Neutral Citation Number: [2024] EWHC 1449 (KB)

Case No: KB-2021-000573

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 June 2024

Before :
His Honour Judge Lewis
(sitting as a Judge of the High Court)

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Between :
BW LEGAL SERVICES LIMITED

Claimant

- and -

TRUSTPILOT A/S

Defendant

- -
- -

Barry Coulter (instructed by BW Legal Services Ltd) for the claimant
Anthony Hudson KC and **Tim James-Matthews** (instructed by Trustpilot Legal) for the defendant

Hearing date: 7 March 2024

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Approved Judgment

This judgment was handed down remotely at 3pm on Wednesday 12 June 2024 by circulation to the parties or their representatives by e-mail and release to the National Archives.

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HIS HONOUR JUDGE LEWIS

1. The claimant is a law firm that specialises in debt recovery work. The defendant operates the well-known website called Trustpilot.

2. These are libel proceedings brought in respect of reviews about the claimant that were published on Trustpilot.

3. The claim was originally brought in respect of 136 reviews. The claimant then amended its claim and now complains of just twenty of the reviews posted between 21 February 2020 and 17 July 2021 ("the Twenty Reviews").

4. The claimant's pleaded claim is for damages between £10,000 - £50,000, an injunction and an order under s.12 of the Defamation Act 2013 ("DA2013") that the defendant publish a summary of the court's judgment.

5. The background to these proceedings is set out in a judgment of Tipples J dated 24 January 2023, handed down following the trial of a preliminary issue: ***BW Legal Services Ltd v Trustpilot A/S*** **[2023] EWHC 6 (KB)**.

6. On 12 July 2023, the defendant served a 73-page defence and pleaded:

    a. general defences to the claim on the basis that it is not a publisher, etc under statute or common law, and has a complete defence to the claim as an operator of a website (s.5 DA 2013);

    b. in respect of each review sued upon, defences of truth (s.1 DA2013), honest opinion (s.3) and publication on a matter of public interest (s.4); and

    c. that the Twenty Reviews (or any of them) have not caused and/or are not likely to cause "serious harm" to the claimant's reputation, within the meaning of s.1 DA2013.

7. The claimant served its reply on 8 November 2023.

8. The defendant now applies for summary judgment on the basis that the claimant has no real prospect of establishing that the publication of the Twenty Reviews (or any of them) has caused, or is likely to cause, serious harm (and serious financial loss) as required by s.1 DA2013. In the alternative, the defendant seeks to strike out the claim pursuant to CPR rule 3.4(2)(b) for abuse of process arising out of delay.

<u>Summary judgment</u>

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

> "(a) it considers that—
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or

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

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

10. The approach to be taken when considering a defendant's application for summary judgment is well established. In ***Amersi v Leslie & another*** **[2023] EWHC 1368 (KB)** at [142], Nicklin J summarised the main principles. Of particular significance for this application is what is said about the approach to be taken when a respondent says that they will produce further evidence at a later stage of proceedings:

> "The, now familiar, principles governing summary judgment were summarised in ***Easyair Ltd -v- Opal Telecom Ltd*** **[2009] EWHC 339 (Ch)** [15] per Lewison J (and approved by the Court of Appeal in ***AC Ward & Sons Ltd -v- Catlin (Five) Ltd*** **[2009] EWCA Civ 1098**). Drawing upon other relevant authorities the following can be stated:
>
> (1) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: ***Swain -v- Hillman*** **[2001] 1 All ER 91**. The criterion is not one of probability; it is absence of reality: ***Three Rivers DC -v- Bank of England (No.3)*** **[2003] 2 AC 1** [158] per Lord Hobhouse.
>
> (2) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ***ED & F Man Liquid Products -v- Patel*** **[2003] EWCA Civ 472** [8]
>
> (3) In reaching its conclusion the court must not conduct a "mini-trial": ***Swain -v Hillman***. This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ***ED & F Man Liquid Products -v- Patel*** [10]; ***Optaglio -v- Tethal*** **[2015] EWCA Civ 1002** [31] per Floyd LJ.
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> (4) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal Brompton Hospital NHS Trust -v- Hammond (No.5)*** **[2001] EWCA Civ 550;** ***Doncaster Pharmaceuticals Group Ltd -v- Bolton Pharmaceutical Co 100 Ltd*** **[2007] FSR 63**.
>
> (5) Nevertheless, to satisfy the requirement that further evidence "can reasonably be expected" to be available at trial, there needs to be some reason for expecting that evidence in support of the relevant case will, or at least reasonably might, be available at trial. It is not enough simply to argue that the case should be allowed to go to trial because something may "turn up". A party resisting an application for summary judgment must put forward sufficient evidence to satisfy the court that s/he has a real prospect of succeeding at trial (especially if that evidence is, or can be expected to be, already within his/her possession). If the party wishes to rely on the likelihood

that further evidence will be available at that stage, s/he must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up: ***ICI Chemicals & Polymers Ltd -v- TTE Training Ltd*** **[2007] EWCA Civ 725 [14]** per Moore-Bick LJ**;** ***Korea National Insurance Corporation -v- Allianz Global Corporate & Speciality AG*** **[2008] Lloyd's Rep IR 413 [14]** per Moore-Bick LJ; and ***Ashraf -v- Lester Dominic Solicitors & Ors*** **[2023] EWCA Civ 4 [40]** per Nugee LJ. Fundamentally, the question is whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success: ***Okpabi -v- Royal Dutch Shell Plc*** **[2021] 1 WLR 1294** [128] per Lord Hamblen.

(6) Lord Briggs explained the nature of the dilemma in ***Lungowe -v- Vedanta Resources plc*** **[2020] AC 1045** [45]:

> "… On the one hand, the claimant cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue…"

(7) The Court may, after taking into account the possibility of further evidence being available at trial, and without conducting a 'mini-trial', still evaluate the evidence before it and, in an appropriate case, conclude that it should "draw a line" and bring an end to the action: ***King -v- Stiefel*** **[2021] EWHC 1045 (Comm)** [21] per Cockerill J".

<u>Serious Harm – the law</u>

11. Section 1 DA2013 provides that:

> "1(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss."

12. The leading authority on s.1 is the Supreme Court decision in ***Lachaux v Independent Print Limited*** **[2019] 3 WLR 18**. Giving the judgment of the court, Lord Sumption explained that s.1 had raised the threshold of seriousness required to bring a defamation claim, and that "serious harm" must be determined by reference to the actual facts about a statement's impact, and not just to the meaning of the words. Lord Sumption also said the following about the operation of s.1:

> "[14] … The reference to a situation where the statement "has caused" serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. The same must be true of the reference to harm which is "likely" to be caused. In this context, the phrase naturally refers to probable future harm… …both past and future harm are being treated on the same footing, as functional equivalents. If past harm may be established as a fact, the legislator must have assumed that 'likely' harm could be also…
>
> [21] … [the claimant] must demonstrate as a fact that the harm caused by the publications complained of was serious…. the judge's finding [at first instance] was based on a combination of the meaning of the words, the situation of [the claimant], the circumstances of publication and the inherent probabilities. There is no reason why inferences of fact as to the seriousness of the harm done to [the claimant]'s reputation should not be drawn from considerations of this kind."

13. Section 1(1) DA2013 therefore requires a claimant to prove as a fact that a publication complained of caused the claimant actual reputational harm that is serious, or that the publication of the statement is likely to cause such harm. This was explained further by Collins Rice J in the recent case of ***Miller & another v Turner*** **[2023] EWHC 2799 (KB)** at [45]:

> "The serious harm test is a question of fact, and facts must be established by evidence. Facts and evidence are matters which are entirely case-specific. *Lachaux* itself confirmed that there is no hard and fast rule as to how serious harm is to be evidenced. That is partly because of the nature of the harm in question: the 'harm' of defamation is the effect of a publication in the mind of a third-party publishee, and not any action they may take as a result (nor is it the direct effect of a publication on a claimant reading it themselves). And it is partly because of simple practical considerations: particularly in cases of mass newspaper publications, the minds of the publishees are effectively unreachable. In such cases, *Lachaux* confirmed ([21]) that the evidential process may be able to be discharged by establishing, and combining, the meaning of the words, the situation of the claimant, the circumstances of publication and the inherent probabilities. This is sometimes referred to as a '*Lachaux* inferential case', based on the '*Lachaux* factors'. But the *Lachaux* decision itself was at pains to emphasise it was not setting out any special standalone rule of law; it was illustrating the essential point that serious harm is a matter of fact and evidence. As I have said elsewhere, an inferential case is not an alternative to an evidential process; it has to be an evidential process…".

14. Collins Rice J's reference to what she had said elsewhere was to ***Sivananthan v Vasikaran*** **[2023] EMLR 7** in which the Judge had said [53]:

> "… a purely inferential case, while in principle available, is not an *alternative* to an evidential process for establishing serious harm – it must be an evidential process for establishing serious harm. There is a difference between inference and speculation. The components of an inferential case must themselves be sufficiently evidenced and/or inherently probable to be capable of adding up to something which discharges a claimant's burden".

Serious financial loss

15. This is a case in which the claimant is a "body that trades for profit". To bring a claim for libel, a body trading for profit must satisfy the requirements of s.1(1). In addition, s.1(2) also requires proof of financial loss or, at least, likely financial loss that is (a) serious and (b) is consequent on the reputational harm, ***Gubarev v Orbis Business Intelligence Ltd*** **[2020] EWHC 2912 (QB)** at [129].

16. S.1(2) was considered by Lord Sumption in ***Lachaux*** [15] within his analysis of the construction of s.1(1):

> "Section 1(2) is concerned with the way in which section 1(1) is to be applied to statements said to be defamatory of a body trading for profit. It refers to the same concept of serious harm as section 1(1), but provides that in the case of such a body it must have caused or be likely to cause serious financial loss. The financial loss envisaged here is not the same as special damage, in the sense in which that term is used in the law of defamation. Section 1 is concerned with harm to reputation, whereas (as I have pointed out) special damage represents pecuniary loss to interests other than reputation. What is clear, however, is that section 1(2) must refer not to the harm done to the claimant's reputation, but to the loss which that harm has caused or is likely to cause. The financial loss is the measure of the harm and must exceed the threshold of seriousness. As applied to harm which the defamatory statement 'has caused', this necessarily calls for an investigation of the actual impact of the statement. A given statement said to be defamatory may cause greater or lesser financial loss to the claimant, depending on his or her particular circumstances and the reaction of those to whom it is published. Whether that financial loss has occurred and whether it is 'serious' are questions which cannot be answered by reference only to the inherent tendency of the words. The draftsman must have intended that the question what harm it was 'likely to cause' should be decided on the same basis."

17. S.1(2) was also considered by Warby J (as he then was) in ***Gubarev*** (supra). The Judge noted at [44] that even with s.1(2) "there is room for inference rather than strict proof". He later continued at [45]:

> "But inference is not the same thing as speculation; there must be a sound evidential basis on which to infer that the publication is more likely than not to have caused serious financial loss. Proof that a statement with a seriously defamatory tendency was widely published in the relevant jurisdiction(s) is not likely to be enough. More evidence, and a more detailed examination of the context, will normally be required. The claimant also bears the burden of

showing that any loss it proves is more likely than not to be a result of the publication complained of, rather than some other cause or causes."

Law on causation

18. To be able to satisfy s.1 a claimant must prove that each publication complained of caused, or was likely to cause, serious harm. For a body that trades for profit, it must also show that each publication caused (or was likely to cause) serious financial loss. In ***Sivananthan*** (supra), Collins Rice J considered how causation should be approached where there have been repeated statements published about a claimant:

> "[45] Section 1(1) uses the language of causation prominently ('caused or is likely to cause'). The 'serious harm' component of libel therefore contains an important causation element, as with any other tort or civil wrong. The starting point is that defendants are responsible only for harm to a claimant's reputation caused by the effect of each statement they publish in the minds of the readership of that statement. A claimant therefore has to establish a causal link between each item he sues on and serious harm to his reputation, actual or likely.
>
> [46] The causation element has a number of aspects of particular application to repeated statements. Since each publication must satisfy the serious harm test, it is not possible to aggregate or cumulate injury to reputation over a number of statements or publications in order to pass the serious harm threshold (***Sube v News Group Newspapers*** **[2018] EWHC 1961 (QB)**). If a statement has been repeated or republished by a defendant, and a claimant has elected to sue on a subset of those publications, he cannot rely on the effects of statements he has not sued on to establish harm caused by those he has (although they may be relevant to aggravation). Where multiple publishers have published the same statement, an individual defendant is responsible only where harm is caused by their own publication in the minds of their own readership. But at the same time, *if* such causation is established, it is not possible for a defendant to diminish the *seriousness* of the harm caused by pointing to the same publication by others, or else the claimant risks falling between the various stools(see the explanation of the so-called 'rule in Dingle' set out in ***Wright v McCormack*** **[2021] EWHC 2671 (QB)** from paragraph 149 onwards)."
>
> [56] … Where a libel claimant selects some publications as examples of a wider campaign of allegations by a defendant, that claimant may face a daunting problem of causation. If a defendant has undertaken a protracted course of conduct publicising allegations, a corresponding improbability arises that any member of that public later re-encountering them in published form will be impacted as an effect of that specific publication. The serious harm test is about the impact of an individual publication by a defendant on its readership. If the readership already knows everything about the defendant's view of the claimant contained in the publication from the defendant's own history and course of conduct, it is correspondingly unlikely that the publication will have material impact. There are other torts addressed to

> campaigns and courses of conduct (such as harassment), but libel is concerned with the effects of individual publications."

19. The question of causation was also considered by Collins Rice J in ***Miller*** (supra). In that case, complaint had been made of cumulative harm caused to the claimants' reputations by the defendant's publications "and those of many others". At [72] Collins Rice J said that there is:

> "no support in those authorities for drawing inferences for the causation of serious harm by the publications sued upon by means of an evidential process amounting to the indiscriminate aggregation of all the imputations complained of, other seriously damaging imputations not complained of, other publications not sued on, and a range of publications by third parties with similar content".

20. More recently, Warby LJ touched on the issue of causation in in ***Banks v Cadwalladr*** **[2023] KB 524** at [47]:

> "A claimant cannot succeed in establishing liability in respect of publications which do not cause serious harm, because there is some other publication that does, or because serious harm is caused by the "publication" taken as a whole. Likewise, it would be unprincipled to treat serious harm caused by conduct which is not actionable because a defence has been made out as a sufficient reason to grant a remedy in respect of other conduct which, viewed in isolation, is not harmful enough to justify this".

<u>The claimant's pleaded case on serious harm</u>

21. CPR PD53B 4.2 provides that "a claimant must set out in the particulars of claim… the facts and matters relied upon in order to satisfy the requirement of section 1 of the Defamation Act 2013 that the publication of the statement complained of has caused or is likely to cause serious harm to the reputation of the claimant, or, in the case of a body that trades for profit, that it has caused or is likely to cause the body serious financial loss".

22. The claimant's case on serious harm is pleaded as follows:

    a. The publication of the Twenty Reviews (and each of them) has caused and/or is likely to cause serious harm to the claimant's reputation including within the meaning of s.1(2) [paragraph 7].

    b. There is a general inferential plea set out in paragraphs 7.1 – 7.4:

        i. The claimant relies on three matters to support its inferential plea:

            1. The seriousness of the defamatory meanings conveyed by the reviews, and the particular importance in legal practice of maintaining a reputation for honesty and integrity [paragraph 7.1].

2. The extent of publication, the prominence of the defendant's website on the Google search engine and the number of occasions reviews had been flagged as "useful" by users [paragraph 7.2].

3. The status of the defendant's website as a provider of trustworthy information about businesses based on genuine and accurate reports of customer engagement [paragraph 7.3].

ii. From these, an inferential case is pleaded that the Twenty Reviews had been read and will continue to be read by a number of prospective clients or customers who had decided (or will decide) not to instruct the claimant, meaning that the claimant had suffered, or was likely to suffer, serious financial loss [paragraph 7.4].

c. There is then a separate plea of actual financial loss. It is said in paragraph 7.5 and sub-paragraph 7.5.5.1 that the Twenty Reviews caused the claimant to suffer the loss of a chance to tender for a contract for the purchase of debt from the telecoms company, Three.

d. The claimant also pleads that given what it says happened with Three, it likely has, and/or will suffer further actual financial loss because other persons with whom the claimant would wish to do business will be similarly deterred from dealing with the claimant by reason of the serious harm to its reputation caused by the publication by the defendant of the Twenty Reviews [7.5.5.2].

<u>The summary judgment application</u>

23. Mr Hudson KC, for the defendant, says this is precisely the sort of claim that s.1(2) was designed to put an end to. He invites me to deal with the summary judgment application in four stages:

a. Firstly, to determine that the claimant does not have a real prospect of success on the issue of its specific plea of actual financial loss. The defendant seeks summary judgment on this issue regardless of what happens in respect of the rest of the claim.

b. Secondly, Mr Hudson says that if the defendant gets summary judgment on the issue of actual financial loss, there is no real prospect of success on the claimant's inferential plea of serious financial loss and so summary judgment should be granted on that issue as well.

c. Thirdly, Mr Hudson says that if summary judgment is granted on the first and second issues, there is no surviving claim on financial loss, and so the claimant will be unable to satisfy the threshold requirement of s.1.

d. Mr Hudson says that there is no other compelling reason why this claim should be allowed to proceed to trial, and so the court should therefore grant summary judgment to the defendant on the entire claim.

24. The claimant says that the application is without merit and should be dismissed. Mr Coulter says that the defendant has failed to meet the heavy evidential burden of establishing that the claimant does not have a real prospect of success.

The claim of actual financial loss

25. The claimant's original particulars of claim put the pleaded case on actual financial loss as follows:

> "The claimant has already lost a business opportunity in respect of a tender for a multi-million pound service contract – one of the reasons being the claimant's overall scores (as part of the tendering process) being downgraded due to a poor Trustpilot rating".

26. The claimant's Re-Amended Particulars of Claim puts the claimant's case on actual financial loss differently:

    a. In August 2020 the claimant was invited to bid to provide debt purchase services to Three for the purchase of debts with an estimated value of £90 million.

    b. If the bid had been successful, the debt would have been purchased by a group company, PRAC Limited, which would have retained the claimant to undertake the debt collection work, for which the claimant would have made £3,700,000 profit on turnover of £5,500,000 over a seven-year period.

    c. On 11 September 2020, the claimant was informed that the bid would not be taken forward to the next stage of Three's tender process. In explaining its reasons for rejecting the bid, Three told the claimant that one of two key considerations for the rejection was the perceived risk to Three's brand were it to do business with the claimant in light of reviews published on the Trustpilot website (and that website alone).

    d. In consequence of the reviews published, the claimant suffered the loss of chance to obtain £3.7m in anticipated profit.

27. In response to a request for further information, the claimant has said:

    a. The notification to the claimant that "the bid would not be taken forward" was provided in writing and was not provided orally (requests 8 and 9).

    b. In response to the following question: "Please provide proper particulars of <u>all</u> the reasons provided to the claimant by [Three] (and/or any other person on their behalf) for rejecting and/or deciding not to proceed with the bid…" the claimant pleaded:

> "The claimant's bid was originally rejected for the following reasons:
>
> *"The price offered was very competitive however there were a couple of areas that were key considerations for us when making our*

> *decision. The fact that BW Legal are not ISO27001 certified is a concern for Three and from a perspective of protecting our brand we were concerned by the feedback that we reviewed on Trustpilot."*
>
> However, ISO27001 compliance is not a requirement of the RFQ. In any event, the claimant's ISO27001 accreditation was in hand although slightly delayed by the Covid-19 pandemic, with an expected completion date of January 2021.
>
> Ultimately, Three awarded the contract to their incumbent supplier, stating *"unfortunately for the time being the business has decided to stick with [the incumbent supplier] as our debt sale partner for 2020*". The incumbent supplier was a long-term debt sale partner with Three who has a 4.2 star Trustpilot rating."

The contemporaneous documentation

28. There has been extensive correspondence between the parties, over the best part of a year, about disclosure of documents relied upon by the claimant in respect of its pleaded case. Both parties have exhibited these documents to their witness statements for this application. The defendant complains that the claimant has been obstructive in refusing to provide key documents when asked, with some important material only being provided some two years into the claim.

29. The Request for Quotation ("RFQ") sent by Three in August 2020 confirmed that the deadline for RFQ responses was 3 September 2020. It said that Three will conduct its evaluation of all responses "in discretion", potentially over a 2-week period from the submission date. It said that this evaluation will include a site visit, with the outcome to be communicated within three months of the RFQ submission date.

30. On Friday 11 September 2020, Three wrote to the claimant to say that it would not be considering the claimant further within the tender process. The claimant included an extract from this letter in its response to the request for further information (see paragraph 27(b) above), and has since disclosed a copy of the complete document:

> "Firstly, thanks again for taking the time to complete and submit your RFQ as part of our debt sale tender process.
>
> The standard of RFQs that we have received from all potential purchasers has made our decision difficult and after reviewing all the submissions, I'm afraid that on this occasion BW Legal have been unsuccessful in being chosen to move onto the next stage of our tender process.
>
> I know you'll be disappointed in our decision however we believe that the options available to us from the other purchasers that we have been talking to are a better fit for Three.
>
> The price offered was very competitive however there were a couple of areas that were key considerations for us when making our decision. The fact that BW Legal are not ISO27001 certified is a concern for Three and from a

perspective of protecting our brand we were concerned by the feedback that we reviewed on Trustpilot.

Thank you for your interest in Three and for taking the time to participate in our tender process."

31. On Monday 14 September 2020, Mr Gibson of the claimant wrote to Three, following a telephone conversation. In his email he asked for Three to re-review its decision, addressed the feedback points raised and provided some further information:

    a. The email provided reassurance that the claimant was working towards obtaining ISO certification and that its policies were already aligned to that standard.

    b. The claimant explained in the email how it already had an existing retainer with Three.

    c. The email responded in some detail to what had been said about Trustpilot reviews, explaining how they are not a helpful measure of customer satisfaction, typically being written by debtors who do not contract directly with the claimant.

    d. The claimant provided alternative external information that it felt provided a more accurate insight into the way it does business, in particular data showing the low level of complaints made about the company to its regulator, the Financial Services Authority, particularly compared to its rivals.

32. In response to this email, Three restored the claimant's application, and proceeded to the next stage of the tender process, which was the site visit. This took place on 8 October, when two representatives from Three visited the claimant's office to observe its operation, technology and work culture. After this meeting, further pricing information was also provided by the claimant to Three.

33. On 30 October 2020, the claimant was told that its tender had been unsuccessful:

    "I've just spoken with Elaine and unfortunately for the time being the business has decided to stick with Lowell as our debt sale partner for 2020.

    I appreciate you will be disappointed with this decision, however, if it is any consolation there is nothing more that yourself, Rachel or BW Legal as a company could have done. We have been extremely impressed with the ease you have been to work with from the outset, you scored highly in the RFQ and your pricing was competitive. Not to mention Kenny and I were more than impressed with the commitment that BW Legal demonstrated to their people and clients during our visit, the passion that BW Legal have was evident and made our visit a useful one.

    However, having been in partnership with Lowell for over 10 years, they have gone to great lengths and efforts to ensure we achieved the outcome we required to hit our debt sale budget for 2020.

> We would however, like to keep conversations going to see if there is another opportunity for us to work together in the future as both Kenny and myself, as well as Elaine and Angela whom we've been reporting into have been impressed with everything that BW Legal have demonstrated so far. Your email showing why Three should reconsider its initial decision not to take things forward with the RFQ in particular got people's attention.
>
> My focus for the rest of the year will shift towards delivering debt sale, however, in early 2020 it would be good to have a catch up to discuss what other options there could be for Three and BW Legal to work together.
>
> We appreciate all the efforts put in by yourself and Rachel as well as others who have no doubt been working in the background and wish you all the best on other acquisitions you may have been working on."

34. <u>The positions of the parties on the case of "actual financial loss":</u>

35. Mr Hudson says there are four fundamental problems with the claimant's case on having suffered actual financial loss: (i) the reliance on a "loss of chance"; (ii) the chronology; (iii) the incorrect account of events relied upon by the claimant to support its claim; and (iv) causation.

Loss of chance

36. Mr Hudson says that there is an inherent problem in seeking to rely on a "loss of chance" in a s.1(2) case in which a claimant must prove they have suffered serious financial loss, or that they are likely to do so. He says that the claimant cannot prove that it would have been awarded the contract if it had not been for the reviews. It might have failed in its bid for lots of different reasons. He says that this means that the claimant cannot prove that it was caused actual loss by the Twenty Reviews.

37. Mr Coulter for the claimant says that "loss of a chance" is a recognised basis for pursuing a claim, and that is even possible to sell on a "loss of chance" claim. He could not think of any principled basis upon which it could be said that it is not open to a claimant to rely on a "loss of chance" for the purposes of s.1(2).

38. It became clear during submissions that the claimant believes that it is pursuing a claim for damages based on the alleged loss of chance. Mr Coulter said that the claimant characterises the libel claim as being important, and of "significant financial value". He said that the minimum sum that they would recover at trial for loss of chance would be £370,000, by way of general damages. Mr Hudson KC said that the claimant's repeated references to this being a "multi million pound" claim were designed to intimidate. He said that the suggestion that the claim might be worth "at least" £370,000 had rather shocked the defendant since this is not the claimant's pleaded case, and the claim form says that the claim is worth, at most, £50,000.

39. It is important to remember that "financial loss" for the purposes of s.1(2) is not the same as a pleaded claim for "special damages" (or indeed any other type of damages). If the claimant had wanted to seek to recover damages for a "loss of chance", then this

would need to have been pleaded specifically as part of its damages claim. The claimant has not done this, presumably recognising the significant challenges it would have in pursuing such a claim. There is, therefore, no pleaded claim in this case for damages in respect of any "loss of chance", which is only referred to in the context of the claimant's pleaded case on s.1.

Chronology

40. The claimant has confirmed that its case is that the tender was dismissed on 11 September 2020, which is when the court should "stop the clock". Mr Coulter says that by 11 September, Three had already reached a pejorative view of the claimant, and after then the stigma of the reviews could not be erased. He says that at no point did Three actually withdraw its 11 September decision.

41. Mr Hudson points out that on this date only three of the Twenty Reviews had been published. These are those identified in Tipples J's judgment as Review 1 (21 February 2020), Review 2 (3 August 2020) and Review 3 (10 September 2020, incorrectly dated 19 September by the claimant). It follows that on the claimant's own case, the other seventeen reviews are simply not in the picture when looking at whether they had anything to do with the loss of the Three contract.

42. For completeness, I should add that even if the relevant date is taken as 30 October 2020 (when Three reached a final decision on the tender), only four of the Twenty Reviews had been published, and so sixteen would be out of consideration.

Inaccurate case

43. Mr Hudson says that the contemporaneous emails that have now been disclosed "completely destroy" and demonstrate the falsity of the claimant's case on serious financial loss. He says they demonstrate the opposite of the claimant's pleaded case:

    a. The 11 September email does not identify any particular reviews, referring to feedback more generally.

    b. It is apparent that the 11 September decision was put to one side, with Three changing their mind and re-considering the tender.

    c. The October email makes no reference to the three specific reviews, or the Twenty Reviews, or indeed the hundreds of other negative reviews on the Trustpilot site. Far from supporting the case on serious financial loss, the October email does the opposite. It is a glowing email written in very positive terms, making clear that Three liked the claimant, but had decided to stay with its long-term contractor.

44. The claimant says that the claim will not be decided on a textual analysis of the brief correspondence between the claimant and Three. Mr Coulter points out that the messages do not say everything, and the parties have not yet given disclosure, or exchanged witness statements. He says that the statements will add detail, colour and context to the pleaded case and to the exchange of correspondence with Three.

45. The claimant's witness statement makes similar points, stating that the principal evidence that will be relied upon by the claimant will be in the form of witness evidence detailing the "context and content" of the meetings and correspondence with Three, and the claimant's "understanding" of the reasons for the failure of its bid. It is also said that this context is needed because from just reading the documents "the commercial realities of a bidding process and the decisions that are made are not to be understood".

46. Mr Coulter also says that even if no further evidence was provided on the point, the claimant has a more than respectable argument based on the correspondence alone that it can establish a loss of chance.

Causation

47. As already noted, the claimant must prove that each publication caused, or was likely to cause, serious harm. The claimant also must prove that each separate review sued upon caused, or was likely to cause, serious financial loss. This cannot be done by aggregating the harm caused (or likely to be caused) by each review.

48. Mr Hudson says that even on the claimant's case that there was a loss of chance, the claimant is unable to show that the three particular reviews caused that loss of chance. In addition, he says that:

    a. The decision of Three has to be looked at in the context of all the other (negative) reviews about the claimant on the site at the time.

    b. There is no evidence that anybody at Three actually read the three specific reviews and it seems improbable that they would have done so.

    c. The evidence of what happened with Three does not support a finding that the publication of any of the three reviews led to its decision on the contract.

49. Mr Coulter says that the first three reviews were accessed between them more than six thousand times, and it is common sense that the three reviews in question would have been seen by Three.

50. The claimant's evidence for this application says that "the effect of the defamatory reviews was a crucial element in the claimant's bid failing". The claimant says that Three has not returned with any further offers of tender, which supports its view that the 30 October email contained just warm words.

<u>Serious harm – pleaded inferential case</u>

51. There are two parts to the claimant's inferential case.

52. Firstly, the claimant says that it "likely has" suffered actual financial loss because <u>other persons</u> with whom the claimant would wish to do business (ie other than Three) will have been similarly deterred from dealing with the claimant (emphasis added).

53. Secondly, in respect of likely future harm, the claimant relies on the matters pleaded at 7.1 – 7.3 to support an inference that the Twenty Reviews were read by prospective clients or customers who decided, or will decide, not to instruct the claimant.

54. Mr Hudson says that the "actual financial loss inferential plea" must be distinct from the issue with Three. However, he points out that we are now four years down the line, and there is no evidence whatsoever of any other financial loss based on the Twenty Reviews, for example that a contract has been lost, or there has been a downturn in turnover. It would be extremely surprising, he says, if the claimant had in fact suffered serious financial loss, but for there to be no evidence of it at all.

55. In respect of the inferential "likely to be caused" plea, Mr Hudson says that this is even more problematic for the claimant. I was taken to an interesting discussion in Gatley on the point in time from which the court is to judge whether a statement is "likely" to cause serious harm [4-019]. The three possibilities considered are the point of publication, the date on which proceedings were issued, or the time at which the court adjudicates upon the claim. Mr Hudson says that it does not matter which approach the court takes in this case:

    a. If the relevant date is when the court adjudicates upon the claim, Mr Hudson says that the claimant should have pleaded any actual loss suffered to date, and so any assessment of what is "likely" should take place as of today's date. He says that there is no evidential basis to support the idea that a specific review published more than four years ago is now likely to cause significant financial loss at some point in the future, and such a suggestion is inherently improbable. This is particularly the case where, as of of 31.10.23, there were 620 reviews about the claimant on the site, and as of March 2024, there were 700 reviews, with 98% being one star, "bad" reviews.

    b. If the relevant date is when the claim was issued – or indeed when the reviews were first published - the defendant says that from the evidence available it was unlikely on the relevant dates that serious loss would have been caused, a position which has since been demonstrated by what has actually happened (or not happened). Mr Hudson points out that if the loss had crystalised, the claimant would be able to show this, and the fact that it has not, rather suggests that it cannot be said that it was likely that the harm would be caused.

56. The claimant's witness statement says that "it is axiomatic that publishing these seriously defamatory statements… will be damaging to the reputation of the claimant and that a firm of solicitors reputation is crucial in its commercial success". It is said that a logical consequence of this is that business will have been lost.

57. Mr Coulter says that in most cases where a business suffers harm, the evidence of this will not be found in the form of documentary evidence. He notes that it would be unusual for a claimant to be able to show that they did not get a specific contract. He says there would have been other potential clients of the claimant who would have read those reviews and drawn back from even inviting the claimant to tender. He says the evidence from Three is powerful when considering the inferential case, since it shows that the reviews have already had a damaging effect on claimant's ability to get clients, supporting the court drawing the inference that unknown potential clients of

the claimant will have been put off engaging the claimant or inviting them to tender for contracts because of the reviews posted on the defendant's site.

58. Even if the loss of chance case goes, Mr Coulter says there is still powerful evidence on which to base such an inference. He also relies on the seriousness of what was said about the claimants, the status and popularity of the Trustpilot website, and the number of hits that the Twenty Reviews received.

The claimant's accounts

59. The defendant has applied by notice dated 28 February 2024 to rely on copies of the claimant's annual accounts published by Companies House. The most recent accounts were only made available to the public on 13 January 2024, and accessed by the defendant on 8 February 2024.

60. The claimant objected to these accounts being admitted so late. Whilst the claimant itself will of course be familiar with its own accounts, Mr Coulter says that nevertheless the claimant's legal team would need a proper opportunity to consider them and take instructions and consider whether any expert evidence might be needed. He also pointed out that earlier accounts have been available for some time.

61. I have not considered the accounts for the purposes of this judgment. I agree with Mr Coulter that they have been provided very late in the day, although this is not the main reason that I am excluding them. If they are to be relied upon, then they need to be considered properly. A selective reading of them, highlighting parts that superficially appear to support the case of one or the other party, is not going to assist in determining matters on this application.

Future evidence

62. I have already noted some of the things that the claimant has said it intends to provide evidence about. Counsel said that the claimant would want to call evidence of what was said in the meetings with Three, and to describe the context and understanding of the reasons for the bid failing, including background as to the specific circumstances in 2020. Mr Coulter says that the court will need to hear from the claimant's employees who took part in the bidding process, so they could explain what they believed happened. He said he did not have to go into the detail now, ahead of exchange of witness statements.

63. Mr Hudson says that the defendant has put across a strong argument and it is for the claimant to put across their best case. He points out that the claimants have repeatedly said that they will call witnesses to deal with their case on serious harm, but they do not indicate what those witnesses are going to say. He says the critical evidence is the contemporaneous documentation. He notes that the claimant says that someone from the claimant will give evidence on their understanding, but that is irrelevant. He says that at the very least, the claimant would need someone from Three to give evidence and say that its correspondence was wrong, and that they had read the three specific reviews. There is no evidence to suggest Three will give evidence, and it is inherently unlikely that it would give evidence supporting the claimant's case since Three would have to say that it conducted a false process or

gave false reasons for refusing the tender. He points out that the claimant's evidence does not even indicate what its own witnesses would say on these issues, or what sort of other evidence it might seek to rely on. On the inferential case, the claimant could have produced evidence that shows a drop off in business, or people who decided not to do business with them, but they have not produced evidence that anything happened. Mr Hudson says this leaves nothing but pure speculation and generalised assertion, undermined by correspondence.

Discussion

64. The claimant specialises in debt recovery work. It gets its business from those owed money by third parties, for example a telecoms company owed money by customers for unpaid bills. The claimant's job is to take steps to recover debts from those third parties.

65. A lot of people have chosen to post comments and reviews about the claimant on consumer websites, including Trustpilot but also on other sites such as Google Reviews. The evidence suggests that these reviews are overwhelmingly negative about the way in which the claimant does business.

66. Of course, it needs to be remembered that most of these reviews are likely to have been posted by the people against whom the claimant has sought to recover money. These third parties are not clients or customers of the claimant. It seems extremely unlikely that any of them will have sought out the claimant or wanted to be the recipient of the claimant's debt recovery services.

67. The claim for serious financial loss needs to be considered against this background. The claimant's pleaded case focusses on the loss of a chance with Three, and it is also said that because of the Twenty Reviews, it will have lost other business.

68. The main problem with the claimant's case is causation. It must be able to prove that each of the Twenty Reviews has caused, or is likely to cause, serious financial loss. It must establish a causal link between each review that it has sued on and such financial loss, actual or likely.

69. There are a number of difficulties with the claimant's case in respect of Three.

70. Firstly, as already noted, only three of the Twenty Reviews had been published at the time the claimant says it lost the opportunity of bidding for the Three contract.

71. Secondly, the evidence that is available does not support the claimant's case that any or all of the three relevant reviews (or indeed the Twenty Reviews) resulted in Three deciding not to proceed with the claimant's bid:

    a. In September 2020, Trustpilot was one of two reasons given for not proceeding to consider the claimant's bid, although this was a general observation about feedback on the site which did not mention specific reviews or comments.

b. The evidence shows that Three reconsidered its initial position and continued with the tender process, after receiving reassurance from the claimant.

c. In October, when Three decided not to proceed with the claimant, the sole reason it gave was because it wanted to stay with its existing supplier. The response was extremely positive about the claimant, making clear that it would be open to working with them in the future.

72. Thirdly, there has been the lack of clarity about the claimant's own case about the cause of any serious financial loss:

a. In the original particulars of claim, the claimant pleaded that 136 separate reviews had been responsible for causing serious loss, whereas now it says that the same actual loss was caused by just the Twenty Reviews.

b. In its original particulars of claim, the only reason pleaded by the claimant for the loss of a potential business opportunity with Three was a lower tender score caused by a low Trustpilot rating, and not any of the (then) 136 reviews complained of. The claimant referred again to Trustpilot ratings in its further information, noting that the successful contractor had a good Trustpilot rating.

73. Fourthly, there is no evidence whatsoever that Three saw the three specific reviews that are relevant to this part of the claim, and it seems to me that there is unlikely to be such evidence. At the time there were many negative reviews of the claimant on the defendant's site.

74. Fifthly, there is the fact that the claimant's case on actual financial harm is based on what is said to be a lost opportunity to tender. The test under s.1(2) is whether the claimant can show that the publication caused, or was likely to cause serious financial loss, which must be proved on the balance of probabilities. Even if the claimant can show that there would have been a real and substantial chance that Three would have acted in a particular way – which seems extremely unlikely – it would still need to prove on the balance of probabilities that one of the three reviews caused it to lose that chance, and that as a result it suffered serious financial loss or was likely to do so.

75. In terms of causation, it seems improbable that the claimant would be able to prove that the three specific reviews were seen by Three, and equally improbable that even if it could, the claimant could also prove on the balance of probabilities that this resulted in the loss of the opportunity, especially given everything else that was being said about the claimant on the defendant's sites and others.

76. I recognise that the claimant says it will produce more evidence to support its claim in respect of Three. The claimant also says that I must start from the assumption that the facts as pleaded will be proven at trial. I am not however required to take at face value everything that a claimant says in pleadings or statements, especially where the assertions made appear to have no real substance, and particularly if contradicted by contemporaneous documents, see ***ED&F Man Liquid Products Ltd*** (supra) at [10].

77. In terms of what evidence might be produced, the claimant has not said anything meaningful, beyond generalities. It has not indicated the source of such additional evidence, nor provided any reasonable grounds for thinking that a fuller investigation of the facts may add to, or alter, the evidence relevant to the issue. The absence of proper explanation from the claimant is striking. By way of example, the claimant says that there were other discussions between the claimant and Three. We know, of course, from the claimant's Further Information that the only reasons given by Three for not proceeding are those set out in paragraph 27 above. Leaving aside that pleaded case for now, if other unpleaded reasons had in fact been given, this information would be in the knowledge of the claimant. There is no reason why this could not have been given in general terms in evidence for this hearing. I note as well that it seems improbable that Three will give evidence at a later stage in this case, and the claimant has not suggested that they will do so.

78. It follows that I am satisfied that the claimant has no real prospect of success in showing that it was caused (or was likely to be caused) serious financial loss from the decision of Three not to pursue matters with the company.

79. Turning to the pleaded inferential case. The claimant relies on a number of factors.

80. Firstly, it says the defamatory imputations in the Twenty Reviews are serious, particularly in the context of a law firm. I note that Tipples J found that most of the more harmful things said were expressions of opinion, rather than fact, but nevertheless I acknowledge that the criticisms made of the claimant in the reviews were serious, including one reviewer expressing their opinion that the claimants are fraudsters.

81. Secondly, there are the publication figures. The number of views for the Twenty Reviews ranges from 596 views (review 5) to 4,087 reviews (review 1), with most said to have been viewed between 1,000 and 2,000 times. In terms of financial loss, it needs to be kept in mind that the claimant has made very clear that the people posting these reviews are not its clients or customers, but are debtors. Indeed, many of the people using the Trustpilot site will be consumers, or other people who may be pursued by the claimant in the course of its business. There is no reason to think that publication of the Twenty Reviews (or any of them) to these consumers would be likely to cause the claimant serious financial loss.

82. It is, however, possible that prospective clients of the claimant would check the Trustpilot site when considering whether to pursue business opportunities. In fact, we know that this is precisely what Three did. It follows that some of the views may be from customers of the claimant, or potential customers, or others with a business connection. There may not have been many, but as is often said, assessment of harm to reputation "is not merely a "numbers game". It needs only one well-directed arrow to hit the bull's eye of reputation" ***King v Grundon*** **[2012] EWHC 2719 (QB)** [40] per Sharp J. Given the initial response of Three, there is some basis for the claimant's concern that other customers or potential customers may have reacted in the same way on reading the material on the defendant's website.

83. Again, the main problem though for the claimant is causation. The claimant bears the burden of showing that any proven serious financial loss is more likely than not to be

a result of each review complained of, rather than some other cause or causes. It has chosen to sue in respect of just twenty of the reviews that had been published at the time. It cannot rely on any harm caused by material on the site that it has not sued on to establish harm caused by those that it has. It must show that each of the Twenty Reviews caused, or was likely to cause, serious financial loss.

84. Given the volume of negative reviews published on the defendant's website at the relevant time, it seems improbable that the claimant will be able to show that any loss (or likely loss) it has suffered was caused by a specific publication. It seems to me that this is a good example of the "daunting problem of causation" referred to by Collins Rice J in ***Sivananthan*** (supra).

85. On the evidence available (or likely to be available) the claimant does not have a real prospect of being able to show that each of the Twenty Reviews (or any of them) has actually caused serious financial loss. If it could, one would expect to have seen something more from the claimant, given that some of the Twenty Reviews were published some four years ago.

86. In terms of likely financial loss there is an absence of reality with the claim as put by the claimant. There is nothing that is likely to link the specific reviews complained of with financial loss, in the context of everything else on the defendant's site. I would reach this conclusion whatever the point in time that I take to assess likelihood: there is no real prospect of showing that there was a likelihood of serious financial loss (i) at the time of publication of the Twenty Reviews (ii) at the time proceedings were issued (which I think is the basis upon which claim has been pleaded); or (iii) now, when I would go so far as to say it is beyond unlikely that the claimant will suffer serious financial loss as a result of the Twenty Reviews.

87. Stepping back and looking at the defamation claim as a whole, I am satisfied that the claimant does not have a real prospect of success in proving on the balance of probabilities that each (or any) of the Twenty Reviews caused, or was likely to cause, serious financial loss. I am satisfied that there is no other compelling reason for this claim to be heard.

88. I therefore grant summary judgment to the defendant.

Strike out

89. It follows that I do not need to consider the strike-out application, nor was it really pursued at the hearing before me. It is of course concerning that the claim was issued over three years ago and there has still not been a CCMC. I recently considered the law in this area in ***Francis v Pearson*** **[2024] EWHC 605 (KB)**. The authorities make clear that delay on its own is an insufficient basis to strike out a claim: there must be evidence of abuse, an example of which might be the continuing of litigation with no intention to bring it to a conclusion. The defendant has not established this, and so its strike out application would almost certainly have been unsuccessful.