG claim is the political use of *Al Arabiya* to serve the interests of the Saudi government, in particular in relation to the Gulf crisis. It is submitted that it is to be inferred that this is one of those occasions: the Video was not mere journalism, but was intended to assist the Blockading States' campaign against Qatar, by harming QAG.

210. These points are all deployed in support of their submission that the primary inference is that the Video performed this purpose at the deliberate instigation of those higher up, but even if that is not right, it is apparent that those who made it were generating it to harm Qatar Airways, not aiming at honest journalism.

211. I have not summarised every point of factual dispute and controversial inference. There is a stark dispute. Only one of the "solo journalist" or the "higher-ups" theories can be correct.

212. It would be wrong in principle applying a summary judgment test to seek to resolve that issue in these proceedings by way of a mini-trial as to who is telling the truth. The background political context and controversial nature of the Video persuade me that the "higher-ups" theory is not merely fanciful. I also consider that once that theory becomes tenable, it also in effect strongly supports the malice case. True it is that QAG's case is largely inferential and based on limited particulars. That however does not establish it is merely fanciful.

213. Although each case depends on its own facts, I consider that in the specific context of a jurisdiction challenge, the decision of Hamblen J in <u>AstraZeneca UK Ltd v Albermarle International Corporation</u> [2010] EWHC 1028 (Comm) provides useful guidance.

214. The respondent in that case contended there was no serious issued to be tried on the conspiracy claim as: "the Particulars of Claim do not provide the basis for a conspiracy allegation, because the pleading…that AC and AIC agreed that AIC should unlawfully and in breach of the 2005 Agreement refuse to deliver any further DIP to AZ has not been further particularised" ([77]). Hamblen J observed that "the origins of conspiracies are concealed and it is usually impossible to establish when or where the initial agreement was made. See <u>Kuwait Oil Tanker v Al Bader</u> [2000] 2 All ER (Comm) 271 (paragraph 111–112 per Nourse LJ). As stated by Deputy Judge Michael Briggs QC in <u>Derksen v Pillar</u> (17 December 2002) at paragraph 33(2): 'Because it will rarely if ever be possible to prove an express agreement between the defendants, the extent or scope of their combination will usually be a matter of inference, to be arrived at by a careful and painstaking review of the acts and omission of each of them, considered as a whole.'" ([78]). Hamblen J therefore concluded that the claimant's "inability to particularise the manner in which agreement between AC and AIC in the present case came into being is neither unusual, nor a bar to the argument that the Court can infer the existence of such an agreement, and that they have established a serious issue to be tried in respect of the conspiracy claim" ([79]).

215. At this stage, QAG has demonstrated to my satisfaction that it has real prospects of showing (on the present facts and inferences one might draw) that: (1) the Video was false and/or conveyed a false impression, to a substantial number of people; (2) the Video was published maliciously, with the motive of harming QAG, and with

knowledge or recklessness of its falsities and this was part of an agreement/combination involving more senior persons; (3) QAG has suffered actual pecuniary loss; and in any event the Video was calculated to cause damage within s.3 of the Defamation Act 1952; and (4) the wide republication was an intended consequence of, and indeed a natural and probable consequence of, and foreseeably flowed from, the publication; certainly someone in the position of the Defendants should have appreciated there was a significant risk of this.

4) **No serious issue concerning responsibility of MEN FZ (D1) and MBC FZ (D3) for the Video**

216. I addressed the substance of this fourth objection when considering the successful summary judgment application by MEN UK above.

217. For the reasons given in that section, I consider there is a sufficiently arguable case of involvement at this jurisdictional stage by MEN FZ, and MBC FZ.

5) **The malicious falsehood claim against AAN FZ (D4) is a "nullity" and is time barred**

218. This is the fifth of the Defendants' objections in relation to "serious issue to be tried". It arises in the following context. The Claim Form was issued on 9 August 2018 and then amended without permission of the Court on 27 November 2018 pursuant to CPR 17.1, so as to add AAN FZ (D4) as a party. The Particulars of Claim including AAN FZ were filed on 30 November 2018. AAN FZ is sued not only in respect of malicious falsehood but all torts, including conspiracy and unlawful interference.

219. The Defendants argue the joinder of AAN FZ (which they claim was the sole party responsible for the Video) was a nullity and is time-barred. It is important to note however that they do not contend that the other claims against AAN FZ are time-barred and that the joinder in that regard was a nullity for that reason.

220. There was a suggestion in the Defendants' post-hearing written submissions based on the Cornwall Gardens case (referred to below) that they were seeking to retreat from this. However, given the way the case was argued (and responded to by QAG) it would not be fair to allow the Defendants to mount this retreat. I would in any event have regarded the claim that the other tort claims were barred to raise a serious issue to be tried.

221. The Defendants' original position was probably an appropriate recognition that, unlike the short 1 year limitation period in respect of malicious falsehood, the limitation period in respect of the other torts is the normal 6 year period which is still current. As appears from the Particulars of Claim and as I have described above, the claims in respect of these torts rely in most respects on the same facts as the malicious falsehood claim.

222. The Defendants' broad argument as to nullity of the joinder as regards malicious falsehood is attractively simple:

i) The Claim Form was issued on 10 August 2018 but only on 27 November 2018, some 15½ months after the Video was published, QAG purported to

amend the Claim Form to add AAN FZ as a further defendant. QAG's evidence originally conceded that since AAN FZ was not named as a defendant in the original claim form, "the one year limitation period for the Claimant's English law malicious falsehood claims prescribed by section 4A of the Limitation Act 1980 ("LA 1980") has expired.".

ii) The purported amendment was made in express and exclusive reliance upon CPR 17.1. This is made clear both on the face of the amended Claim Form and repeatedly in the witness statements of QAG's solicitor.

iii) CPR r. 17.1(1) provides: "A party may amend his statement of case at any time before it has been served on any other party." However, this rule must be read in conjunction with CPR 17.4 (which specifically concerns "Amendments to statements of case after the end of a relevant limitation period") and CPR 19.5 (which contains "Special provisions about adding or substituting parties after the end of a relevant limitation period").

iv) The effect of Roberts v Gill [2011] 1 AC 240 at [38], Best Friends Group v Barclays Bank Plc [2018] EWCA Civ 601 at [2], [9] (cited at White Book Vol 1 para 17.1.1), and Jalla v Royal Dutch Shell Plc [2020] EWHC 459 (TCC) Stuart-Smith J at [88], [105], [153] and [274] is that CPR 17.1 cannot be used to add or substitute a new party after the expiry of the limitation period.

v) Any such amendment purportedly made under CPR 17.1 is accordingly a nullity and ineffective. A null and ineffective addition to a Claim Form self-evidently has no prospect of success.

223. I note that about a week in advance of the hearing before me QAG wrote to the Defendants stating that it "will be taking the position at the hearing that it has claims in malicious falsehood against [AAN FZ] which arose on or after 27 November 2017 and which are therefore not arguably time barred…These claims arose from the publication of the Video to individuals and or loss suffered by [QAG] on or after 27 November 2017".

224. In response to this development, Leading Counsel for the Defendants took me to the Particulars of Claim dated 30 November 2018 which he said made it clear at para 13 that the claim was concerned solely with the publication of the Video on the UAE Websites "On 13 August 2017". He submitted that the only pleaded losses were those said to have occurred in the 30-day period immediately following that publication, and that this pleaded case as to the loss allegedly suffered by QAG remains unchanged in the draft Amended Particulars of Claim (POC2 and 3). He also argued that there is in any event no evidence of substantial publication of the Video after 27 November 2017 and took me to graphs which depict the views of the Video over time and show a precipitous drop in late August 2017, followed by negligible further views after September 2017.

225. Leading Counsel for the Defendants submitted that it is to be inferred that the viewing figures in respect of social media platforms and other third party websites are similarly likely to be intensely concentrated in the period immediately following publication (as is typical for most topical news stories).

226. Overall he argued that under the case law a purported amendment of a claim form under CPR 17.1 after expiry of a limitation period is a nullity and QAG cannot escape this consequence by advancing a late argument that although most of its malicious falsehood claims were time-barred at the date of the purported amendment, there was a tiny subset which were not.

227. In summary, QAG's position at the hearing was as follows:

1) AAN FZ was only not included as defendant on 9 August 2018 due to an error of name.

2) The Claim Form was validly amended without permission to add in AAN FZ under CPR 17.1 on 27 November 2018. AAN FZ can apply to set aside that permission under CPR 17.2 in part if for example they wish to argue that parts of the claim were by then time-barred, but that is a matter for the merits stage (and they have not made any such application). But the Claim Form cannot be set aside as against AAN FZ altogether, because on any basis they are valid parties to the conspiracy and unlawful interference claims.

3) There is no time bar at all in relation to publication post 27 November 2017 as the amended Claim Form was issued with AAN FZ in it on that day (the Particulars of Claim were filed on 30 November 2018). Consequently, AAN FZ will be party to the malicious falsehood claims for the later publications.

4) Further, in relation to publication pre-27 November 2017, no time bar will apply because (i) any time bar can be set aside under s. 32 LA; (ii) QAG is entitled to add AAN FZ as defendant with respect to all claims that might otherwise be time barred, under CPR 17.4 (substantially the same facts and issues) or CPR 19.5 (mistake as to defendant). Consequently, any CPR 17.2 application to set aside the amendment under CPR 17.1 will fail. It is not necessary to decide whether QAG are right about this now. It is sufficient that, at this stage, QAG can show a real prospect of success that they will succeed in defeating any CPR 17.2 application – or using any other appropriate route to show that this part of their claims is not time barred.

5) In any event the question of whether the earlier publications (or even all the malicious falsehood claim, if QAG is wrong about the later publications) are a valid part of the claim is not a matter for the jurisdiction stage: it does not affect whether there is a serious issue to be tried against AAN FZ, and is more appropriately a question for the merits stage when AAN FZ if so advised can apply under CPR 17.2, and perhaps more specifically apply to strike out those parts of the claims against it which it says were time barred (but not the others).

6) Consequently, there is a serious issue to be tried at this stage and AAN FZ's limitation points are no reason to uphold the jurisdiction challenge in limited part.

228. I am satisfied that at a jurisdictional stage where the other tort claims against AAN FZ have been validly included in the joinder it is appropriate for the limitation argument

relating to joinder to be a matter of case management in due course. I essentially accept QAG's submissions above.

229. However, in order to explain this conclusion, I have to address a number of pleading points and issues of procedural law which can be resolved now.

Pleadings

230. First, I do not read the original Particulars of Claim as being limited just to losses in the 30 day period following 16 August 2017: para. 31 of that statement of case says in terms that the figure cited are the best particulars that could "presently" be given and that loss was "continuing". Further, para, 31.1 (last line) refers to losses in relation to "publication and republication" of the Video.

231. The later iterations of the Particulars of Claim more specifically point to the publications and republications in issue (as well as social media sites), but I do not consider a reader of the original draft pleading as a whole would consider a single 13 August 2017 publication was the limit of the claim.

232. As explained above, it is established law that under the tort of malicious falsehood publication for the purposes of the tort via internet websites occurs not when and where content is posted on a website but instead when and where that content is accessed by a reader/viewer.

233. QAG accepts that its claims in malicious falsehood for losses which accrued prior to 27 November 2017 remain prima facie subject to the one-year time bar contained in s.4A LA. It is however entitled in principle to pursue claims for losses which accrued after that period which I consider were covered in the general language of the original pleading.

Was the joinder of AAN FZ under CPR 17.1 a nullity?

234. As identified above, the Defendants rely upon the trio of cases: Roberts v Gill [2011] 1 AC 240 at [38], Best Friends Group v Barclays Bank Plc [2018] EWCA Civ 601 at [2], [9] (cited at White Book Vol 1 para 17.1.1), and Jalla v Royal Dutch Shell Plc [2020] EWHC 459 (TCC) at [88], [105], [153] and [274] in support of their submission that CPR 17.1 cannot be used to add or substitute a new party after the expiry of the limitation period.

235. In my judgment, Best Friends and Jalla only make this point because it was common ground. In Best Friends, Simon LJ observed that "Before the [first instance] Judge, it was rightly accepted that the amendment of the Claim Form was either ineffective or must be set aside" [8]. So, there was no argument but I note Simon LJ said not only that the amendment might have been ineffective but alternatively it should be set aside (language suggestive of validity until setting aside as opposed to nullity).

236. In Jalla at [153] Stuart Smith J does use the term "nullity" to describe such a joinder but it is to be noted that this was because earlier [88] he identified this was common ground. I add that Lord Collins' judgment at [38] in Roberts v Gill does not ultimately assist on the issue I need to resolve. He does not discuss CPR 17.1.

237. By contrast, I consider there is both procedural common sense and case law supporting the contrary position to the effect that such CPR 17.1 joinder is in principle valid (despite expiry of limitation) and the Defendants may seek to have it set aside (if they wish) by way of CPR 17.2, which allows such an application.

238. CPR 17.1 sets out the general rule that a party may amend its statement of case without permission at any time before it has been served. CPR 19.4 sets out the procedure for adding or substituting a party, which requires the Court's permission "unless the claim form has not been served" (in which case no permission is required – see CPR 17.1).

239. If a statement of case has been amended without permission, a party is not left without any options if it subsequently wishes to object to the amendment. It is clear that they may make an application under CPR 17.2 to disallow the amendment. Here, that would be an application to disallow the claims for malicious falsehood insofar as they relate to publication/loss before 27 November 2017 (or if the Defendants do not accept the point on later publications/losses, all the malicious falsehood claims). That all makes perfect procedural sense. That is also the time to argue that it is improper to allow QAG to pursue claims for the other torts which are essentially, they would argue, different versions of the time-barred malicious falsehood claims.

240. In effect it would be a strike out of parts of the Particulars of Claim. The appropriate time for such an application would be *after* jurisdiction is upheld and after the Defendants' second acknowledgement of service was filed.

241. If and when the Defendants make such a CPR 17.2 application (if and when this matter is proceeding on the merits), it will then be for QAG to show that it can rely on the provisions of CPR 17.4, CPR 19.5 (insofar as open - see para.244 below)) and/or s.32A of the LA: Reuben v Time Inc [2003] EWCA Civ 6, [17] (a service out case); Armes v Godfrey Morgan Solicitors Limited [2018] 1 WLR 936, [9]; and Muduroglu v Stephenson Harwood [2017] EWHC 29 (Ch), [60]-[73].

242. I note that Professor Zuckerman in his text *Civil Procedure: Principles of Practice* 3rd Ed., at para.7.67, does not suggest that amendments before service which add a time barred claim under CPR 17.1 are a nullity. He explains "…Where a party has added a new claim to his statement of case before serving it, which may be done without court permission, the opponent may apply under CPR 17.2(2) to have the amendment disallowed on the grounds that the limitation period has expired". That appears to support the conclusion which I consider follows from the case law.

243. For these reasons, I do not consider the joinder to have been a nullity. It follows that I do not consider the commentary in the White Book Vol. 1 at para. 17.1.1 (based on Best Friends) to be accurate. Whether the joinder as regards time barred claims will survive is a matter to be resolved in due course on the merits.

244. For completeness, I should also address briefly another procedural route raised by QAG. It argues that there is a real prospect of success of showing in due course (if necessary) that CPR 19.5 applies. The limb of CPR 19.5 identified as relied upon is CPR 19.5(3)(a), which provides for substitution of a new party for a party who was named in the claim form by mistake. I can resolve this issue of law with finality now. That provision does not in my judgment allow the addition as opposed to the

substitution of a party: Armes v Godfrey Morgan Solicitors Limited [2018] 1 WLR 936 at [27]-[28]. An alternative argument was made by QAG that it could use CPR 19.5 to make what it called a "partial substitution". I do not need resolve that issue at this stage given my other conclusions above. If that argument is to be maintained it can be raised in due course.

Serious issue to be tried as to limitation

245. As I have explained above, I agree with QAG that whether the time-barred claims can be pursued should be addressed in due course (if service is not set aside) in the context of appropriate procedural applications and evidence which explains why AAN FZ was not joined originally.

246. More specifically, I agree with QAG that there is a serious issue to be tried as to whether it will obtain relief under s.32A of the 1980 Act and/or whether it can meet the conditions under CPR 17.5 and potentially CPR 19.5 (see para.244 above).

247. Without identifying every argument and evidential point, my reasons for this conclusion are as follows:

i) Although the exercise of the Court's discretion under s.32A has been described as exceptional, the discretion is a wide one and has been said to be "largely unfettered" (see Gatley at §19.21). In addition to the specific matters identified in s.32(2), the Court will also consider: (i) the seriousness of the alleged defamation/malicious falsehood; (ii) the extent of publication; (iii) whether, irrespective of the fact that one claim is commenced outside the limitation period, other claims will proceed; and (iv) whether the claimant notifies the defendant of the likelihood of the claim soon after the publication (see Gatley at §19.21). I note also Maccaba v Lichtenstein [2003] EWHC 1325 (QB), in which factor (iii) seems to have been decisive ([19]-[20]).

ii) If, as I have concluded there is a "serious issue to be tried" on the meaning of the Video, the causes of action, and loss, then the malicious falsehood is plainly serious.

iii) The malicious falsehood claim was brought against "Al Arabiya" on 9 August 2018 and the Defendants' complaint is on one view just a technical point about corporate identity within the same group. It seems to me that QAG intended to name the company operating the *Al Arabiya* News Channel and explained at the time this was their intention in the letter of 10 August 2018. Its English lawyers Osborne Clarke have confirmed that they thought they had done exactly that by suing MEN FZ. So, it seems the omission of AAN FZ was probably an error. It also seems that QAG moved swiftly to add AAN FZ as soon as it became aware of the position.

iv) My reading of the correspondence is that AAN FZ was aware from the letter of 10 August 2018 contemporaneous with the Claim Form (and sent on the first day of the relevant publication) that it was being claimed against; and indeed had probably known from 17 August 2017 that a serious allegation of a claim was being made against it.

v) Also, between 10 August 2018 and 12 October 2018, QAG was seeking Al Arabiya's substantive response to the allegations and was holding back on service until then. On 27 November proceedings were issued soon after the identification of AAN FZ on 12 October. They then took 8 months to be served (because the foreign defendants refused to accept service through their lawyers). So AAN FZ would have been formally on notice at essentially the same time, even if it had been in the original Claim Form.

vi) It cannot be said that the commencement of the claim against AAN FZ in November 2018, as opposed to August 2018, has caused any evidence to be unavailable or less cogent, or in any other way has prejudiced AAN FZ's ability to defend the claim. No such suggestion has been made in the Defendants' evidence.

vii) The claims for conspiracy and unlawful interference which traverse the same facts will be proceeding against AAN FZ in any event, as will (if QAG is right about that) the later part of the malicious falsehood claims as explained above. The broadening, or addition, of a claim for malicious falsehood adds only a new legal category in which to place the same publications and intentions. It is a matter of legal form rather than substance.

viii) QAG's malicious falsehood claim for publication/loss from 27 November 2018 onwards will proceed against AAN FZ in any event.

248. I should emphasise that these are not findings on the evidence. These matters may well be disputed but they do in my judgment raise a serious issue to be tried in the context of an appropriate application in due course. That may be a strike out, a formal application by the Claimant under s. 32A, an application for the setting aside of the order for joinder or some other procedural course.

249. What is not appropriate is a full-blown argument on this issue in a jurisdictional application when there is clearly a serious issue to be tried in relation to limitation.

250. I emphasise that by these comments, I am not shutting out any arguments that the Defendants may wish to make in due course in relation to limitation and specifically what follows from the case I drew to the attention of the parties during argument, Cornwall Gardens v Garrard [2001] EWCA Civ 699.

251. I invited further submissions on this case and the helpful notes submitted by Counsel satisfied me that there is a real issue to be tried as to whether QAG can bring claims for the other torts if the malicious falsehood claim is substantially time barred (and the court in due course refuses permission for it to be pursued).

252. I consider there is substantial force in QAG's submissions that the preponderance of authority supports its position that there is no principle which would prevent a party claiming (on overlapping facts) remedies for other economic torts (such as conspiracy) even if a claim in malicious falsehood was barred. Specifically, insofar as there is some form of "non-evasion" rule as contended for by the Defendants (which prevents a barred claim being "dressed-up" as another claim in order for example to avoid restrictions on the remedies which might be available in respect of the first claim), that seems to apply in the limited context of defamation claims which, unlike

malicious falsehood, are concerned with general damages for injury to reputation. But this is not for resolution now.

253. At the time those issues are determined, the Defendants can also pursue their argument that the non-time barred claims for malicious falsehoods by AAN FZ raise the causation problems referred to in Tesla Motors Ltd. v BBC [2013] Civ 152 at [136].

6) No real and substantial tort in England & Wales

254. Under this sixth challenge, the Defendants say that the malicious falsehood claims (but not those in respect of the other torts) fall to be struck out as an abuse of process. They argue that a claim for malicious falsehood arising out of publication in multiple jurisdictions is liable to be struck out as an abuse of process "if the publications which took place in the jurisdiction do not (individually or collectively) establish a real and substantial tort within the jurisdiction": Karpov v Browder [2014] EMLR 8 at [69(1)].

255. It was common ground that Karpov is an example of what is sometimes called Jameel abuse, after the Jameel (Yousef) v Dow Jones & Co. Inc. [2005] QB 946 (CA). In that case the Court of Appeal held that the real and substantial tort test applied both to an application for permission to serve out of the jurisdiction and to an application to strike out a claim for an abuse of process. The facts in that appeal were that a foreign claimant issued libel proceedings against the publisher of a US newspaper in respect of an article posted on a US website but accessible to subscribers in England. Only 5 individuals were said to have accessed the article in England and the abuse argument succeeded: "the game was not worth the candle" [69].

256. The thrust of the Defendants' argument is that QAG has not adduced any evidence that the Video was actually watched by a substantial number of people within the jurisdiction.

257. Before addressing that submission, I should address the parameters of the Jameel abuse jurisdiction. The principles have been helpfully summarised by Nicklin J in Alsaifi v Trinity Mirror [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] E.M.L.R. 296 , 319 per Eady J. The jurisdiction is useful where a claim 'is obviously pointless or wasteful': Vidal-Hall v Google Inc [2016] Q.B. 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 [2014] 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."

258. In my judgment, the Jameel abuse application fails. The facts before me are far from that case or indeed any case cited to me where the Jameel jurisdiction has been exercised. The allegations are serious and even if one looks only at publication/loss in England, the evidence as it presently stands (summarised above) shows that there are real prospects of showing significant publication in England.

259. That evidence also establishes that there are real prospects of success of showing loss in the millions in England. It cannot in my view be said that the claim is at all pointless and wasteful, whether one focusses on publication and loss in England alone, or the worldwide claims.

260. For completeness, I should address a number of further points argued before me in relation to this head of complaint. It was said that a "substantial proportion" of any loss was not suffered in England and that there was not "significant publication or substantial tort … in comparison with the rest of the world". I consider it to be arguable that there was substantial publication and loss in England, but I do not in any event regard such relative consideration as relevant to Jameel. The Jameel question is absolute not relative: if there is a real and substantial tort in England, that is enough to defeat abuse, and it does not matter if greater torts may have also been committed abroad.

261. There was also an argument in the evidence (but not developed orally) that it is an inappropriate use of the English court to "make political points in respect of the relationship between Qatar and other countries". I am not persuaded that the claim is being brought for such a purpose but in any event, even if there was such a motive to bring an otherwise legitimate action, that would not be abusive: Broxton v McLelland [1995] EMLR 485 (CA), 497-498.

262. Finally, I note that although there is an issue of law which I will address in next section (that is, whether a malicious falsehood claim can include foreign publications) no attempt was made by the Defendants to argue that the claims in respect of the other torts (aside from malicious falsehood) were limited to losses in England.

7) **The malicious falsehood claims against UAE Defendants are barred insofar as they relate to foreign publications: "the rule"**

263. This is the seventh and final challenge under the serious issue to be tried head. It raises a pure issue of law.

264. The Defendants argue that there is a well-established substantive rule of English law that permission to serve out can only be obtained for a malicious falsehood claim in respect of publications within England and Wales: Berezovsky v Michaels [2000] 1 WLR 1004, [1032]. If such a rule exists, it seems to me that in terms of juridical nature it must be a rule of common law. It is not a rule which, on the Defendants' arguments, is based upon the language of any jurisdictional rules such as we now find in PD6B (or, historically, in RSC Order 11 and its predecessor procedural regimes).

265. The Defendants say the rule was acknowledged by Eady J in King v Lewis [2004] I.L.Pr. 31 at [18]; and was applied in Huda v Wells [2018] EMLR 7, where Nicklin J explained [12]:

> "If permission to serve out is granted in a defamation or malicious falsehood claim, the claimant must limit his claim to alleged publications within England & Wales: [2000] 1 W.L.R. 1004 ,1032 per Lord Hope citing with approval Diamond v Sutton (1866) L.R. 1 Ex 130."

266. In addition to these cases, I was taken to the passages in the leading textbooks:

i) Gatley at §24.29:

> "As matters stand, any claimant applying under CPR r.6.36 for leave to serve out must confine himself to suing in respect of English publication only. It is an abuse of process to do otherwise"; and

ii) Duncan & Neill at §9.09:

> "If permission to serve out is required, the claimant must limit his claim to publications occurring in England and Wales, even if the defendant was also responsible for publication of the same matter elsewhere";

and to the same effect at §9.22:

> "When permission to serve a claim form outside the jurisdiction is required, it is impermissible to include a claim in respect of foreign publications."

267. The starting point is accordingly that certain aspects of the case law and textbooks appear to provide strong support for the Defendants' submission that there exists such a rule.

268. It is common ground that if they are correct in this submission, it follows that QAG cannot claim in malicious falsehood in England in respect of publication of the Video outside the jurisdiction. I note, however, that the Defendants do not argue that a claim for essentially the same foreign losses cannot be made as a matter of law in respect of

the other torts (such as conspiracy based on deceit or interference with business). The argument is confined to malicious falsehood and that may mean in practical terms this issue is of limited relevance. The point is nevertheless an important one.

269. QAG argues that there is in fact no such rule of substantive law. QAG says that it is true that before the amendments to RSC Order 11 in 1987 (to widen what is now CPR 3.1(9)), to cover not just a tort committed within the jurisdiction, but also damage within the jurisdiction (Cairo v Brownlie [26]), and before the amendments in 2015 to add new head CPR 3.1(4A) (covering claims on "closely connected" facts), it was often *assumed* that the court would (in service out cases against a foreigner) have no territorial jurisdiction for claims for defamation in relation to publication outside England and Wales.

270. But, QAG argues, this was an *assumption* as to the effect of the jurisdictional rules, not a rule of substantive law. It says the assumption arose because (pre 1987) of the limited scope of old RSC Order r 1(1)(f), which meant that as against a foreign defendant, it was usually only be possible to establish jurisdiction over torts of defamation committed by publication within England (which would be governed by English law).

271. QAG's attack on the existence of the rule involves an ambitious and bold submission, given how well established the rule seems to be as part of the architecture of libel law.

272. The rule is often traced back to Diamond v Sutton (1866) LR 1 Ex 130. That was a case in which there was an issue as to whether the plaintiff could sue a Jersey-based editor for libels said to be contained in a magazine (*Photographic Notes*) which was printed and published in Jersey, but which also seems to have been published in London. Martin B held that the order permitting service of the writ outside the jurisdiction would be set aside unless the plaintiff undertook to confine himself to the cause of action arising within the jurisdiction. When I refer below to "the CLPA" this is shorthand for the Common Law Procedure Act 1852.

273. Martin B's clear but brief reasoning was as follows [132]:

> "But for the act [the CLPA], the plaintiff could not sue at all; the act allows him to sue a defendant residing out of the jurisdiction for acts committed here; but it is an abuse of the act if, under its powers, he brings the defendant here, and then includes in the same action matters occurring elsewhere, and for which the act does not give him power to sue; and the defendant is entitled to ask for protection against this abuse."

274. I was not taken to section 18 of the CLPA in argument but it is well-known as a matter of legal history that was the early (and probably, the first) jurisdictional statute which permitted a plaintiff to sue a person resident out of the jurisdiction. It allowed such proceedings to be served in two situations: where the cause of action arose within the jurisdiction, or where there was a cause of action in respect of a breach of a contract made within the jurisdiction. The procedural position at the time of Diamond v Sutton is described in *Prentice, Common Law Procedure* (1866) at 214.

275. On its face, all this case appears to decide is that if jurisdiction was obtained on the basis of torts committed within the jurisdiction, torts committed outside the jurisdiction (and in respect of which service out could not have been independently obtained under the jurisdictional regime of the CLPA) could not be included in the writ to evade the jurisdictional rules. That seems to me to be simply a basic principle in jurisdictional law as opposed to a more profound rule arising in a defamation (or, indeed malicious falsehood) context.

276. Although not the subject of submissions before me by Counsel, I have noted the example given by Martin B in argument at [132] of bringing a defendant into the jurisdiction to sue on a bill of exchange but then suing him for an assault in Jersey. When one puts this example together with the ruling I have set out above, it seems that Martin B considered that the plaintiff was essentially committing the same form of abuse - bringing the Jersey defendant to London to sue him for libels in London but adding in libels committed in Jersey (which would be outside the permissible scope of service out of the jurisdiction under the CLPA). This seems to me to be about the scope of the CLPA and nothing more profound than that.

277. In terms of chronology, the next case is the New Zealand authority referred to by Lord Hope in Berezovsky at [1032E]: Eyre v Nationwide News Proprietary Limited [1967] NZLR 851. In that case, the plaintiff, a New Zealand politician, had obtained leave to serve a claim for defamation outside the jurisdiction against an Australian company publishing *The Australian*. That paper had a circulation of 66,000 in Australia but just 21 copies were sent to subscribers in New Zealand. The New Zealand Code of Civil Procedure, Rule 48, provided that a writ of summons may be served out of New Zealand by leave of a Judge where the act for which damages are claimed was done in New Zealand.

278. The Judge, Wellington J, explained [852, line 5] that "It is clear that there is no jurisdiction to allow service of process out of the jurisdiction except by statutory enactment or Rule of Court and the Court has no power to grant leave unless the case comes within the terms of the Rule". Wellington J went on to hold that because the plaintiff had not confined himself to a cause of action arising within the jurisdiction, this "exceeds the jurisdiction of the Court and in addition I am not satisfied there is a question of substance in this country" [855].

279. This case does not support the existence of the rule. In fact, it tends to support what I consider is the true ratio of Diamond v Sutton, namely that the jurisdictional rules did not permit the plaintiff to sue for publications outside New Zealand. The second part of the Judge's decision (no question of substance in this country) seems to be an early example of a type of Jameel approach.

280. Turning to Berezovsky v Forbes [2000] 1 WLR 1004 (HL), my reading of that case is that the lack of jurisdiction over claims for defamatory publication outside the jurisdiction was a matter of common ground. The claim was in respect of publications in England and Wales alone and the issue was *forum conveniens* for those claims. It is not concerned with malicious falsehood.

281. Leading Counsel for the Defendants first drew my attention to what was said by Lord Steyn at 1012H-1013B:

> "Counsel argued that it is artificial for the plaintiffs to confine their claim to publication within the jurisdiction. This argument ignores the rule laid down in *Diamond v. Sutton (1866) L.R. 1 Ex. 130* , 132 that a plaintiff who seeks leave to serve out of the jurisdiction in respect of publication within the jurisdiction is guilty of an abuse if he seeks to include in the same action matters occurring elsewhere: see also *Eyre v. Nationwide News Pty. Ltd. [1967] N.Z.L.R. 851* . In any event, the new variant of the global theory runs counter to well established principles of libel law. It does not fit into the principles so carefully enunciated in *Spiliada..."*

282. In my view, what was said by Lord Steyn was *obiter* and on the basis of the common ground. His observations in context (pp. 1012H-1013A) really amount to no more than the proposition that if a plaintiff seeks leave to serve out on the basis of a tort committed within the jurisdiction only (which is all he says falls within CPR 3.1(9)(b)) then it is an abuse also to seek to add claims for publication elsewhere which do not fall within that jurisdictional basis. That is to say no more than Diamond v Sutton as applied by Wellington J in Eyre.

283. This does not seem to me to be an opinion that if there is a separate jurisdictional basis under CPR PD 6B for a claim for publication or loss outside the jurisdiction, it is somehow substantively abusive to claim for such publication and consequent pecuniary losses by way of a claim for malicious falsehood.

284. The same point applies to the equally *obiter* observations of Lord Hope at 1032D-E which were based on what was common ground:

> "In a defamation case the judge is not required to disregard evidence that publication has taken place elsewhere as well as in England. On the contrary, this feature of the case, if present, will always be a relevant factor. The weight to be given to it will vary from case to case, having regard to the plaintiff's connection with this country in which he wishes to raise his action. The rule which applies to these cases is that the plaintiff must limit his claim to the effects of the publication in England: *Diamond v. Sutton (1866) L.R. 1* Ex. 130; *Schapira v. Ahronson [1999] E.M.L.R. 735*; see also *Eyre v. Nationwide News Pty. Ltd. [1967] N.Z.L.R. 851*.Common sense suggests that the more tenuous the connection with this country the harder it will be for the claim to survive the application of this rule."

285. The "rule which applies in these cases" to which Lord Hope was referring was simply the practical consequence of the same jurisdictional point Lord Steyn was making, namely the combined effect of (what was assumed to be) the restriction of the service out rules to torts committed in the jurisdiction, and the doctrine articulated in Diamond v Sutton, in relation to defamation.

286. Leading Counsel for QAG submitted that no one seems to have reflected on the question of whether the expansion of the service rules in 1987 to cover damage in the jurisdiction as well as torts in the jurisdiction might have changed the position from Diamond v Sutton. That seems correct. In any event, the point was not addressed, and the House of Lords was, it appears, reasoning on the basis of a concession based on the pre-1987 rules.

287. One possible reason for this may have been that the point was regarded as not worth exploring for a defamation claim for general damages for harm to reputation (where there was no claim for special pecuniary loss) as such general damage to reputation is often assumed to be suffered only in the territory of publication. It is well established that harm to the claimant's reputation cannot form part of the basis of an award of damages for malicious falsehood: Tinkler v Ferguson [2020] 4 WLR 89, at [44].

288. Overall, I consider that the House of Lords in Berezovsky did not need to reach contested conclusions on the scope of Diamond v Sutton, the implications of the expansion of Order 11 in 1987, on new PD 6B 3.1(4A) which did not then exist, or their application to malicious falsehood.

289. The case of Schapira v Ahronson [1997] EMLR 735 (cited by Lord Hope at [1032F] in Berezovsky) does not take the debate any further. It merely holds that in a case (which was substantively a forum dispute) a claimant was "entitled" to bring proceedings here against foreigners who were aware that their publication would be sent to subscribers in England and to "limit his claim to publication in England". The case does not discuss the rule.

290. I was also taken to Dicey from 2012 (before CPR 3.1(4A)) at §§35-108, 35-119 which said that under the "current version of the rules of court" the claimant is required to limit his claim to publication in England. In my view, this simply reflects the same assumptions about jurisdiction based on the pre-1987 position, and with regard to defamation only.

291. It clearly does not consider the effect of new CPR 3.1(9)(a). The authorities cited by Dicey are Berezovsky (which is not in my view authority for any such proposition for reasons already given), and King v Lewis [2005] ILPr 16, [2], which says nothing on the point. In that case the claimant had voluntarily limited his claim to publication in England.

292. If the jurisdictional rules (what is now CPR PD 6B) on their proper construction can in principle cover publication and loss outside England for malicious falsehood, I can find nothing in the case law which could make such claims an abuse as a matter of substantive law.

293. Indeed, I would find it odd in principle and legally incoherent that an equivalent speech-based business losses claim, such as classic common law deceit (where those deceived are outside the jurisdiction) is in principle permissible, but pleading the same essential facts as a malicious falsehood claim heading infringes some kind of rule. I appreciate that defamation may be different given its concern with general damages for reputation. But the present case is a claim for commercial losses based on something said or done in relation to QAG's business. Commentators have noted that malicious falsehood is often regarded as an economic tort: *Clerk & Lindsell on* Torts (23rd Edition) at para. 23-01 and the recent judgment of Nicklin J in Peck -v- Williams Trade Supplies Limited [2020] EWHC 966 (QB) at [12].

294. Nor has anything been submitted to me in argument which shows such claims fall foul of some unwritten rule operating independently. It is not contended that some form of public policy or non-justiciability principle is in issue. Indeed, if there were such a

policy why would it not bar the conspiracy claim which is based on essentially the facts?

295. Huda v Wells [2018] EMLR 7 is strongly relied upon by the Defendants. In my view, Huda was another case where the claimant conceded before the hearing that it could not claim for publication and loss outside the jurisdiction [47], [85(ii)].

296. On the basis of that concession, and without argument to the contrary, Nicklin J at [12] summarised the rule in Diamond v Sutton, for *both* defamation and malicious falsehood, as being that where there was jurisdiction over claims for publication in the jurisdiction, a claimant could not add claims for publication abroad for which the Court would not *independently* have had jurisdiction. This is correct as stated.

297. What was not considered, however, due to the concession, was whether the claimant could have obtained jurisdiction for claims for publication outside the jurisdiction for example under CPR 3.1(4A) or 3.1(9)(a), as no such point was advanced.

298. I note that there was debate about whether the claims for publication within England could be justified under CPR 3.1(4A) but the Court quite rightly said [15] that on the facts of the case this added nothing to CPR PD 6B 3.1(9), tort within the jurisdiction- which was the only possible gateway. But Nicklin J then held that the 3.1(9) gateway could not be relied on because there was no sufficiently arguable case of publication in England (apart from a privileged publication) [37], [48]-[49], [52], [69], [83]. So, the claim failed on serious issue to be tried: [83].

299. Further, I note that there was no argument of loss in England independent of the failed case of publication in England; and additionally, since no basic gateway had been found to apply, CPR 3.1(4A) could not have been triggered in any event as there was no basic claim for it to be dependent on.

300. Huda is not authority for any substantive rule that claims for malicious falsehood cannot lie for publication outside England. Nor is it authority that CPR 3.1(4A), or 3.1(9)(a), cannot apply to such claims if the conditions of those heads are satisfied.

301. I find persuasive the example given by QAG's Leading Counsel: if there has been a malicious falsehood published abroad (talking to B abroad) but causing actual pecuniary loss by indirect effects in England (because B talks to C in England who acts to A's detriment), why should it not be possible to obtain jurisdiction over it under CPR 3.1(9)(a) (subject of course to *forum conveniens*)?

302. As I have indicated already above, in my judgment, the point is yet clearer when malicious falsehood is considered alongside deceit, unlawful interference or conspiracy which have no such restriction and may be based on the same "speech-based" facts.

303. I accordingly conclude that there is no freestanding rule of substantive law which in and of itself makes it an abuse to sue for malicious falsehood in respect of publications outside the jurisdiction. I do not have to decide any issue in relation to the existence of such a rule as regards defamation and nothing I have said is intended to apply to that tort.

304. In my judgment, there has never been such a substantive common law rule but merely a procedural bar in defamation cases based on the terms of the statutes and procedural rules which formerly governed service out of the jurisdiction. It is to those rules as they change over time that one must look to identify the scope of the English court's jurisdiction.

305. The boundaries of the English court's territorial jurisdiction are defined and circumscribed by rules of court (and practice directions) which succeeded statutes like the CLPA. As explained by Professor Briggs, "…the basic assumption of the common law is that where there is service there is jurisdiction" (Briggs, 464).

306. I accordingly reject the seventh point and turn to another pleading issue.

The Communications Act 2003 claim

307. At POC3 para. 28.3, QAG seeks to add an additional form of "unlawful means" to its unlawful means conspiracy claim. It also relies upon this further "means" as part of the interference with business tort. In POC1, the two original "means" relied upon were malicious falsehood and common law deceit.

308. By the new plea, QAG alleges that the publication of the Video constituted an offence contrary to sections 127(1) and 127(2) of the Communications Act 2003 ("the 2003 Act") which provide as follows:

> **"127 Improper use of public electronic communications network**
>
> (1)A person is guilty of an offence if he—
>
> (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
>
> (b) causes any such message or matter to be so sent.
>
> (2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—
>
> (a) sends by means of a public electronic communications network, a message that he knows to be false,
> (b) causes such a message to be sent; or
> (c) persistently makes use of a public electronic communications network."

309. So, in broad terms, this provision prohibits, under criminal law, the transmission of "menacing" and "false" messages over networks. QAG does not rely upon the TV broadcast of the Video but only the later internet transmission via *Al Arabiya's* website and social media accounts.

310. The Defendants submit that no serious issue to be tried arises in relation to this plea. They rely upon two points: the lack of extra-territorial application of the 2003 Act (relying upon the principle that it is presumed that an Act of Parliament does not have extraterritorial effect); and secondly, on a definitional argument. I note that the first argument does not concern the "civil actionability" of the crime, but more basically

whether, given the extraterritorial nature of the conduct in issue, a crime under English law would in fact be committed.

311. Turning to this first argument, the offences under section 127 are complete when a person sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character or of a false nature (with relevant intent).

312. In the present case, the "sending", such as it was, would have been the inclusion of the content in the accessible websites or social media accounts of the channel. There is no evidential basis for me to find it even arguable those acts took place within the jurisdiction and it has not been argued that the Act was given extraterritorial effect. I have not been shown any statutory extension of these offences to acts outside England despite the further written submissions from QAG. Indeed, I would find it surprising if they had been extended. The first argument accordingly succeeds. I refer to well-known legal principles summarised in *Blackstone's Criminal Practice* 2020 at para. A8.2.

313. The Defendants' definitional argument relies on s.127(4) of the 2003 Act which provides that the offences established under s. 127(1) and (2) of that Act "do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990)". They point me to a number of definitions which appear to exclude things done in the course of providing a defined "programme service" (see section 127(4)) from the ambit of s.127(1) and (2) and invite me to conclude that the only acts on *Al Arabiya's* website and social media channels consisted of the sending of "sounds or visual images" (viz. the Video) via "an electronic communications network" (viz. the Internet) for reception at two or more places in the UK (*viz.* on the computers of UK-based followers of those social media channels), as well at many places outside the UK. Hence they say these were excluded.

314. Against this, QAG argue (amongst other points) that the creation and publication of the Video was not something "done in the course of providing a programme service" for the purpose of s. 127(4) of the 2003 Act because the definitions are concerned with excluding only things done on a broadcast <u>television</u> service (which is not the subject of their new plea).

315. There is real force in this argument and in QAG's additional submissions. They are right to contend that the logical consequence of the Defendants' submissions is that anyone who posted a video on a website or twitter would always be engaged in a programme service. The consequence would be that all internet/social media posting would be outside sections 127(1) and (2). That seems a surprising result. It would also suggest that <u>Chambers v DPP</u> (holding that a tweet to the world is within s. 127(1)), and <u>Chabloz v Crown Prosecution Service</u> [2019] EWHC 3094 (Admin) (holding that a blog with hyperlink is within s. 127(1)), were wrongly decided.

316. Putting to one side the extraterritoriality issue, I consider there is a serious issue to be tried as to whether an internet broadcast by websites is caught by the Act. I do not however have to resolve this issue because of my conclusion that the Act does not apply on an extraterritorial basis. It would require more detailed argument and examination of the definitions and cross definitions in the 2003 Act and the

Broadcasting Act 1990. It would also be unwise for me to venture to give a view on this important issue of domestic criminal law, unless it was absolutely necessary.

317. I should finally refer to the fact that during and after the hearing (in its further written submissions) QAG referred to a number of other unpleaded breaches of criminal law (such as a breach of the Malicious Communications Act 1988) which might be relied upon as unlawful means. I say nothing about those matters. They are not pleaded, even in draft form, and if they are to be pursued they will need to be the subject of a formal application in the normal way.

318. I now turn to consider the gateways relied upon following my conclusion that as regards the claims against all Defendants as set out in POC3 (apart from all claims against MEN UK (D2) and the draft 2003 Act claim), QAG has established a serious issue to be tried in respect of each of the claims in that draft statement of case. This is of course without prejudice to any limitation issues which AAN FZ may wish to raise in due course concerning its joinder.

IX. The Service Gateways

319. QAG relies upon CPR PD 6B 3.1(9), (2), (4A), and (3). The Defendants challenge the application of each gateway. Accordingly, I will need to go to the law (and return to the facts) in some detail.

320. I will say nothing further about 3.1(3) ("necessary and proper party") because I have struck out the claim against the UK Defendant D2, MEN UK. I do not need to consider whether the joinder of MEN UK was abusive, as argued by the Defendants in reliance on the developing doctrine described in Lungowe v Vedanta Resources Plc [2019] 2 WLR 1051 [23]-[40].

321. Before looking at the substance of the law in relation to each gateway, I will identify some general points of law.

322. First, for malicious falsehood, there are separate causes of action for publication in each country. Second, in malicious falsehood, publication for the purposes of the tort via internet websites occurs not when and where content is posted on a website but instead when and where that content is accessed by a reader/viewer. Where actual special pecuniary loss is claimed, the cause of action for malicious falsehood is not completed by publication but by the consequential loss. Where section 3 of the Defamation Act 1952 is relied on, the cause of action for malicious falsehood is completed by publication.

323. However, it was not disputed that the causes of action for unlawful interference and conspiracy arise out of all the facts and do not depend on publication as an element of the cause of action.

324. Finally, despite some early submissions of the Defendants which appeared to suggest the contrary, it was ultimately common ground that there is no presumption that the gateways are to be interpreted narrowly or literally, and the correct approach is neutral interpretation: Orexim v Mahavir Port [2018] 1 WLR 4847 (CA), [34]-[35], applying Abela v Baadarani [2013] 1 WLR 2043, [53]; also Fujifilm v Abbvie [2017] RPC 7, [83]; Al Jaber v Al Ibrahim [2016] EWHC 1989 (Comm), [21].

Tort Gateway: CPR PD 6B §3.1(9)(a) and (b)

325. CPR 3.1(9) provides that a claim form may be served out of the jurisdiction where:

> "(9) A claim is made in tort where –
>
> damage was sustained, or will be sustained, within the jurisdiction; or
>
> damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction."

326. The key principles in relation to the Tort Gateway are as follows:

1) The damage limb, (a), was introduced in 1987 and has since been amended in 2000, to broaden it, by changing "*the damage*" to "*damage*": Cairo v Brownlie (CA), [26]. It is now clear that CPR 3.1(9)(a) is free-standing and its interpretation is not driven by the interpretation of Article 7(2) of the Brussels I Recast: Cairo v Brownlie (CA) [22]-[40], [158]-[160], adopting the majority in Brownlie v Four Seasons (SC) [50]-[51].

2) Where the damage occurs solely in England this head applies without question, provided that there is a "real and substantial tort" within the jurisdiction: Chadha v Dow Jones [1999] EMLR 724, 732, Berezovsky v Forbes [2000] 1 WLR 1004, 1012E.

3) However, in cases where there is damage both within and outside the jurisdiction, §3.1(9)(a) can still be relied on to justify service out of a claim with regard to all the damage. To do this, it is not necessary to show that most of the damage occurred within the jurisdiction. Rather, it is necessary to show "some significant damage" within the jurisdiction. Further, damage includes what might be called "indirect" and not just "direct" damage and includes damage on the "ordinary and natural sense" of the word, not confined to the damage that completes the cause of action. See Metall & Rohstoff v Donaldson 437C-D ("it is enough if some significant damage has been sustained in England"); and Cairo v Brownlie (CA)) per McCombe LJ at [27], [29], [50], 53, [54] and per Underhill LJ at [158]-[160], adopting the majority in Brownlie v Four Seasons [2018] 1 WLR 192 (SC) [40], [52], [56], [62], [64]-[65], [68].

4) Further, my reading of these passages from Metall, Cairo, and Brownlie is that they say that satisfaction only of "some significant damage" is "enough" i.e. there is a no addition of a further, relative requirement of relative significance. That is, it is not necessary to show that the damage in England amounted to any particular proportion of the total worldwide loss. In my view that that would be inconsistent with the wording and its broadening from "the damage" to "damage" in 2002.

5) I was taken to numerous cases that have adopted the test in Metall without engaging in any "relative" comparison: Conductive Inkjet v Uni-Pixel [2014] FSR 22; and in Ashton Investments Ltd v Russian Aluminium (Rusal) [2007] 1 Lloyds Rep 311 [62] an absolute approach to significance seems to have

been adopted. I also note that the leading textbook does not suggest a requirement of relative significance (Briggs, Civil Jurisdiction and Judgments, ((6th ed 2015), p. 486).

6) There is a single case which may point the other way and it was strongly relied upon by the Defendants: Microsoft Mobile Oy (Ltd) v Sony Europe Ltd [2017] EWHC 374 (Ch). In that case Marcus Smith J concluded that the damage must be "significant relative to the damage sustained outside the jurisdiction" [163]. With respect to the judge this observation was made without reference to authority and seems to me to be inconsistent with the case law I have set out above. In any event, I note that Marcus Smith J was not postulating any more than a low flexible concept of relative significance. In this regard, I note [172] his point was that the claims in question were wholly insignificant, being less than half of one percent of global claims, and any event his conclusions were *obiter* as the application of CPR 3.1(9) was decided on other grounds.

7) Even if there is some hurdle of relative significance, it is a low and flexible criterion of "some" significance overall, not any requirement of a particular or major proportion (cf Cairo v Brownlie, [29]): i.e. at most it rules out only "minor and insignificant" damage. In my judgment, interpolating any hard requirement of relative significance, especially with some high minimum threshold of proportionate significance, would be to add a gloss which the words of the rule do not support. The relevant control on claims for relatively insignificant damage is *forum conveniens*.

8) As to the "act" limb, (b) (which is the old existing pre-1987 rule), where the entirety of the acts in question occur in England, this head applies without question. But in cases where acts have occurred both in England abroad, head (a) can still apply where "damage has resulted from substantial and efficacious acts committed within the jurisdiction [by the relevant defendants] whether or not substantial and efficacious acts have been committed elsewhere" (Metall & Rohstoff, 437E-F).

9) Under this head, the Court of Appeal in Metall observed that it would contravene the letter and spirit of the rule if jurisdiction was assumed on the strength of "some relatively minor and insignificant act having occurred here": 437E. QAG rightly submits that this aspect is also to be assessed by reference to the particular part of the claim being brought within 3.1(9)(b). It only seeks to bring within 3.1(9)(b) the part of its claim for damage arising out of acts of publication within the jurisdiction, and in relation to those claims, I have decided that it is arguable (to the relevant standard) that the acts of publication here are not minor and insignificant.

327. Turning to the application of these legal principles and beginning with malicious falsehood:

1) Considering first that part of QAG's claims, made up of the tort(s) constituted in respect of both publication and loss in England, which necessarily occurs here, in my judgment this falls directly within CPR 3.1(9), and indeed the defamation case law consistently accepts without question that CPR 3.1(9) is satisfied by publication within the jurisdiction: King v Lewis at [2].

2) It is not necessary to pass any extra threshold of relative significance, assuming there is a sufficient case of a real and substantial tort, as I have found there is.

3) Further, QAG has established there is a substantial and efficacious act within the jurisdiction, and a real and substantial tort, given that there was substantial publication here (and substantial arguable damage resulting). I will not repeat the material cited above about the arguable number of views of the Video. A good arguable case of publication that is significant, substantial and efficacious, both absolutely and relatively, has been established.

4) I would add, as to relative significance, if it is relevant, this is satisfied once it is realised that under this part of the case, QAG is only fitting publication in England within 3.1(9)(b), so the UK publication is 100% of publication, and thus is obviously not "minor and insignificant" in the context of the acts complained of. So, comparing it to publication worldwide is not the relevant point for fitting this distinct tort within the gateway, but even if it was in my view percentages in the range of 6%-9% are a significant on the global scale.

5) Further, for the reasons already explained, there is sufficient evidence to prove significant and substantial loss at the English point of sale, and thus significant and substantial damage in England, and therefore this part of the claim falls within 3.1(9)(a) as well. I refer to the rough figure of US$3.68m of loss for one month in the UK percentage.

6) Finally, in my view QAG can also rely on the E-Commerce loss in the UK. This is around $11.08m and 72% of E-Commerce revenue is paid into the UK. In my view, E-Commerce revenue losses are damage within the broad concept of damage, including indirect damage, adopted in Cairo v Brownlie; and see by analogy Metall & Rohstoff on the facts at 449. They are a loss "felt" in the relevant UK bank account when worldwide E-Commerce sales did not occur and so payments were not made here.

7) There were additional losses relied upon by QAG but what I have identified above is sufficient for the Tort Gateway purposes.

328. For unlawful interference, in my view the same approach applies:

1) Publication is not a technical part of the cause of action. Nevertheless, the operator of a website or social media channel is committing an act where content is downloaded and viewed (and not merely where it is uploaded) as their technology permits the download and sends the data to the recipient in the receiving state: this is the logic behind the publication rule for malicious falsehood. For the same reasons, therefore, key parts of the acts of unlawful interference occur where publication occurs in the malicious falsehood sense.

2) The unlawful interference claim can therefore be broken down into a set of sub-causes of action, in respect of the loss in each country at QAG's choice (obviously QAG could claim in different countries for the loss suffered in that specific country, and so it can divide its claims: see Briggs, p. 486). This nationally disaggregated basis is legitimate, not least as the likely mosaic

application of Article 4(2) of Rome II would produce a different applicable law for the tort constituted by the loss in each country; and it is consistent with Berezovsky v Forbes.

3) On this basis, the same logic would apply as discussed in relation to malicious falsehood, and the claims for losses in England (including where there was publication abroad) and publications in England (including where they caused loss abroad) would fit within 3.1(9)(a) and (b) as discussed. The claim for English losses/publications would plainly be significant/substantial against any relative yardstick, for the reasons given above.

329. For conspiracy, "some significant damage" has been shown to have occurred in England to a sufficient standard (on the basis of the same analysis as in relation to unlawful interference and malicious falsehood), so 3.1(9)(a) is satisfied. I have not addressed QAG's more elaborate argument in relation to limb (b) because it is not necessary.

330. The Tort Gateway is satisfied.

The Injunction Gateway CPR 3.1(2)

331. QAG claims a final injunction to restrain diffusion of the Video by the Defendants in England and Wales and also an order requiring publication of a retraction. Thus, it says, it satisfies the gateway: "(2) A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction."

332. The Defendants argue that the gateway is not satisfied because the Video has in fact now been taken down. Leading Counsel for the Defendants took me to POC2 which recognises at para 17 that the Video remained on the UAE Websites and AAN FZ's social media channels until at least 3 January 2019 almost two years ago and accepts at para. 33 that the Video is no longer directly published by any of the Defendants. They argue that the gateway is only available where there is a real basis for anticipating that the conduct complained of will be continued or repeated. They rely on Dicey §11-158 "permission will be refused if there is no real ground to anticipate repetition of the action complained of", citing De Bernales v New York Herald [1893] 2 QB 97 and Watson v Daily Record Ltd [1907] 1 KB 853.

333. In my judgment, QAG are correct to submit that this submission involves a confusion between gateway and forum issues. Case law establishes that the gateway question is to be assessed at the time permission to serve out was granted. They say that the injunction claim was still live at that time. Undertakings were sought from the Defendants and refused, and there was a good arguable case for an injunction.

334. I was referred to a number of cases in this regard. I will not set them out because they are summarised by Gloster LJ in Erste Group Bank AG v JSC (VMZ Red October) & Ors [2015] EWCA (Civ) 379; [2015] 1 CLC 379 [44]-[45]. QAG is correct in its submission. Watson v Daily Record Ltd is a case where it was accepted that the plaintiff was within the gateway but as a matter of discretion, leave was set aside.

335. The Injunction Gateway is satisfied. There is also a serious issue to be tried as to a corrective publication. The Defendants' position before me is that the Video is in all

respects accurate. Their evidence makes no concessions and they argue strongly in defence of the contents.

The Further Connected Claims Gateway: 3.1(4A)

336. Before turning to the submissions in relation to this gateway, I will summarise the applicable legal principles, in respect of which I did not detect any real dispute between Counsel.

337. 3.1(4A) is a new head of jurisdiction introduced in October 2015 which increases the scope of jurisdiction under §3.1. It applies where:

> "(4A) A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts."

338. As to the law:

i) 4A is a broad and flexible head to which narrowing glosses should not be applied; its words speak for itself. Thus, in Kea v Watson [2019] EWHC 309 (Ch), the Court rejected any narrow approach saying that 4A should be given a "natural' reading and "the practical sense of gateway (4A) is that if factual allegations are going to be litigated in England between the claimant and a foreign defendant in any event, it is sensible for the claimant to be able to rely on any claim arising out of those facts or closely connected facts." [34]. Consequently, an argument that the "same facts" were confined to those that constituted cause of action 1, was rejected: [31]-[34].

ii) I was referred also to Eli Lilly v Genentech [2018] 1 WLR 1755, [28]-[32]. I found this a very helpful case. Birss J emphasised that:

> "…pragmatic factors are appropriate factors to take into account in deciding whether the connection between the facts is sufficiently close to justify service out having regard to the overall justice of the circumstances… The purpose of gateway (4A) is to allow the joinder of a further claim against the same defendant based on the same or closely connected facts so as to further the interests of justice, including taking into account practical considerations such as a procedural economy and an avoidance of inconsistent results."

iii) The fact that the "further claim" is made under a different applicable law does not in itself prevent the application of 4A: Eli Lilly v Genentech [2018] 1 WLR 1755, [34]. It is significant in my view that parallel claims under different national patents were covered by CPR 3.1(4A).

339. 3.1(4A) requires "anchor claims". The claims focused on by QAG in submissions were those in relation to the Tort Gateway under CPR 3.1(9). It also formally relied on 3.1(2).

340. In opposition, the Defendants relied upon the argument that there were no anchor claims, the foreign publications abuse rule (governing malicious falsehood) and the lack of satisfaction of the "same or closely related facts" requirement. The first two points are addressed by what I have decided earlier. I will need to consider the third point in more detail.

341. The Defendants submit that by definition, the foreign publications are factually different to publications and losses alleged to have occurred in England, that they involve allegations about when and how different people viewed and responded to the Video on different dates and in different parts of the world. They also say that that the "foreign aspects" of the claims will be governed by an array of foreign laws. Since questions of foreign law are issues of fact, and since the content of the foreign law is likely to diverge significantly from the content of the relevant principles of English law, they argue that this is a further reason why those "foreign aspects" of the claims do not arise from the same or similar facts as the claims based on publications within England.

342. As to this second argument, in my judgment it does not necessarily follow that at this stage foreign laws will be in issue.

343. I have already concluded that CPR 3.1(9) will justify service out against the defendants of claims for malicious falsehood, conspiracy and unlawful interference in respect of the publication of the Video. In my judgment, the identical facts arise as to everything the Defendants (excluding MEN UK) are said to have done. These are acts in relation to the creation of the Video, towards its going live on the website, and as to download, publication and loss. The facts which arise in other countries will be directly parallel, differing only in that the downloading and publication happens in other countries and/or the parallel sales losses of QAG in other countries.

344. It also seems to me that those facts will be intertwined with the facts falling under 3.1(9). The losses in individual countries will be intertwined with each other as part of an overall global loss felt by the business – both as regards the Point of Sale losses and also as regards the E-Commerce losses. And the worldwide publication is part of the same alleged "media storm" triggered by the Defendants' Video. This is more than sufficient.

345. If I am wrong about the non-existence of the foreign publications rule, then this Gateway is still engaged in relation to claims worldwide for the same losses claimed under malicious falsehood, by route of the other torts where it has not been argued there is a bar.

346. Gateway 3.1(4A) is satisfied. I turn to the final substantive issue, forum conveniens.

X. <u>Forum Conveniens</u>

347. The Defendants argue that even if QAG is able to establish a serious issue to be tried, and a good arguable case that one or more of the jurisdictional gateways is applicable, I should in any event set aside permission to serve out on the basis that (a) England is not clearly the most appropriate forum for the trial of the claims; and (b) QAG has not

adduced cogent evidence that it would face a real risk of substantial injustice in the appropriate forum (viz. the UAE's domestic courts or the Dubai International Financial Court - DIFC). It has undertaken to submit to the jurisdiction of those tribunals.

Legal principles

348. The legal principles are well-established and were not in dispute, although there were natural differences of emphasis. It is necessary to show under CPR 6.37(3) that England is "the proper place to bring the claim". As explained by Lord Goff in Spiliada, for both stay and service out cases, the ultimate question "is to identify the forum in which the case could suitably be tried for the interests of all the parties and for the ends of justice": Lungowe v Vedanta Resources Plc [2019] 2 WLR 1051, [66], [68]-[69], [88].

349. In determining the forum where "the case" can be suitably be tried, it is important to recognise that the "case" is not restricted to an analysis of the claim (in terms of causes of action) and relief sought by the claimant. The Court must have regard to the totality of the dispute, including where necessary the defendant's answer to the claim: VTB Capital v Nutritek [2013] 2 AC 337 at [57], [90]-[91], [192; and Lungowe at [68], [73]-[74], [88]. The Court's task is to "identify the dispute between the parties as the matter to be tried" without formalism: Unwired Planet International Ltd v Huawei Technologies (UK) Co. Ltd [2020] UKSC 37, [94].

350. The Defendants focussed on the case law which identifies the Court's task as standing back and asking the practical question where the "fundamental focus of the litigation" was to be found, relying upon Erste Group Bank AG (London) v JSC (VMZ Red October) [2015] 1 CLC 706 at [149].

351. A defendant challenging jurisdiction must identify another candidate, which does have jurisdiction to determine the dispute, and the question will be tested by reference to the identified candidate: Unwired Planet v Huawei (SC) [96]. The other candidate must be an "available" forum, in the sense that the dispute must be capable of being tried there: Unwired Planet v Huawei (SC) at [96]-[98].

352. It was common ground that "appropriateness" is a wider concept than natural forum, in the sense of the most closely connected forum, and is a central part of the assessment: Cherney v Deripaska [2009] 2 CLC 408 [12]-[23]. So, for example, England can be the most appropriate and proper forum even if not the natural forum, if there are factors that show the natural forum is a less appropriate forum than England [20]. And another forum will not be appropriate, even if the forum most closely connected to the dispute, if there is a real risk that substantial justice will not be obtainable there: Lungowe at [88]; Cherney at [26].

353. Given the arguments on the facts made to me, I need to say a little more on the legal approach to the consideration of the risk that substantial justice will not be obtained. This matter is essentially concerned with well-known "fair trial" considerations: corruption, unfairness, or other inherent defectiveness of the foreign legal system. Bearing in mind the respect due to foreign courts, "cogent evidence" is required of a "real risk" of this: Cherney at [14], [27]-[28], [29], [44], [60].

354. I note however that this is a special category: the "cogent evidence" requirement does not apply to other factors which show that England is more appropriate than the natural forum or that the natural forum is inappropriate, which are assessed pragmatically: Cherney [28]. Thus, for example in Cherney, where one of the factors was that Mr Cherney said he would not want to go to Russia, this was just a factor to be assessed generally (together with the reasons for that choice), not something that required "cogent evidence": at [29], [32].

355. Reliance was placed by QAG on King v Lewis [2005] EMLR 4, a case in which the Court of Appeal addressed global defamation produced by publication on the internet. They cited Lord Steyn's comment in Berezovsky v Forbes that "the Court exercising its discretion must consider the global picture", and reiterated that as held in Berezovksy, and in Australia in the Gutnick case, there was not one single global cause of action for defamation, but rather individual causes of action in each country of publication. In that context in King the Court of Appeal observed:

> "29. ... we consider with respect that his reference to the court's need, in the case of trans-national libels, to "consider the global picture" is something more than a passing aside. What is "the global picture"? … in relation to Internet libel, bearing in mind the rule in Duke of Brunswick v Harmer that each publication constitutes a separate tort, a defendant who publishes on the Web may at least in theory find himself vulnerable to multiple actions in different jurisdictions. The place where the tort is committed ceases to be a potent limiting factor.
>
> …
>
> 31. We do not suggest, nor did Mr Browne, that Gutnick is a gateway for the introduction of a new rule in the law of England relating to Internet publications. It established no new rule in Australia. But the court's rejection of sweeping submissions that would have done away with Duke of Brunswick in favour of the "single publication rule" known in many US States, alongside the dicta in Gutnick which emphasise the Internet publisher's very choice of a ubiquitous medium, at least suggests a robust approach to the question of forum : a global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant. We by no means propose a free-for-all for claimants libelled on the Internet. The court must still ascertain the most appropriate forum; the parties' connections with this or that jurisdiction will still have to be considered; there will be cases (like the present) where only two jurisdictions are really in contention. We apprehend this third strand in the learning demonstrates no more than this, that in an Internet case the court's discretion will tend to be more open-textured than otherwise; for that is the means by which the court may give effect to the publisher's choice of a global medium. But as always, every case will depend upon its own circumstances.
>
> …
>
> 36. … The relative importance of all the factors which must then be examined — the place of the tort, the parties' connection with this or

> that jurisdiction, the publisher's choice to go on the Internet — are not legal rules. They are matters which will inform the judge who must decide where the balance of convenience lies."

Submissions and conclusions

356. In powerful and attractive submissions, Leading Counsel for the Defendants began by submitting that QAG had conceded in its application for permission to serve out that "the UAE might be considered a 'natural forum'" and reminding me that it was common ground the UAE courts would have jurisdiction in respect of the dispute. He also submitted that the courts of the DIFC would also have jurisdiction to hear the claims.

357. Leading Counsel for the Defendants argued that England is not clearly the most appropriate forum while the Dubai Courts and the DIFC courts are both fora

358. where the totality of the claims against all of the Defendants can more suitably be tried "for the interests of all the parties and for the ends of justice" (recalling the words of Lord Collins in <u>Altimo</u>) cited above.

359. In summary, he relied on the following main points. First, the parties lack any substantial connection with England. Indeed, only one of the five parties is domiciled outside the Middle East, MEN UK, where I have struck out the claims.

360. Second, the subject matter of the claims has no substantial connection with England. Reliance was placed upon the fact that the case centres on a Video which was commissioned and produced by UAE journalists and published by a UAE television news channel on UAE Websites, and which concerns the consequences of the Blockade imposed by various Middle East states against another Middle East state. The subject matter of the claim and the circumstances of the Video's creation therefore have no meaningful connection with England.

361. Third, the place of commission of the main alleged torts (malicious falsehood and conspiracy) points strongly against England as the appropriate forum. The Defendants drew to my attention to Lord Mance's observations in <u>VTB Capital v Nutritek</u> [2013] 2 AC 337 that "The place of commission is a relevant starting point when considering the appropriate forum for a tort claim" ([51]). The Defendants also repeat their case to the effect that its evidence shows that a small percentage of worldwide views of the first article on the UAE Websites occurred in the UK.

362. Fourthly, the Defendants argued that the English court would only have jurisdiction to determine part of the malicious falsehood claims (submissions I have rejected), whereas the UAE Courts could hear the whole of the claims.

363. Fifthly, they relied upon the limited relevance of the claim against MEN UK to the analysis of appropriate forum (I have struck out that claim).

364. Sixthly, they refer to the fact that witnesses and documents are almost entirely located outside England.

365. Finally, they submit that there is no real risk that substantial justice will not be done in UAE or Dubai. They argued in this regard that QAG has not adduced cogent evidence

of a real risk that substantial justice would not be done in the UAE. It is correct that QAG's case on this issue is based in large part on the expert evidence of Ian Edge, an English barrister who has appeared many times to give oral and written expert evidence on Islamic and Middle Eastern laws before courts and tribunals in the UK.

366. The Defendants mounted a direct attack both on Mr Edge's expertise and his lack of candour in his report. They said that he and QAG fell to be criticized for failing to refer to the fact that the quality and accuracy of his expert evidence (including evidence pertaining to the UAE legal system) has (they allege) been the subject of adverse comment in a number of recent judgments.

367. I will say no more about this issue save that I am not satisfied that this was a fair or accurate criticism of Mr Edge, given the actual terms of the judgments to which reference was made by the Defendants in the submissions before me. I add that it would also be wrong in principle for me in a jurisdiction hearing of this type to make such serious findings against Mr Edge, a Member of the English Bar.

368. To be fair to Leading Counsel for the Defendants he did not develop these criticisms orally and I consider the Note in response from QAG (in relation to these criticisms) more than answered the allegations that Mr. Edge had been found to be unreliable. I will take Mr Edge's evidence in UAE systems and law into account just as I take into account the Defendants' evidence on those issues from its own lawyers in the UAE, the Al Tamimi firm (which is not suggested to be independent, but I accept that firm's report should be given weight).

369. Leading Counsel for the Defendants stressed in his oral submission that the evidence before me shows that the courts of the UAE and Dubai are independent and impartial. Aside from constitutional protections, he took me to reports by independent international organisations which attest to the independence and fairness of the UAE judicial system. One example is the World Justice Project which has produced a Rule of Law Index covering 128 jurisdictions and countries. The 2020 Rule of Law Index placed the UAE 30th in the world (i.e. in the top quarter of all states/jurisdictions) and 1st in the MENA region. I note that in respect of absence of corruption, the UAE was placed 16th in the world (i.e. better than 88% of countries/jurisdictions surveyed), while in respect of "Civil Justice" it was placed 24th in the world (i.e. better than 80% of countries/jurisdictions surveyed). This is powerful evidence.

370. The Defendants also relied upon the fact that the Dubai courts have fairly adjudicated a number of claims between Qatari and UAE parties and Al Tamimi have extensive first-hand experience of a wide array of civil litigation before the UAE Courts. Having considered that evidence, I note that Al Tamimi's evidence expressly confirms that: "The UAE Courts are independent and fair." In particular, "The UAE Courts can and do make finding of fact against the UAE State and its appendages." That firm says that the UAE Courts have entertained claims against the UAE Federal and Emiri governments in the past and continue to do so now and have found against them.

371. In the alternative (if there were a real risk of injustice before the UAE courts) the Defendants say there is no such risk before the DIFC courts. That is common ground.

372. This is a powerful array of arguments. Ultimately, however, I have been persuaded by QAG that England is the most appropriate forum. That is a conclusion based a number of matters which I will summarise below, but I should make clear at this stage that I reject QAG's submission that there is a real risk of injustice before the UAE courts.

373. On that issue, I have considered in particular the Greek Fighter [2006] Lloyds Rep Plus 99 (the high point of QAG's case this regard) but I do not consider, when weighed against more recent evidence, it establishes real risk of injustice. I also note that QAG's expert, Mr Edge said "I do not say that the courts in the UAE are generally not independent or are unfair". QAG have not adduced cogent evidence in relation to their challenge to the fairness of the UAE courts.

374. However, as appears below, a major factor which has persuaded me that the UAE is not an appropriate forum is what I would broadly call "access to justice" considerations in what has clearly become a "hostile environment" for Qataris in the UAE.

375. I am satisfied that there is cogent evidence (a higher test than that which may in fact be applicable) to the effect that QAG would suffer significant disadvantages when compared to the Defendants if it had to litigate in the UAE. England is an available and neutral forum with no political commitment to either Qatar or the Blockading States; and all parties will have equal access to justice.

376. My reasons for preferring QAG's submissions may be summarised as follows.

377. I begin with the UAE courts:

i) In the highly political circumstances of this case, the UAE would not be a perceived neutral forum, being one of the Blockade States. Any judgment it would give would have less international force.

ii) The uncontradicted evidence is that QAG no longer has any significant connection to the UAE because it has, in effect, been barred from the UAE due to the Gulf crisis.

iii) QAG has experienced very small loss (perhaps no loss) in the UAE – for the simple reason that since QAG could not fly to the UAE due the blockade, the Video was unlikely to do it materially *more* harm there.

iv) Publication in the UAE is lower than publication in England. It also seems to me that the greatest arguable impact of the Video was via third party news sites and there is no suggestion by the Defendants of any significant UAE news consumption via third party websites.

v) There is no evidence that UAE press reporting of the Video (leaving aside Al Arabiya's own) was anything like as important as the UK press. Looking at the table in the Digitalis 1st, I note that any Gulf media outlets that commented (apart from Qatari ones) had very limited worldwide readership compared to the English outlets.

vi) The UAE legal system is in my view less functionally appropriate for the trial of this matter. Getting at the truth of what happened will require disclosure and live witness evidence. Those would be available in England and the English courts are very well suited to trying an action of this kind. The evidence is that disclosure is unavailable in the UAE courts, and live witness evidence is not much used. I have considered Al Jaber v Al Ibrahim [2016] EWHC 1989 (Comm) in this regard.

vii) As indicated above, and perhaps of most importance, is that fact that the political situation has created very grave problems for the pursuit of any litigation in the UAE by QAG. The evidence before me is that the UAE state has a strong anti-Qatari stance and this claim would be likely to be viewed as involving the public interest and public policy of the UAE. It is not in dispute that the Blockade is a highly political matter in the UAE. Specific measures taken by the UAE mean that QAG is not free to do business in the UAE. Its business operations have been closed down by the state. It no longer has offices there. It no longer has functioning bank accounts there. Qataris, including QAG's Qatari staff, are prohibited from travelling there and there are real uncertainties as to QAG ability to make payments into the UAE.

viii) QAG is right to submit that the measures taken by the UAE create a hostile environment for QAG and any Qataris operating in the UAE. Indeed, the material before me suggests that it is a criminal offence (or at least it has been stated by the authorities that it is a criminal offence) for persons on the UAE to express sympathy for Qatar. I conclude therefore that there is a real risk that anyone involved in QAG's litigation in the UAE would be committing a crime or threatened with such and this would have a chilling effect on representatives and witnesses. Mr Edge with his long experience of the UAE agrees that in the circumstances, witnesses and experts may well be discouraged from giving evidence for QAG.

ix) In relation to this last point I am most concerned by the reported comments of the UAE Attorney General of the UAE, Hamad Saif al-Shamsi, who said in June 2017 that:

> "Strict and firm action will be taken against anyone who shows sympathy or any form of bias toward Qatar, or anyone who objects to the position of the United Arab Emirates, whether it be through the means of social media, or any type of written, visual or verbal form."

Counsel for QAG was justified in submitting that aside from QAG personnel, lawyers acting for it in the UAE would clearly be concerned by this statement by a Law Officer. They would think twice before taking on instructions to act against UAE entities in a dispute which arises in the political context of the Blockade.

x) Aside from this, I am satisfied on the evidence that QAG would be unable to engage local lawyers who would be willing to act. Osborne Clarke (English Solicitors) are unable to be lawyers on the ground for QAG as they have no office in the Middle East. Mr Al Baker, the CEO, expressly confirms that in

fact QAG have been unable to find lawyers to act for them. Mr Edge agrees that QAG would be unlikely to be able to find lawyers to act for them. I have not ignored that Al Tamimi argue to the contrary, and refer to cases where Qatari firms have had UAE legal representation, but I have the direct evidence to the contrary from Mr Al-Baker (supported by an expert), and Al Tamimi refer to other cases of a very different nature. They do not engage with the basic facts Mr Al-Baker recounts. This lack of an ability on QAG's part to engage a lawyer in the forum which the Defendants identify as appropriate raises a fundamental access to justice problem. It would be a strange thing to force a claimant into a jurisdiction where no local lawyer was willing to take its case.

xi) It was not disputed that QAG's Qatari witnesses or employees assisting with the litigation would be unable to travel to the UAE. Those witnesses may include (i) Mr Al-Baker and (ii) members of QAG's finance and operations teams. Even if oral evidence was permitted, the option of video-link proposed by Al Tamimi is not a fair restriction to impose on QAG, when the Defendants' witnesses might be able to give oral evidence. And while it may be that the UAE courts, in general, rely less on oral evidence than the UK courts (as Al Tamimi say) it is not guaranteed that there would not be oral evidence in a case like this and it might be relied on so there is a very real risk of prejudice. There is unfairness in preventing QAG's preferred "team" from gathering in the UAE for the litigation even if not giving live evidence.

378. As to the English courts:

i) England is an available forum and the whole claim can be tried here. It is also a neutral, and highly respected, forum with no political commitment to either the Qatar or the Blockading States side in the Gulf crisis, giving its judgment a greater vindicatory worldwide force. In contrast a judgment from the UAE courts would not have that valued perceived international neutrality.

ii) Qatar Airways has significant connections to England. It operates part of its business through a branch in England, where it has arguably suffered significant damage. Aside from Qatar, the UK is the most important flight destination on Qatar Airways network. I note also that the UK is where 78% of Qatar Airways worldwide E-Commerce revenue is paid. I have considered the Defendants' evidence as to what QAG said in copyright litigation as to their UK presence, but I do not consider it is inconsistent with the evidence before me.

iii) On the basis of the current evidence, it is arguable that there has been substantial publication here, which is disproportionately significant on a worldwide basis.

iv) Of the worldwide press coverage, important events took place in England. The articles by The Independent and The Mail were of particular significance as was Al Arabiya's exchange with The Independent.

v) There will have been substantial arguable loss here, which is disproportionately significant on a worldwide basis. When E-Commerce

revenues are factored in the amounts become larger and I consider that the E-Commerce figures are a real connection to the UK.

vi) English law will apply to the claims for loss suffered in England. And while it is true that a mosaic of foreign laws might, in principle, if relied on and shown to be different, apply to claims for losses suffered abroad, this is not a material factor against England in this case where thus far the Defendants have shown no intention to rely on the content of foreign laws. As matters stand, I am not willing to infer that there is likely to be debate on foreign law. In any event this factor can only ever be a neutral one: for a worldwide claim like this, it is perhaps likely that a "mosaic" of applicable laws might be applied wherever it is tried (if an available alternative forum were found that would hear it).

vii) The English courts, and specifically the specialised Media and Communications List, would be well suited to trying this claim: (i) they are sophisticated and well used to global media disputes; (ii) they use the English language which is a key language in this dispute as the Video was subtitled in English; (iii) they are experienced in applying foreign law and using foreign language documentation; and (iv) importantly, they have developed procedures for getting at the truth in a case such as this where what an alleged conspiracy is central to the claim and will require disclosure and cross examination.

viii) All the witnesses for both sides will be able to come to England and give evidence here without difficulty or concern.

ix) There will be equality of arms in legal representation in England.

379. I can deal shortly with the DIFC. It is a respected institution but neither QAG nor the Defendants have any connection with it and the case has no connection with the DIFC. I accept that foreign lawyers can appear in the DIFC so there may not be as much of a problem in that regard as in the UAE courts. The DIFC courts are a sort of "litigation island" within the UAE, created to attract legal business by their perceived superior neutrality, and higher quality, compared to the local courts. But as such, they have no superiority compared to the English courts, also a neutral forum. The English courts have the other connections to the case, which the DIFC courts do not.

380. Of importance is also the fact that that the "hostile environment factors" to which I have made reference above would apply in just the same way to QAG litigating in the DIFC. Proposed solutions such as video link do not cure the unfairness of facing artificial constraints. The giving of evidence by video link is recognised to have significant limitations as compared with live evidence. It may be said that the DIFC courts are more convenient to the Defendants' witnesses geographically. But this is a minor factor when they can get on a plane to London without difficulty. In contrast, QAG's Qatari witnesses, and also local witnesses and experts, would face serious issues in the UAE.

381. I conclude that England is the proper forum for QAG's claims. I have come to this conclusion applying conventional principles, but I also consider that the comments in King v Lewis (cited above) are relevant in this case. A channel like *Al Arabiya*

publishing on the internet a video with worldwide impact should not be "too fastidious" about where it is sued.

XI. Full and Frank Disclosure

382. The Defendants argue that QAG breached its duty of full and frank disclosure. This point was dealt with in the Defendants' evidence and (very briefly) in their skeleton where the allegations were nevertheless labelled as "serious". The allegations were however not the subject of any oral submission from the Defendants. Leading Counsel for the Defendants did not withdraw these allegations in any respect, and I must accordingly consider them. They were addressed briefly (in accordance with my request) in oral submissions by QAG's Leading Counsel.

383. As to the legal principles:

i) The applicant on an ex parte (without notice) application has a duty to make full and frank disclosure of all matters which are material to the exercise of the Court's discretion.

ii) As to materiality: "A fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made" (Alliance v Zhunus [2015] EWHC 714 (Comm) [65]).

iii) The full and frank duty only relates to the matters which the Court has to decide. So, on an application to serve out, where only a serious issue to be tried is relevant to the merits (MRG (Japan) Ltd v Engelhardt Metals Japan Ltd [2003] EWHC 3418 (Comm), [26]-[27]):

> "The focus of the inquiry is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case.
>
> …
>
> In my view, a failure to refer to arguments on the merits which the defendant may seek to raise in answer to the plaintiff's claim at the trial should not generally be characterised as a failure to make a full and fair disclosure, unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant leave."

iv) Courts have recognised that non-disclosure arguments are routinely deployed by respondents for procedural advantage. The Court takes a realistic view, particularly in complex cases:

"…where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion…I would add that the more complex the case, the more fertile ground for [the respondent] raising arguments about non-disclosure and the more important it is, in my view, that the judge should not lose sight of the wood for the trees…in applying the broad test of materiality sensible limits have to be drawn."

(Crown Resources AG v Vinogradsky, unreported, 15 June 2001, approved in Kazakhstan Kagazy Plc v Arip [2014] EWCA Civ 381 at [36]).

v) It is not necessary to refer to every authority if the principle derived from them is drawn to the court's attention: Wild Brain Family International Ltd v Robson [2018] EWHC 3163 (Ch) [48]:

"Without seeking to diminish the importance of the fair presentation obligation in any way whatever, it seems to me that there must be some limit to that obligation. To take an example, just because a respondent might have taken the court to a number of cases to reinforce a legal proposition, so long as the applicant has fairly drawn to the court's attention the principle derived from those cases, I do not think that the applicant is required to take the court to those cases in the way the respondent would have done. To repeat what Popplewell J noted in the Fundo case, "the ultimate touchstone is whether the presentation of the application is fair in all material respects."

vi) There are important obligations on a party advancing an allegation of non-disclosure: "Where non-disclosure is alleged it is indeed incumbent on the party making the allegation to give proper particulars of the case being advanced, so that it can be fairly responded to by the other party" and there must not be "a moving target": Public Institution for Social Security v Amouzegar [2020] EWHC 1220 (Comm) [149]. That is because "an allegation that a Claimant or his lawyers have failed in [the duty of full and frank disclosure] is a serious allegation involving misconduct or default on the part of the Claimant or his lawyers. If it is to be made, adequate and clear notice of it must be given and full details provided" (Bracken v Gutteridge, unreported, 17 December 2001 (Ch)). It is not appropriate for unspecific complaints to be made in evidence and it is not appropriate for specific complaints to be made for the first time in skeleton arguments.

384. The evidence at the without notice stage before the Master was given by Mr Andrew Bartlett, the Solicitor for QAG. I begin with a preliminary observation in relation to that evidence. It is clear to me that this was a heavy and complex application and that QAG and its advisers took the duty of full and frank disclosure seriously. In my judgment, the numerous points that could be taken against QAG were identified throughout the main witness statement of Mr Bartlett. Indeed, the legal issues on which it is said there was a failure of disclosure are issues specifically raised by Mr Bartlett who identified the relevant principle.

385. The Defendants have made various allegations of material non-disclosure, but they do not say that any of the alleged non-disclosures were deliberate.

386. Given that the points were not developed in the Defendants Counsels' oral or written submissions, I have done my best to group together the five main points by considering the witness statement evidence of the Defendants (the evidence of Mr Whitehead) in which the alleged failures are identified.

Foreign law

387. A complaint is made about what Mr Bartlett said on the issue of whether QAG should plead foreign law or whether it can rely on the presumption. In my view, this was raised squarely in Mr Bartlett's First Witness Statement.

388. So, at §§41-60 Mr Bartlett addressed applicable law and made clear that foreign law would in principle apply to major parts of the claims, but explained for the purposes of the application QAG was relying on the presumption, which he submitted was sufficient at that stage (§§48, 59). On the presumption, at §§58-59, Mr Bartlett summarised the law, cited Dicey §25-121, explaining that the presumption was only a general rule and subject to exceptions, and quoted OPO v MLA [2014] EWCA Civ 1277. He explained the Claimant's submissions that it could rely on the presumption, but observed specifically: "the Defendants may argue that the Claimant has failed to demonstrate that it has a serious case to be tried on the merits in relation to the foreign aspects of the claims, on the basis that it has not shown a cause of action under the applicable foreign laws" (Bartlett First Witness Statement, §60). So, the principle was fully before the Court.

389. The Defendants assert in their evidence that "QAG does need to plead foreign law, and I [Mr Whitehead] am advised that reliance on OPO is not good enough. It is not the leading authority. In any event the position is more complicated than Mr Bartlett suggests.". He gives no particulars there but at §69 he does say that the contrary position is made out by Belhaj v Straw [2015] 2 WLR 1105.

390. However, the law on this point as I have found it to be was as QAG stated. There was in fact a host of additional authority QAG could have cited, including a string of Court of Appeal decisions in its favour. I note that the Court of Appeal in Cairo v Brownlie has specifically addressed an applicant's duty of disclosure in this situation: at [136] Arnold LJ said (even though on the substance he had a more negative view of the presumption than the majority):

> "136. No difficulty arises in a case where the claimant contends that English law is the applicable law, even if the claimant recognises that it is arguable that some other law applies (although the duty of disclosure may in that case require the claimant to disclose that to the court).
>
> 137. If the claimant accepts that the applicable law is a foreign law, then the duty of disclosure requires the claimant to disclose that to the court. I do not consider that, at the stage of the without notice application, a claimant who accepts that the applicable law is a foreign law is obliged to provide evidence of the foreign law (or to plead it).

> Rather, it is open to the claimant to rely upon Rule 25(2); but again the duty of disclosure requires the claimant to disclose that to the court. Faced with such a position, a defendant who wishes to dispute the jurisdiction of the court may choose expressly to agree that the substantive content of the applicable law is the same as English law, thereby saving both parties the trouble and expense of obtaining evidence of the foreign law. Alternatively, the defendant may silently acquiesce in the position adopted by the claimant, thereby impliedly agreeing to it."

391. With regard to Belhaj, it is not relevant authority. I repeat what I have said above.

Publication

392. The Defendants complain that Mr Bartlett did not explain that the "Particulars of Claim refer only to exposure of the Video, but that that is not in and of itself sufficient to constituted publication". This is put on a false basis. POC1 pleads that the Video was "published" (see e.g. §17). As part of that in §17 it drew a distinction in the figures between exposure and viewing, thus making clear figures for exposure were not in themselves figures for viewing - although obviously they could support inferences.

393. The application to serve out was not dependent on this aspect of the POC and did not depend on precise viewing nor exposure figures. Instead Mr Bartlett said that the Video has been widely republished on other websites and has been shared and commented upon on social media, making no specific reference to UK views. As to publication in England, he did not make any assertions as to its particular significance, just saying that there was publication there, and there was loss there, but making clear that publication and loss had also happened abroad.

394. In any event, there is and was evidence that the Video was published worldwide and in England by being downloaded/viewed there, and on a significant scale, and certainly that was QAG's understanding at the time of Mr Bartlett's evidence.

395. In that context it is clear that Mr Whitehead's point (the only specific point he makes) is misconceived. Mr Bartlett did not rely on "exposure" at all in Bartlett 1. So far as concerns the details in the Particulars of Claim, they were part of the case on the merits, and so not something of direct relevance to service out, nor such as to engage the duty of disclosure, unless they touched on "serious issue to be tried" sufficiently clearly to engage that duty.

396. But there was nothing in the reference to "exposure" in the Particulars of Claim that comes close to showing that Mr Bartlett should have gone into the details of the difference between exposure and views. The Particulars of Claim referred to publication and QAG had a good basis to infer significant publication; the reference to exposure was just one data point in the pleading and one not relied on for the purpose of the application to serve out. But anyway, it was a perfectly fair point to include without any need to engage in further detailed explanation. The reference to

exposure was plainly not meant to be the same as views, and it was not necessary to explain that it was a data point from which views could be inferred.

Digitalis Report

397. The Defendants' evidence argues "QAG should have exhibited the Digitalis report in order to give the Defendants the opportunity to interrogate its findings". I agree with QAG that this is not coherent as a point in relation to the duty of full and frank disclosure at the without notice stage; it refers to possible debates at the later inter partes stage.

398. In any event, if the point being made was that the Digitalis Report should have been disclosed so that the Court could consider it, it is material that was *supportive* of QAG's case on the merits, and not in any way contradictory. As explained above, it was not relevant to the way QAG was putting its case for service which was not based on detailed publication figures nor assertions of any level of significance for the UK; but in any event was only supportive of what was being said and of QAG's position.

399. No materiality has been made out: had Digitalis 1st been exhibited and explained, this would only have supported the application. Mr Bartlett's decision not to exhibit it was, I accept, a fair professional judgment, governed by a sincere perception of his duties to the court.

The "Rule" limiting 3.1(4A)

400. The fourth point relied on is that "There has not been full acknowledgment of the argument that paragraph 3.1(4A) gateway should not be used to circumvent the well-established rule that malicious falsehood claims should be limited to alleged publications with in England but not abroad". This refers back to the submissions asserting such a rule is established by the "highest authorities". But none is cited, either there or at Whitehead 2, §100. This is an inadequate complaint, not sufficient to found a case of breach of the duty of full and frank disclosure.

401. In fact, however, I note that Mr Bartlett referred specifically to the supposed rule but explained that as he understood it, it was confined to the position prior to CPR 3.1(4A). He referred to the Dicey passage at §35-119, where this issue is discussed in terms that make it clear that the supposed rule arises solely from the operation of CPR 3.1(9) (and in the context of defamation) "where the English court has jurisdiction under CPR PD 6B, para 3.1(9), then the claimant is required to limit his claim to the English publication". That is what he had in mind – and it was a reasonable basis for a competent professional on which to proceed, and it is not contrary to QAG's case under 3.1(4A).

402. Mr Bartlett made clear he regarded CPR 3.1(4A) as having changed the position and he mentioned 3.1(4A)'s "relative novelty" and searched his mind for full and frank points that could be made against its use, identifying them at §§83 and §86(b). Consequently, the possible "principle" on the pre-CPR 3.1(4A) position was firmly before the Court at the service out stage, as was the point that QAG were arguing for a novel position on the basis that CPR 3.1(4A) had changed the previous position.

Mr Al-Baker's evidence on QAG losses

403. The Defendants submit that QAG ought to, at the without notice stage, have adduced all the evidence that is contained in Mr Al Baker's statement on QAG's losses. In my view, it would have been disproportionate at the without notice stage for QAG to engage in any exercise of seeking detailed evidence from its CEO on its breakdown of losses. Mr Bartlett set out the reasons why there was a serious issue to be tried in respect of loss, based on an inference from the 13% sales fall. He pointed clearly to the weaknesses of this, explaining that the analysis of loss would be "complicated and contentious" and would require detailed expert evidence; but said that the matters he was relying on were sufficient to make out a serious issue to be tried.

404. In POC1, QAG included some pleading as to loss making the same points but again made clear that the precise quantification would require expert evidence at trial (§31).

Conclusions on Full and Frank Disclosure

405. I have dealt with the substance of the complaints. In my judgment none of the Defendants' points on non-disclosure have merit. And even if any of them identify some technical defect, it is not material, nor in any event a matter that could justify setting aside service out.

406. In my judgment, Mr Bartlett, QAG's Solicitor, acted wholly properly and in accordance with his professional obligations and fairly in preparing and presenting the evidence placed before the Master.

407. It will have been a stressful process for him to have to address the allegations made against him (and to wait for this resolution). Mr. Bartlett acted without fault.

XII. Conclusion

408. For the reasons set out above, I have decided:

i) The claims against the Second Defendant, MEN UK, are to be struck out and/or dismissed by way of summary judgment.

ii) The UAE Defendants' application to set aside the Master's order of 31 December 2018 (sealed on 29 January 2019) giving the Claimant permission to serve the claim form on them outside the jurisdiction, is dismissed.

iii) The Claimant will be granted permission to amend its Particulars of Claim in the terms set out in the draft I have referred to as POC3, save that I refuse permission to include the Communications Act 2003 claim and the claims against MEN UK (D2) will have to be removed. This permission is without prejudice to any application to be made by AAN FZ (D4) to set aside its joinder on limitation grounds.

409. A hearing will be convened to consider consequential orders.

QAG v MIDDLE EAST NEWS
ANNEXE A : THE VIDEO

Understanding the Qatar airways ban

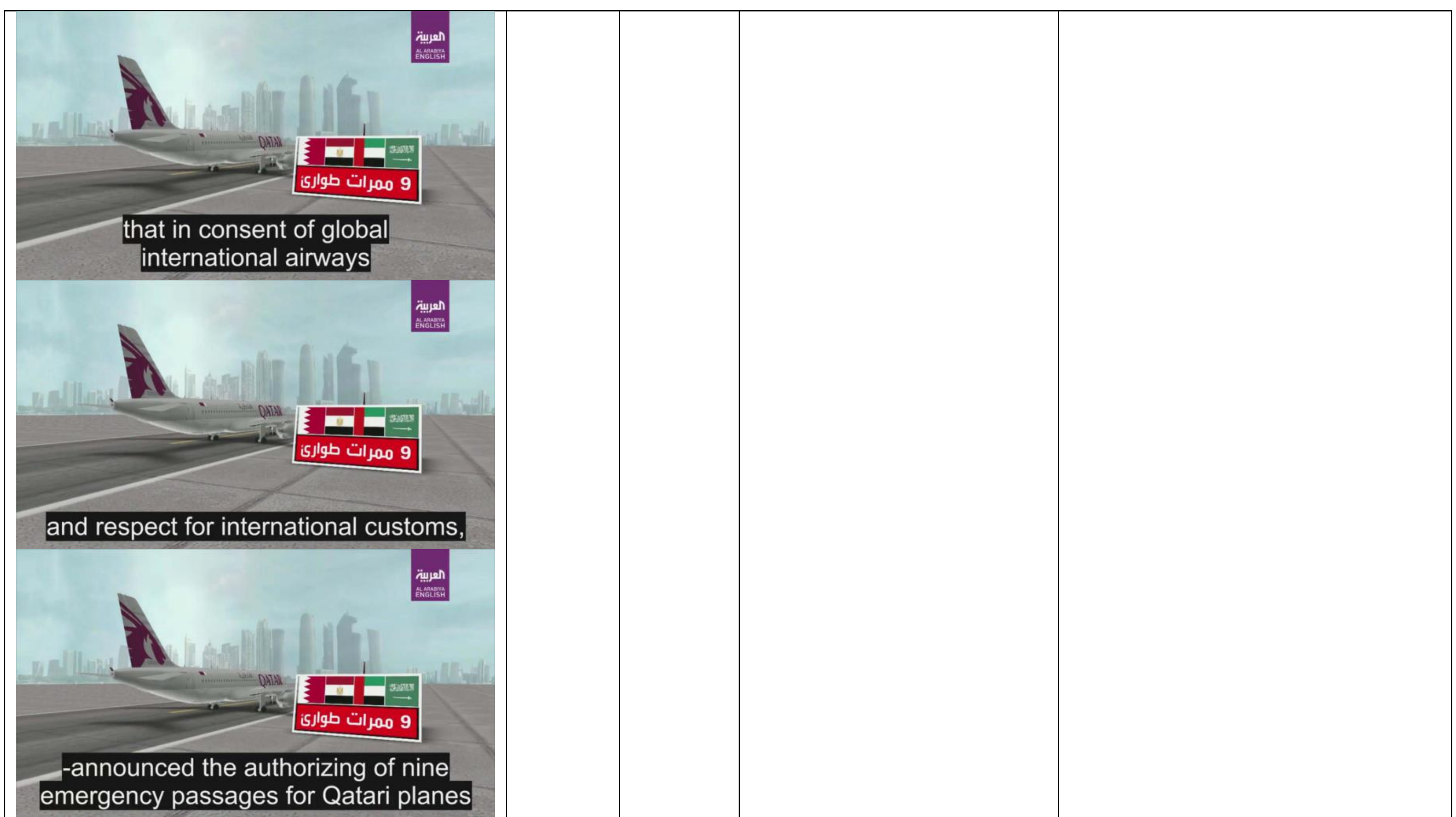
	Time code		Transcription of Audio	Translation of audio
	From	To		
	00.00.00	00.00.09	قرار الدول الداعية لمكافحة الارهاب بمقاطعة قطر تضمن حظراً جوياً على الطائرات القطرية يمنعها من عبور اجوائها.	The decision of the countries calling for countering terrorism by boycotting Qatar, included imposing a flight-ban on Qatari aircraft, preventing them from flying over the boycotting countries' airspace.
	00.00.10	00.00.17	ووفقاً للقانون الدولي، فالدولة التي تحضر على أي طيران العبور فوقها لها الحق في التعامل مع أي طائرة تدخل أجواءها.	According to international law, a state that imposes a ban on flights over its airspace has the right to deal with any aircraft entering its airspace.

	00.00.18	00.00.36	الخيارات في هذه الحالة عادة ما تكون إما ارسال مقاتلات جوية تجبر الطائرة على الهبوط، ومن ثم يحاكم افراد طاقمها بتهم عدة منها المساس بالأمن القومي وتعريض حياة مدنيين للخطر، وعادة ما يتم التعامل مع الرحلات التجارية بهذه الطريقة.	The options in this case are usually either sending fighter-jets forcing the plane to land, then prosecuting its crew members on several charges including compromising national security and jeopardising the lives of civilians; commercial flights are usually dealt with in this way.

العربية
AL ARABIYA ENGLISH
QATAR
either dispatching fighter planes
to force it down -
العربية
AL ARABIYA ENGLISH
QATAR
after which its members may be
prosecuted for several crimes
العربية
AL ARABIYA ENGLISH
محاكمة أفراد الطاقم
-such as breaching national security
and exposing civilians to danger-

	00.00.37	00.00.49	إلا ان القانون الدولي يكفل أيضاً للدول إسقاط أي طائرة تدخل أجواءها وتميز على أنها هدف معاد خاصة في المناطق العسكرية حيث يكون الدفاع الجوي غير مقيد.	However, international law also provides that states can shoot down any aircraft that enters their airspace and is identified as a hostile target, especially in military areas where air defence is unrestricted.

which is identified as an enemy target especially in military bases, where Air Defense is unrestrained.				
9 ممرات طوارئ The boycotting states had announced to Qatar	00.00.50	00.01.19	الدول المقاطعة لقطر كانت أعلنت انه التزاما بسلامة الملاحة الجوية العالمية واحتراماً للقوانين الدولية أعلنت فتح تسعة ممرات طوارئ أمام الطيران القطري ابتداء من الأول من أغسطس، ثمانية منها في الخليج العربي يسمح للطائرات القطرية بالملاحة فيها فوق المياه والاجواء الدولية وليس فوق المياه أو الأجواء الإقليمية لدولتي الإمارات والبحرين، وواحد فوق المتوسط يخضع لإدارة الملاحة الجوية المصرية.	The states boycotting Qatar announced earlier that in keeping with their obligations towards the safety of international aviation and their commitment to international laws, they were announcing the opening of nine emergency air corridors for Qatar's aircraft from 1 August, eight of which are in the Arab Gulf airspace allowing Qatari aircraft to fly over international waters and airspace, avoiding the regional waters and airspace of the U.A.E and Bahrain, and another air corridor over the Mediterranean under the control of the Egyptian Air Navigation Authority.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AL ARABIYA ENGLISH
9 ممرات طوارئ
that in consent of global international airways
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and respect for international customs,
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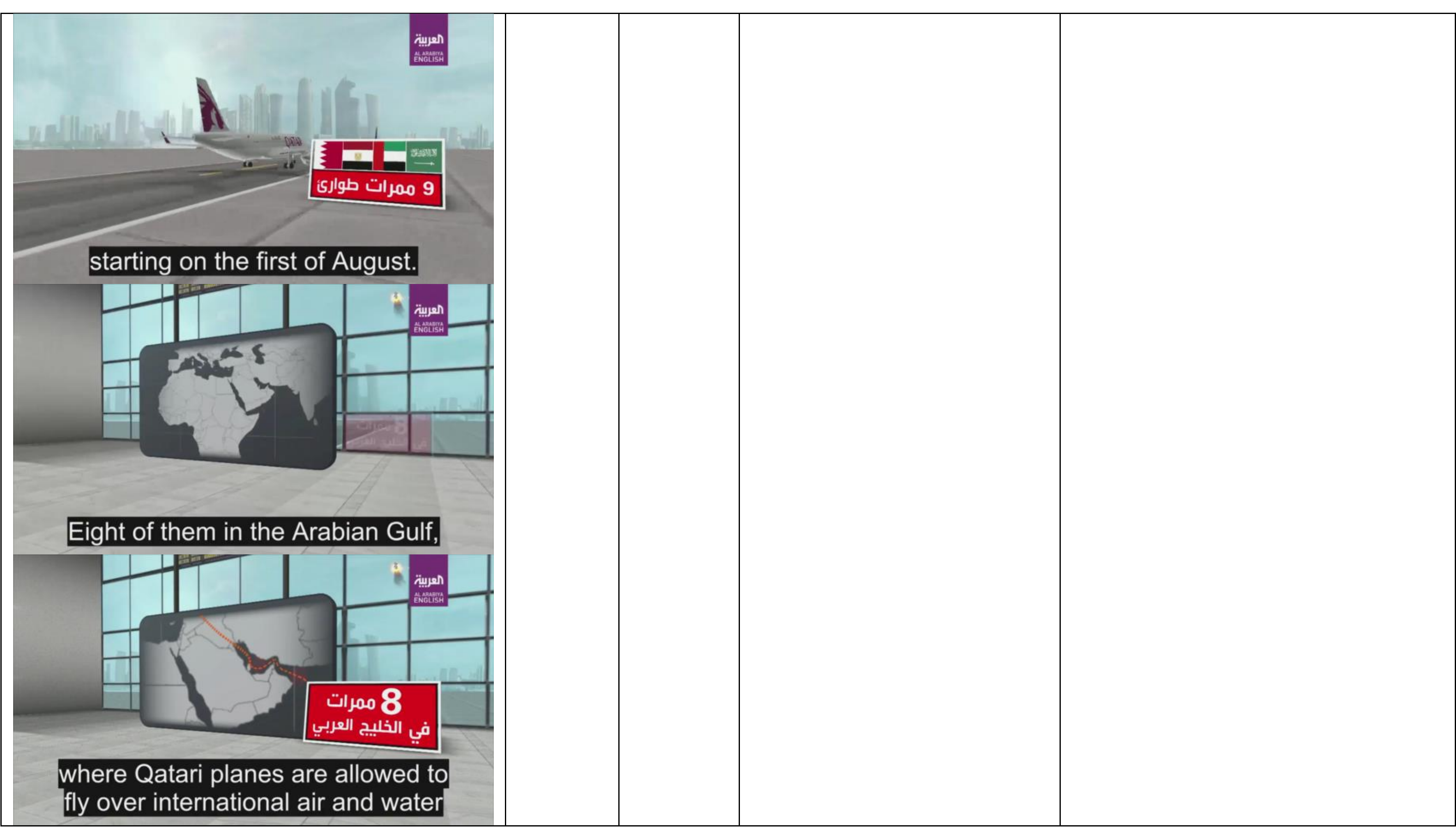
AL ARABIYA ENGLISH
9 ممرات طوارئ
-announced the authorizing of nine emergency passages for Qatari planes


العربية
AL ARABIYA ENGLISH
9 ممرات طوارئ
starting on the first of August.
العربية
AL ARABIYA ENGLISH
Eight of them in the Arabian Gulf,
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AL ARABIYA ENGLISH
8 ممرات
في الخليج العربي
where Qatari planes are allowed to
fly over international air and water

العربية
AL ARABIYA ENGLISH
8 ممرات
في الخليج العربي
but not over the regional airspace
or water-space of UAE and Bahrain.
العربية
AL ARABIYA ENGLISH
يخضع لإدارة الملاحة
الجوية المصرية
Another pass will be over the
Mediterranean Sea,
العربية
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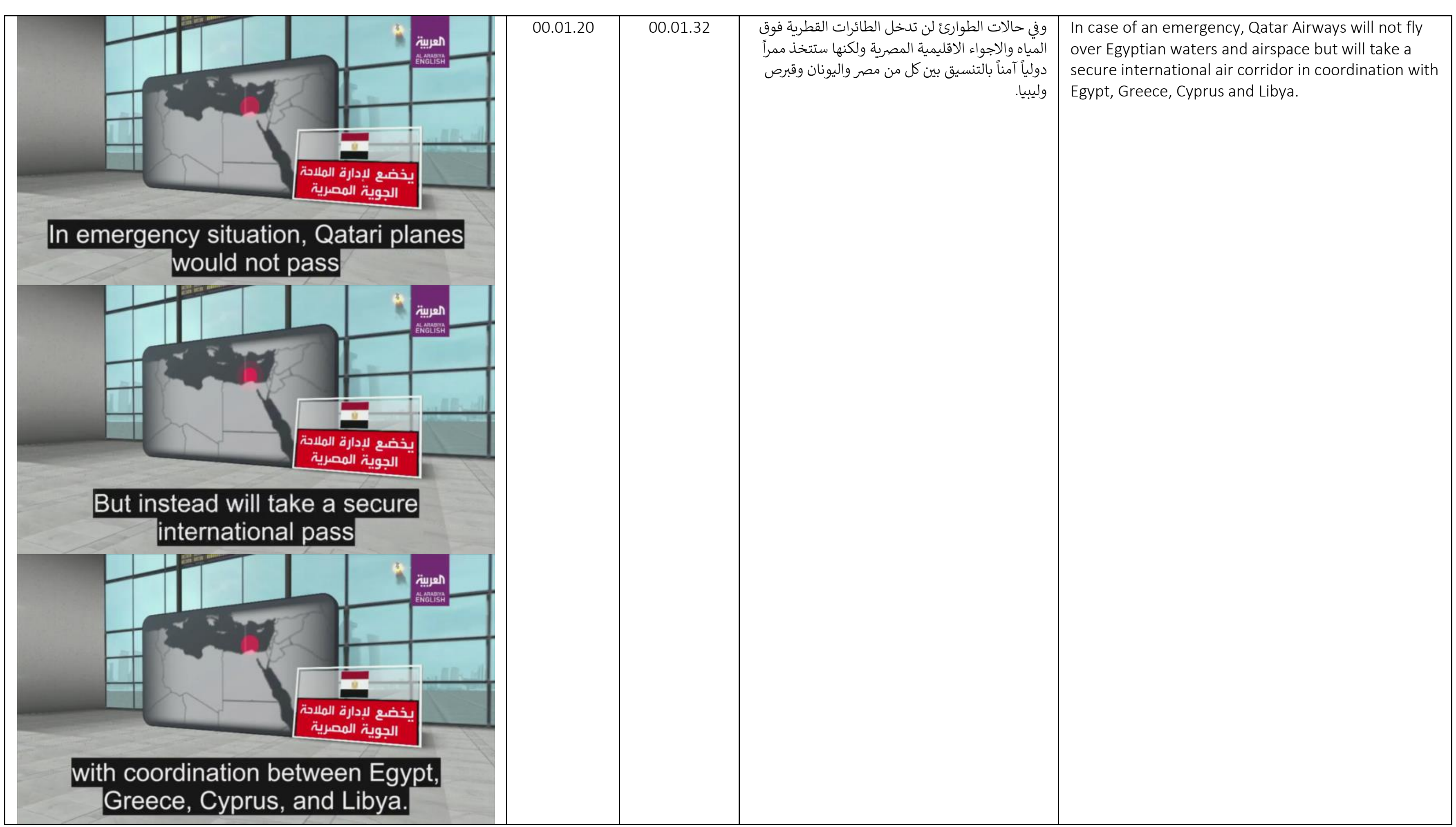
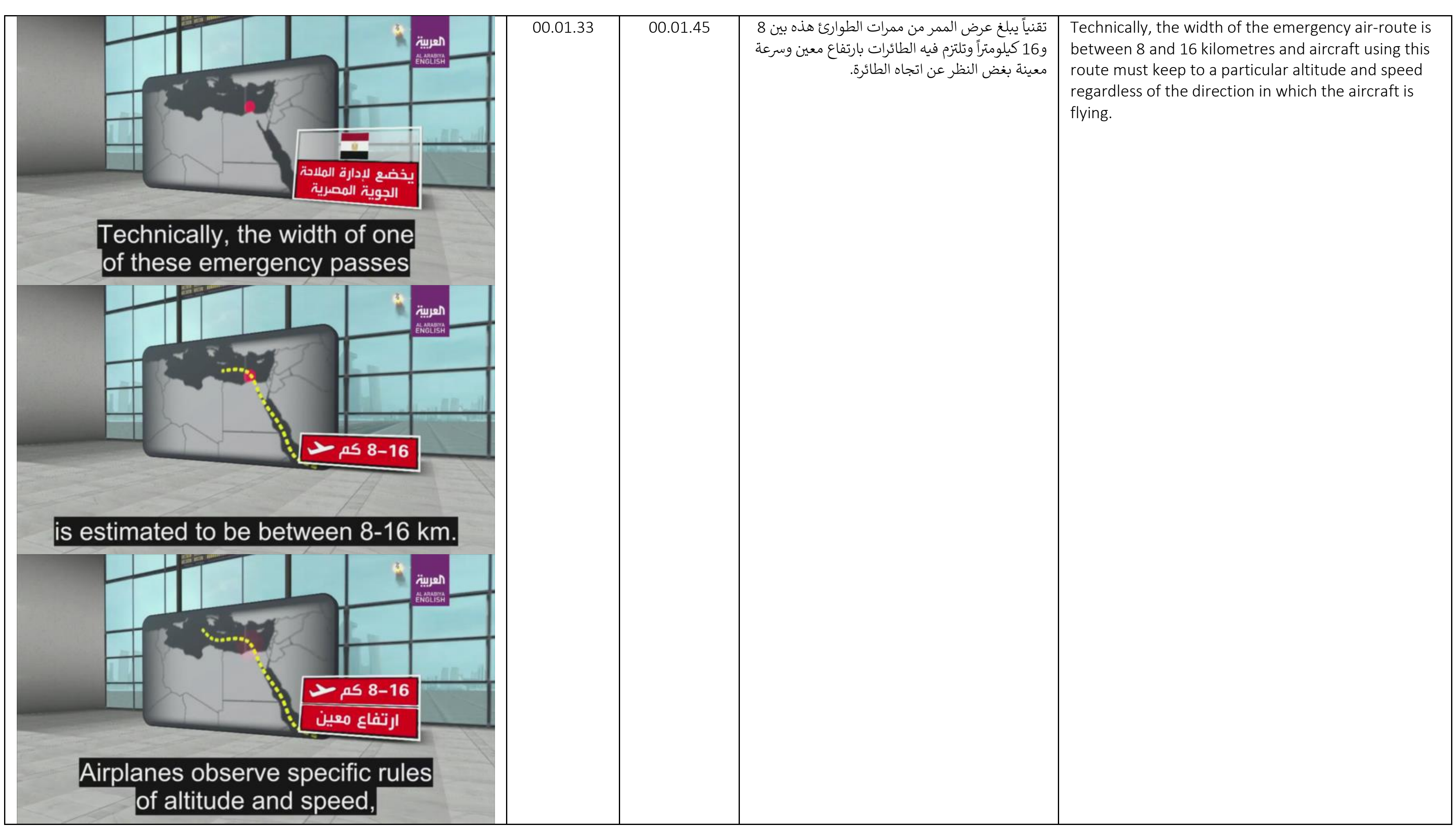
يخضع لإدارة الملاحة
الجوية المصرية
that is under the management
of the Egyptian Airway Navigation



	00.01.20	00.01.32	وفي حالات الطوارئ لن تدخل الطائرات القطرية فوق المياه والاجواء الاقليمية المصرية ولكنها ستتخذ ممراً دولياً آمناً بالتنسيق بين كل من مصر واليونان وقبرص وليبيا.	In case of an emergency, Qatar Airways will not fly over Egyptian waters and airspace but will take a secure international air corridor in coordination with Egypt, Greece, Cyprus and Libya.



	00.01.33	00.01.45	تقنياً يبلغ عرض الممر من ممرات الطوارئ هذه بين 8 و16 كيلومتراً وتلتزم فيه الطائرات بارتفاع معين وسرعة معينة بغض النظر عن اتجاه الطائرة.	Technically, the width of the emergency air-route is between 8 and 16 kilometres and aircraft using this route must keep to a particular altitude and speed regardless of the direction in which the aircraft is flying.

	00.01.46	00.01.53	هذه الممرات تستخدم فقط في حالة الطوارئ كالأعطال المفاجأة أو أي طارئ صحي لأحد الركاب.	These air-routes are used only in case of emergency such as sudden mechanical failure or a health-related emergency of any of the passengers.

	00.01.54	00.01.56	زينة روابدة، العربية	Zaina Rawabdi – Al-Arabia