Case No: QB-2020-004509

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

Neutral Citation Number: [2021] EWHC 2270 (QB)

Royal Courts of Justice, Strand, London WC2A 2LL

Tuesday, 25 May 2021

BEFORE:

MASTER DAGNALL

BETWEEN:

MARILEEN VUGTS

Claimant

- and -

LANCE JAMIESON CHRISTIE

Defendant

MR J REED QC appeared on behalf of the Claimant
MR A EARDLEY appeared on behalf of the Defendant

JUDGMENT
(Approved)
(Remote Hearing)

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(Official Shorthand Writers to the Court)

1. MASTER DAGNALL: This is my judgment on two applications made in this claim brought by the claimant for damages, injunctions and other relief for alleged, and in fact to some degree admitted defamation and misuse of private information. Notwithstanding those admissions, by application notice of 2 February 2021 the defendant has applied to strike out the claim alternatively for reverse summary judgment in relation to it on the basis of essentially four types of matters.

2. Firstly, it is said that by a settlement agreement of 13 July 2017 these was a full and final settlement both of claims from arising then existing facts and also future claims arising from subsequent facts and which future claims include those which have been brought within this action.

3. Secondly, it is said that most of the claims brought in for the law of defamation are out of time for limitation purposes as a result of the operation of section 4A of the Limitation Act 1980 ("the 1980 Act").

4. Thirdly, all or at least those not limitation-barred defamations are not capable of passing the serious harm requirement contained in section (1) of the Defamation Act 2013 ("the 2013 Act").

5. Fourthly, the remaining claims do not pass what is called the *Jameel* level of seriousness (*Jameel v Wall Street Journal* [2006] UKHL 44) and as a result are not deserving of the allocation of court resources to them.

6. The second application before me is the claimant's application by application notice dated 26 March 2021, which is made under section 32A of the 1980 Act, for the limitation period at section 4Ato be disapplied on the basis of it being equitable to do so. There is also before me the claimant's application for a trial of a preliminary issue as to the alleged meaning of the published statements. I do not need to deal with that in this particular judgment, although I will have to come on to it in due course.

7. I have been provided with four bundles of documents of and to which I have been taken and read much. I have also been provided with full skeleton arguments and heard oral submissions from counsel, that is to say Mr Reed QC for the claimant and

Mr Eardley for the defendant. It seemed to me that following a full day's hearing it was desirable, in order to progress the case and seek to achieve the overriding objective, to give an oral judgment but to have given myself the intervening period since the hearing on 21 May for reflection. If in this oral judgment I do not cover all of the material or submissions, that is not because I have not borne them in mind, I have, but have limited this judgment for considerations of brevity.

8. The defendant's applications are under various rules contained within the Civil Procedure Rules. For the strikeout application, there is relied on first CPR 3.4(2)(a) that the court can strike out if particulars of claim as a statement of case do not disclose reasonable grounds for making the claim. It is common ground that I approach that on the basis that the facts pleaded are assumed to be such as may be proved at trial.

9. Secondly in terms of strikeout, the application is brought under CPR 3.4(2)(b) on the basis that the claim is an abuse of the process of the court. That can be the case in relation to a claim if it is bound to fail for one of various reasons including because there is an obvious limitation defence.

10. The third basis on which the application is brought is for reverse summary judgment under CPR 24.2. That provides the court may give summary judgment against a claimant on the whole of a claim or on a particular issue, if (a) it considers that the claimant has no real prospect of succeeding on the claim or issue, and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

11. With regards to the summary judgment application, I read into this judgment what is set out at section 24.2.3 of the White Book, which involves a summary of the well-known principles regarding the court's approach to the question as to whether or not a party has real prospects of success. This is as follows:

    ""no real prospect of succeeding/successfully defending"

    24.2.3

The following principles applicable to applications for summary judgment were formulated by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at [24]:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All E.R. 91;

ii) 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 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

In respect of points of law and of construction the notion of "shortness" does not appear to relate to the length of the document to be construed or the length of the material passage in that document but may relate to the length of the hearing that will be required and the complexity of the matrix of fact the court will have to consider: see the comments of Chief Master Marsh in Commerz Real Investmentgesellschaft MBH v TFS Stores Ltd [2021] EWHC 863 (Ch). He further commented that there was an overlap between the idea of a point of construction not being "short" and the second limb of CPR r.24.2: there may be some points that the court is capable of grappling with that, nevertheless, due to the context in which they arise or other factors, are best left to be dealt with at a trial.

In some cases the disputed issues are such that their conclusion by settlement or trial largely depends upon the expert evidence relied on by each side. In such cases, an application for summary judgment will usually be inappropriate unless it is made after

the exchange of the experts' reports and, in most cases, after the experts have discussed the case and produced a joint statement (Hewes v West Hertfordshire Hospitals NHS Trust [2018] EWHC 2715 (QB), a clinical negligence claim)."

12. I bear in mind that it is not for the court to conduct a mini trial, but the court can construe documents and contracts at least if there is no surrounding factual dispute which affects their construction. In fact it is common ground here, and both parties have asked me simply to construe the settlement agreement and to make a binding determination as to its construction and effect on a final basis. Both counsel have confirmed that to me by email.

13. I also bear in mind that while the court does not conduct a mini trial, the court can resolve factual issues where the evidence before the court renders it so clear as to what a judge will decide at trial that the court could properly conclude that a party has no real prospects of success on the relevant issue. The court, though, bears in mind that the process of disclosure of witness statements and other investigations may throw up evidence which is not presently before it. One looks at those matters carefully asking whether or not there is sufficient real potential for such occurring and does not engage in what is generally said to be Micawberism, ie. the mere hope that something may turn up which does not have any real basis.

14. The approach to the section 32A application is more complex and can in certain circumstances involve detailed consideration of evidence and oral evidence. It is common ground in this case that I should deal with the section 32A application finally on the basis before me. That is the course which was adopted in such cases as the leading decision of *Bewry v Reed Elsevier* [2015] 1 WLR 2565, and having considered the matters before me I see it as appropriate to take that course in this case.

15. As far as the history is concerned, much of it is common ground. Prior to and in 2017, the defendant was the managing director of a company, Weavabel Group Limited, and a senior partner in a related partnership, Weavabel Partnership. Those were both family entities in which other family members of the Christie family, including the defendant's children, had senior positions and interests. Many and perhaps all of the family were members of the Plymouth Brethren. That is an exclusive Christian church

which has a structure, rules and operation which can be said to be characterised by at least some degree of rigour and strictness with regards to moral conduct as well as other more theological matters. Thus conduct which is viewed as "immoral" has the potential to meet with strong disapproval in the minds of church members and authorities with concomitant effect on the reputation of the conductor in their eyes.

16. The claimant was an employee in the business of the company and the partnership. It is not said that she was in any particular way or at all a member of the Plymouth Brethren Church. The claimant says that on 26 March 2017, she met privately with the defendant at his request, and during their conversation she both supplied the defendant with certain private, as far as she was concerned, information on an obviously confidential basis and was subject to sexual misconduct on the defendant's part.

17. The defendant accepts that the meeting occurred and that private information was supplied to him, engaging the claimant's right to and the law of privacy. I am not entirely sure what the defendant's position is with regards to the actual facts of the alleged sexual misconduct aspect, but firstly it does not seem to me that it is necessary for me to determine that at this hearing, and secondly I do however note and bear in mind the defendant's admissions regarding certain matters before me that I will come to in due course.

18. In any event, following whatever happened, the claimant resigned and left her employment with Weavabel and intimated claims against both the defendant and her employer, and made a formal employment complaint to and against Weavabel regarding this. That resulted in a settlement agreement of 13 July 2017 between the claimant, the Weavabel Entities, and the defendant, all sides being advised by lawyers, and under which the claimant received £30,000 and various obligations from the defendant and Weavabel, which agreement the defendant says barred and settled not only existing claims but also at least certain future claims, including claims of the nature and based upon subsequent events which the claimant now seeks to bring in these proceedings.

19. I therefore turn to the settlement agreement itself. That was made on an Advisory Conciliation and Arbitration Service, that is to say ACAS, form as being an agreement in respect of an actual or potential claim to the Employment Tribunal. The parties are identified as the claimant by name and as the respondents the two Weavabel Entities and also the defendant by name. It provided for a settlement reached on 13 July 2017 as a result of conciliation action and starts, "We the undersigned have agreed …"

20. I do note that as far as those who have signed are concerned, I only have a document signed by the claimant and by one of the defendant's sons on behalf of the Weavabel Entities. On the other hand, it seems to be admitted by the defendant, including in other proceedings to which I will come, that the settlement agreement was entered into by him.

21. Clause 1 provides that the first and second respondents, that is to say the Weavabel Entities, without admission of liability jointly agree to pay and the claimant agrees to accept the sum of £30,000 in full and final settlement of the claimant's claims to the Employment Tribunal under a particular early conciliation number and in full and final settlement of any and all other claims or rights of actions that the claimant has or may have against -- and there are then identified five types of entity which include both the Weavabel Entities and the defendant as well as other directors, officers, employees or consultants of the Weavabel Entities.

22. The clause then goes on to say:

> "Whether arising out of her employment with the first respondent [that is to say the Weavabel Entities] or its termination or from events occurring after this agreement has been entered into, whether under common law contract, statute or otherwise, whether such claims are or could be known to the parties or in their contemplation of the date of this agreement. For the avoidance of doubt, nothing in this agreement compromises claims for personal injury, of which the claimant was not and could not reasonably be aware of at the date of this agreement other than claims for injury to feelings, which were expressly compromised, or any claims in respect of accrued pension rights or any claim to enforce the terms of this agreement."

23. Clause 2 provides for the payment to occur within a specific time period. Clause 3 provides that the claimant make herself available for the purpose of internal investigations of the Weavabel Entities. Clause 4 contains a confidentiality obligation on the claimant to keep the payment, any negotiations leading up to the agreement, the terms of the agreement and circumstances leading up to termination confidential, that is to say something which is often termed a gagging clause. There are questions in other proceedings as to whether or not this or a somewhat similar clause is actually binding, but that is not a matter before me.

24. Clause 5 provides that the claimant is withdrawing her submitted grievances. Clause 6 provides as follows:

> "The claimant agrees that her subject access request made under the Data Protection Act 1988 at(?) the first respondent is to be treated as withdrawn with immediate effect, and this agreement compromises any claim the claimant has or may have under or connected to the Act, further agrees not to make any further subject access request of the first respondent, that is to say the Weavabel Entities, whether under the Act or otherwise."

25. Clause 7 provides that the claimant and the second respondent, that is the defendant, agree not to make any derogatory comments about the other parties, and in the case of the first respondent and Group companies, any of their directors, officers, employees or consultants. The directors of the first respondent agree not to make any official announcement about the claimant containing derogatory comments.

26. Clause 8 of the document deals with what happens if requests are made of the Weavabel Entities or a reference regarding the claimant.

27. As I said, the claimant has signed the document dated 14 July 2017. Weavabel signed the document dated 27 July 2017. The space for the defendant to sign is left blank, but it appears to me that he admits that he is bound by the agreement and indeed he seeks to rely on it as part of his applications.

28. Following on from that, it is common ground that the defendant was at that point in time writing and subsequently writing a set of documents which he entitled

"draft autobiography" although it is also termed a dossier. The defendant's version of events is that his first version of this material was created in June 2017 but that he subsequently revised, updated and extended it in various ways in various months following July 2017.

29. It is also common ground that this material, at least in its final version, firstly contained element of the claimant's private information, secondly, at least arguably, and although the defendant disputes this (which is a matter for the claimant's application to determine meaning), would mean to the reasonable reader that the defendant was saying that, "The claimant's employment complaint about the actions of the defendant was deliberately false, so that she would receive an unjustified settlement payment" that being the meaning which is asserted by the claimant in these proceedings and which she advanced in correspondence, to which I shall come.

30. I pause to note that the subject matter of the employment complaint was in effect that the most senior male officer and owner of the employer had engaged in sexual misconduct with a female employee junior in rank, position and age. At first sight it seems to me that such a meaning and any publication of it to others is a distinctly serious matter, or at least potentially so, in reputational (that is regarding the claimant's reputation) terms.

31. Sexual misconduct in the workplace is rightly viewed with great disapproval and all the more so when exacerbated by the factors which I have mentioned above, although it would still be such without them. However, also viewed with great disapproval is the invention of unfounded false allegations of this nature, both generally and all the more so if done with the aim of extorting money from the employer.

32. This is for a number of obvious reasons. Firstly, such inventions are deceitful and deliberately so, at least when termed as deliberately false. Secondly, it involves a misuse of an apparent vulnerability which the employee has and which should be safeguarded and be an occasion, where there is sexual misconduct, for sympathy. It is a misuse of that vulnerability for personal gain. Thirdly, it may in fact involve criminality. I have no need to decide whether or not it would be, but in any event it is at least close to, blackmail and theft. Fourthly, for such matters to be invented

potentially betrays those who have genuinely suffered from sexual misconduct and both encourages others not to believe those who are genuine victims and inhibits genuine victims from complaining.

33. As far as I am concerned, there is no doubt in my mind that that is why the defendant has admitted in a solicitor letter and before me that if in fact his documents did convey that meaning then that meaning would be defamatory. I will come back to how he has done so in due course.

34. It is again common ground, and indeed was volunteered by the defendant, that the defendant published the draft autobiography, or at least the relevant elements of it and thus whatever meanings it has to a number of people, the defendant says a total of 38, in June 2017 and following. The defendant says that the vast majority of those publications were in 2017 and the first part of 2018, though the defendant appears to accept that two publications took place in December 2018, one in January 2019 and two publications being to an Emma Glasner and a Lance Weremouth in January 2020.

35. The claimant says that those publications will have been republished by the various publishees. The defendant's position on that is not clear to me, except that there seems to be some acceptance that Mr Weremouth might well have republished to members or senior members of the Plymouth Brethren Church.

36. Coming back to the history of the time of and following the settlement agreement, the defendant was and has remained in dispute with other members of his family, including those of his children who occupy senior positions within the Weavabel Entities. The defendant himself resigned from Weavabel. He is saying that he was forced out of it. The defendant has also been subjected, though it is unclear to me as to whether or not he is still being subjected, to some sort of process which could have involved or eventually involved his excommunication from the Plymouth Brethren Church depending on how matters turn out.

37. It was during these disputes that Weavabel learnt of the publications and the content of the draft autobiography. Weavabel instructed solicitors, Kingsley Napley, and has brought proceedings against the defendant by a claim form dating from January 2020,

being claim number QB-2020-000319 in this division. In that claim, Weavabel sued for breach of the settlement agreement and in particular clause 7. The defendant has advanced various defences including saying that, notwithstanding there is an acceptance that he had engaged in derogatory comments regarding the claimant, clause 7 is unenforceable on the part of Weavabel. The defendant also contests the remedies sought in many ways.

38. This seems to have led to Kingsley Napley writing a letter to the claimant on 13 January 2020 and sending it to her email address, this being on the same day that a letter was also sent to the defendant by Kingsley Napley acting for Weavabel relating to these matters. The letter to the claimant refers to the history of her complaint about sexual misconduct and the settlement agreement and then says, "We are sorry to have to bring to your attention that Weavabel has discovered the defendant appears to have breached the contract." It then explains about the draft autobiography, says that it is believed that it has been distributed to a number of people, says that Weavabel has itself written to Mr Christie threatening legal proceedings, then goes on to say:

> "It is entirely a matter for you whether you wish to take any action against Mr Christie yourself whether for the breach of the contract or misuse of your private information. We have been asked to assure you that Weavabel will support you in whatever course you like."

39. The letter then goes on to say that Kingsley Napley would be grateful if Charlotte Harris, who was the partner dealing with the matter, was contacted by the claimant either by email or on one of two United Kingdom phone numbers in order to discuss the matter in more detail.

40. The claimant has in her witness of 26 March 2021 described her receipt of this letter and stated that she instructed Kingsley Napley as her solicitors. There is no detail of the process that she engaged in except that, as I accept, the claimant is herself a Dutch national. Although previously working in England, following her leaving Weavabel she had moved to Holland and had lived in both Nigeria and Holland, and at the point of receipt of this email was herself in Nigeria. I have also been provided with a witness statement of Charlotte Harris of 26 March 2021 in which it is said that Kingsley Napley were formally instructed by the claimant in April 2020. Neither

document gives any information as to the intervening events. Various of those events may have been subject to legal professional privilege. There is simply no explanation as to what happened in the meantime at all.

41. In any event what did happen was that on 14 April 2020, Kingsley Napley sent what they regard as being a formal pre-action protocol letter before claim to the claimant. The letter referred to the settlement agreement, referred to the terms of the contract and stated that the draft autobiography and its publishing had involved the defendant making derogatory comments about the claimant so as to breach clause 7. It stated that the claimant was extremely distressed about this, that what had been said was both derogatory and extremely hurtful and that the claimant required the defendant to pay damages for breach of contract.

42. It also stated the full extent of the breach was not yet known and sought information as to precisely what had been published to whom and when. The letter then went on to say that there had been various misuse of the claimant's private information and that an undertaking and damages were sought in relation to that. It then went on to have a section entitled Libel, and in which it identified sections of the draft autobiography and asserted that the draft autobiography contained the meaning, "that Ms Vugts's employment complaint about the actions of Lance Christie was deliberately false so that she would receive an unjustified settlement payment."

43. Th letter said that that meaning was defamatory at common law, that the claimant would seek injunctions but also that the claimant, "requires you to pay damages for libel". It went on to say that damages would need to be sufficient to give proper vindication but might be mitigated by a prompt apology being provided.

44. There is then a section of relief sought in terms of a number of undertakings which it was said should be given to the court and submission to an enquiry as to damages for breach of contract, misuse of private information and libel, as well as seeking costs. There was also reference to the fact that any claim would be issued in the Media and Communications List, as this one has been in accordance with the Rules.

45. There was then some four weeks later a reply from the defendant through his instructed solicitors, Messrs Gordons, dated 12 May 2020. That referred to the letter of 14 April 2020, said that the defendant was apologising sincerely and that he would provide certain listed undertakings in the form of an annex annexed to the letter but without saying whether the undertakings were to be provided to the court or simply to the claimant's solicitors.

46. He contested whether or not the document was strictly a draft autobiography, terming it at this point as being "writings", said that he accepted that they contained derogatory comments and that this was a breach of the settlement agreement, and provided some information as to whom he had said that he had provided the writings. He said that at this point he was not prepared to accept that there was a misuse of private information, and then in paragraphs 8 and 9 said under the heading of Libel and Defamation:

> "The writings were first circulated in 2017, as you are aware. Accordingly, your client is out of time for any claim in libel or defamation and as such we do not intend to incur further costs commenting on the merits of this claim.
>
> 9. In any event, the undertakings and the annex to this letter should provide your client with the comfort she seeks."

47. There are then references to contact, references to an apology in a particular form and damages. As far as the apology was concerned, the apology was clearly only an apology for any distress caused without going any further, for example as apologising for having advanced false statements. It was carefully drafted to merely be an apology for distress caused by whatever had been done and no more. As far as damages is concerned, paragraph 14 said that the issue of damages for breach of contract would be dealt with without the need for formal pleadings.

48. Thus, some undertakings were being proffered, albeit unclear whether it was to the court or simply as a matter of personal relationship or personal proffering. An apology was being proffered but in guarded terms. As far as libel is concerned, it seems to me perfectly clear at this point it was being said that limitation would be relied upon, but as far as damages is concerned at this point in time it was perfectly clear that the only damages being suggested might be paid were damages for breach of contract.

49. I note at this point that it is common ground that damages for breach of contract are likely to be very much less than damages for libel. I am not making any final determination as far as that is concerned, but on the basis that damages for libel normally provide for compensation for damage to reputation and an injury to feelings, and it is difficult to obtain either matter in the form of money as by way of damages for breach of contract, it seems to me at first sight that that is both a sensible and also an obvious approach.

50. Kingsley Napley responded to the letter of 12 May by their own letter of 20 May 2020. There they said they were not satisfied by the relief which was proffered and enclosed a draft amended particulars of claim, which proceeded on the basis rather than the claimant bringing a separate claim by separate action, the claimant would become a co-claimant in the Weavabel existent extant proceedings but with amended particulars of claim to include her claims as well as Weavabel's.

51. The letter went on to say as to why it was said that the remedies proffered or undertakings proffered were insufficient for the purposes of dealing with the breaches of contract, and that a mechanism needed to be put in place to quantify damages for breach of contract, that the claim for misuse of private information was being pursued, and that as far as libel was concerned it was said that it was wholly inadequate for the defendant simply to take a limitation point and use that as a reason for not engaging with the merits of the libel claim.

52. It was stated in the next paragraph that as limitation was relied on in a defence, then the claimant would in a reply plead reliance upon section 32A of the Limitation Act. It was asserted that the court would be likely to give such permission on the basis that the claimant had only learnt of the matter in January 2020, that is some four months before at the time of this particular letter.

53. It was also said that the defendant would have to make clear as to on what dates publications had occurred in order to be able to rely on limitation, and it then went on to say:

> "In the circumstances and consistent with our client's need to bring proceedings with reasonable expedition, she will be commencing a

> libel claim by way of amendment unless your client offers the relief that has been sought, and that the contractual undertaking offered did not provide sufficient relief."

54. Thus seems clear that at this point in time the claimant regarded herself as being in a position to bring a libel claim, even though she would be seeking on the advice of her solicitors to bring it by way of a joinder application rather than by a separate claim form. Consent for joinder was also sought.

55. Gordons responded by letter of 27 May 2020. They said in relation to remedies that they were clarifying their previous letter, that they would provide undertakings to the court and in 2.3 stated that, "Our client, that is the defendant, has agreed to an enquiry as to damages" but saying that, first that, what should be done would be to see whether or not damages could be agreed.

56. There is a section headed Libel and Misuse of Private Information. It says at paragraph 5, "We maintain that these claims will not succeed and in the case of the libel claim are time-barred." It is clear that limitation was still being relied on. It went on to say, "Notwithstanding this, the remedies sought in respect of these claims are being offered by our client in any event." They then say the claimant's side should be satisfied and should not issue proceedings, or more accurately, incur the cost of issuing proceedings.

57. It seems to me that letter is somewhat ambiguous with regards to the question of libel and damages. Under the Remedies section, it is said that an enquiry as to damages has been agreed, although of course the previous agreement was only as to an enquiry as to contractual damages. However, in paragraph 5 of the letter it is said that the remedies sought in respect of these claims, meaning libel and misuse of private information, “are being offered by our client in any event.” Of course, one of the remedies sought in relation to those claims was damages. Thus, it seems to me that the letter to say the least appears to lack clarity.

58. In any event, on 5 June Kingsley Napley responded. They said that remedies were now being offered beyond what had been proffered in the 12 May letter but that there needed to be admissions of liability in relation to libel and misuse of private

information, that being in part because unless there was an admission of liability it would be impossible to calculate or assess damages, so it would be unclear as to on what basis a calculation or assessment should take place. It seems to me that from that Kingsley Napley were either understanding or at least wishing to put forward an understanding of Gordons' letter to the effect that it was now being accepted that there would be libel and misuse of information damages.

59. Gordons eventually responded to this letter on 17 June 2020. Again in their summary at paragraph A3 they said that the defendant was agreeing as to an enquiry as to damages, but this time extended the summary section to a section B saying the defendant was maintaining his position in respect of the libel and misuse of confidential information. It then went on to say:

> "… the remedy he has offered has included what your client sought in relation to such a claim, see for example [various paragraphs of the undertaking initially sought]… In view of what has been openly proposed we do not consider the pursuit of claims for libel and misuse of confidential information purely to achieve the vindication referred to would in any way be a proportionate exercise, even if the underlying claims had merit, which we do not accept."

60. They then say it is accepted that various matters with regards to undertakings require agreement. In paragraph 3, they repeat under Libel and Misuse of Private Information that their client's position remained unchanged and repeated the references to undertakings being offered.

61. They refused to investigate certain matters further and proposed to provide an affidavit as to what had happened, again stated that they would provide the apology proffered and said that was an important matter.

62. Again, it seems to me this letter is ambiguous with regards to the question of damages for libel and misuse of confidential information. It seems at one point on one construction to say that everything which the claimant was asking for was being offered, and at another point to a dispute it on the basis of saying the defendant was maintaining his position with regards to libel and misuse of confidential information and simply proffering undertakings.

63. Kingsley Napley responded two weeks later by a letter of 3 July 202. They started off their letter by a section headed Admission of Liability for Libel, saying that they required such an admission if there was to be a settlement. They pointed out that the only defence which had been asserted so far was limitation but the latest letter seemed now not to accept the underlying claim for libel had merit.

64. They went on to say that vindicating reputation by judicial pronouncement was an essential purpose of a libel claim, a pronouncement on the falsity of the defamatory statement complained of or absence of an admission to this effect, said that the failure to admit liability was wholly unacceptable and that while there was an offer of damages this was not an adequate remedy, and in any event it would be impossible to assess damages without an admission or finding of liability. They then went on to repeat their assertions with regards to what they say was the meaning which the reasonable reader would draw from the draft autobiography documents.

65. I pause to note that in the absence of agreement or a defendant actually maintaining a defence of truth which is found not to be proved that technically speaking a judicial pronouncement that there has been defamation does not actually operate as a pronouncement that the relevant statement was false. That question as to whether or not the defendant is prepared to concede falsity is something which may be highly material to the assessment of damages. On the other hand, the letter does proceed on the basis that the writer, presumably for the reasons which I have already given, is assuming that the defendant is actually accepting a liability to pay damages in relation to defamation.

66. The second section of the letter deals with the need for a court order principally because if undertakings are being given they are not enforceable at all if they are simply a written statement unless there is consideration, but also because it is said that the undertakings had to be given to the court both for them to be sufficiently serious and to allow for a remedy in the form effectively of a committal in the event of breach.

67. There is then a section regarding the need for an apology which went more to falsity rather than simply an apology for distress caused; and references to need for particular undertakings and other matters; and then in section 7 it was stated under the heading

Commencement of Proceedings, "It is in all the circumstances now necessary and appropriate for our client to commence her claim against your client."

68. It then went on to say that they still intended to proceed by way of joinder application rather than by issue of a claim form. Although obviously what was clearly being stated at that point was that they regarded their client as being both in a position to issue proceedings and in circumstances which she should.

69. That was responded to though by a letter from Gordons dated 10 June 2020 but which is common ground should actually be dated and was sent on 10 July 2020. That responded to Kingsley Napley's letter of 3 July. It is said again that the position with regards to commencement of proceedings had not changed. It was not accepted that it would be proportionate to issue proceedings, but in any event the defendant was offering further concessions.

70. There is then a section headed Libel, where it was made clear in the first paragraph that the defendant was not going to admit liability for libel and that there were various issues, including relation to limitation as previously intimated. In paragraph 2 it was stated:

> "Our client is however prepared to accept that the meaning which your client asserts in respect of the relevant statements is defamatory and is false. To clarify, our client does not contend that your client's 'employment complaint about the actions of our client was deliberately false so that she would receive an unjustified settlement payment.'"

71. I asked Mr Eardley during this hearing as to whether this was still the defendant's position that it was accepted that the meaning which the claimant asserted in those terms would, if it was in fact the meaning, be both defamatory and false. Mr Eardley confirmed that was his client's position. It seems to me that is something which needs to be recited in the order which I am going to make in any event.

72. The letter went on to deal with in a draft order which had been proposed the question of apology, the question about particular undertakings which were sought, and in paragraph 9 under Commencement of Proceedings says:

> "Our client's position on commencement of proceedings and on joinder have been clearly articulated both in our earlier correspondence and above. It is troubling that your client appears so keen to issue proceedings when there is no need to do so."

It was said it was hoped that a compromise would be achieved.

73. Again in that letter, although liability for libel is uncontestably disputed, it is not absolutely clearly stated that there is simply a refusal to pay damages for libel or misuse of private information. Kingsley Napley responded on 30 July to say that in their view it was regrettable that the defendant refused to provide an appropriate remedy that there was no proper engagement, it was now clear the matter could not be settled, and that proceedings needed to be commenced and that permission would be applied for a joinder.

74. It was said that there was a failure to specify any counter-meaning, notwithstanding an apparent dispute over the claimant's meaning, and that there was no offer to provide the claimant with appropriate vindication or relief and that the fact there was no agreement to a court assessment of damages in the event of an absence of agreement as to damages was not acceptable. Thus it seems to me that it was being said that it was clear that effectively legal proceedings would have to be taken albeit by way of joinder.

75. Kingsley Napley followed that up by a letter of 18 August saying that they were giving formal notice that an application for joinder had in fact been issued and made and asking for the court's private room appointment form to be completed so that the court could list the hearing of such an application.

76. Gordons responded to say they wished to consult with counsel. Kingsley Napley then wrote on 24 August to say that Gordons should appreciate that as a limitation defence had been raised the joinder application needed to be dealt with on an urgent basis.

77. There then followed various communications between Kingsley Napley and the court in which it started to become apparent that the court was not going to be able to list a hearing of substantial length very quickly simply through a mechanism of correspondence.

78. Gordons eventually sent a letter, which is dated October 2020, where it is common ground that it was sent on 14 October 2020, where they set out that they would consent to a joinder application in relation to breach of contract matters but they would not accept a joinder which extended to the libel and misuse of private information claims, that being on the basis that the claim was substantially out of time, and that they contested liability on the basis that there was no real damage. They asked for Kingsley Napley to produce a revised set of particulars of claim.

79. Kingsley Napley responded to say that the joinder application should still proceed, but notwithstanding efforts made by the court to deal with the matter speedily it became clear that a substantial hearing could only be arranged for some time in February 2021.

80. That then resulted in Kingsley Napley sending a letter of 13 November, saying that as far as joinder was concerned they were merely going to seek to amend to raise the claimant's breach of contract claim.

81. Notwithstanding that was stated by a letter of 13 November, it was on 17 December 2020 that the claimant issued the claim form in these proceedings raising the libel and breach/misuse of private information claims. Following service, the defendant responded with the defendant's strikeout and summary judgment application of 2 February 2021. The claimant then counter-responded some seven weeks later with the application to rely on section 32A of the 1980 Act to disapply the limitation period, the claimant having previously made an application for determination of meaning dated 1 March 2021 but which came before Nicol J on a paper review, and who directed by order of 2 March 2021 that it should be referred to the Master, which is why it is now also before me.

82. The various applications are supported by various witness statements which I have read, but it does not seem to me that it is necessary to refer to them in any particular further detail apart from the references I have already made to certain of the witness statements and some elements of the defendant's witness statement, which I will come to in due course.

83. The first issue on the defendant's application is whether the settlement agreement bars these libel and misuse of private information claims. The defendant says that is the effect of clause 1 of the settlement agreement, albeit in the context of the remainder of it.

84. Mr Eardley submits that clause 1 settles not only claims that the claimant has but also expressly claims that the claimant "may have", something which points to the future as well as to the present. He submits that clause 1 settles claims not only which were claims arising out of her employment or its termination but also "from events occurring after this agreement has been entered into"; that the parties envisaged in clause 1 that they were accepting various matters which appear there and in the rest of the agreement but were not accepting future matters of a particular nature; fourthly, that the parties had actually decided to deal with the possibility of the defendant publishing defamatory material about the claimant in clause 7, that clause providing for an express contractual obligation and liability upon the defendant not to make any derogatory comments and providing for a remedy, namely those remedies which exist under the law of contract, including both injunctions and damages.

85. Mr Eardley submitted that this would give the claimant various advantages over the position she would otherwise have absent the settlement agreement in libel law, firstly that for liability there would only need to be a derogatory comment. It would not need to be strictly defamatory or such as to attack reputation as such. It would not need to satisfy the serious harm test of section 1 of the 2013 Act. Defences such as truth, qualified privilege and public interest would not exist, at least to a substantial degree. The claimant would also be able to be in a position in contract law to obtain injunctions in advance of publication, or of a *quia timet* nature or of an interim injunction nature to restrain further publication after an initial publication but before a trial, all matters which are of a very considerable difficulty in libel claims, where Article 10 of the Human Rights Convention applies in favour of free speech and where the court is distinctly reluctant to grant interim injunctions where any defence such as truth might be advanced in response to a claim in defamation. The claimant would also have certain advantages as a result in terms of damages that since liability would be simple there would be at least some potential for damages in contract law.

86. Mr Eardley accepted that the claimant would be under various disadvantages as a result, in particular in the realm of damages where the contract damages would be likely to be very much less than libel damages for the reasons which I have already given and because there are various remedies available under the law of libel, in particular statutory law, such as requiring the publication of judgments, which are not necessarily available in contract law.

87. Mr Eardley submits this is a classic example of an allocation of various risks, rights and obligations which gives the claimant benefits in the law of contract in exchange in effect for disadvantages in what would otherwise be the law of tort. Mr Eardley would also point to the fact that a contract claim has a six-year limitation period, unlike the primary one-year limitation period in libel law, and that these actual facts, namely where the claimant only discovers something some time after the event, is a classic example of the value of that.

88. Mr Eardley went on to say that he accepted that the settlement agreement would have some limits in terms of what was actually being settled by it but that those limits would extend to encompass disputes arising out of or related to in any way the previous employment relationship and what had happened then. He said that what has been raised in this claim effectively arises out of the employment relationship and time, as he would say can be seen from the content of even the meaning that the claimant asserts, and the fact that the private information is said to have been communicated while the employment relationship was ongoing and as between the defendant in holding his senior position in Weavabel.

89. Mr Reed says firstly this is a misreading of the clause, secondly that the court is restrictive in its approach to construing contracts to settle claims, in particular claims which arise from matters which (a) are not known to the claimant, and (b) have indeed not yet occurred. Thirdly, he submits the wording works as a matter of English language to apply to various situations which it might well be commercially sensible and desirable to have resolved at this point, being where the future events which are relied on are really all part and parcel of one cause of action which emanates from the past, even it may only be inchoate. Such being, for example a libel which has been published but in circumstances which do not give rise to any real claim, such as to

somebody who views the claimant as having no good reputation at all, but which libel is then republished at a later date by that initial publishee; or alternatively in general tort law a situation where a potentially tortious act or omission has taken place but a cause of action will only arise once damage has been sustained.

90. He submits that clause 7 aims to protect the claimant, not deprive her of rights, and he also relies on clause 6 saying that if the parties had intended to give up a specific right then they would have said so, as clause 6 provides in relation to certain rights under the Data Protection Act.

91. I do not find his points with regards to clause 6 as being particularly persuasive. Firstly, although there is an example of giving up a right there, it is in a very specific context, and, second, it does not seem to me that clause 6 is really about the defendant's actions at all.

92. It is common ground though that I should construe the settlement agreement on the modern iterative approach for the construction of contracts involving considering the words used, the commercial purpose, the factual matrix but not the subjective intentions of the parties and that I should ask what the reasonable reader considers to be the most appropriate meaning.

93. This is all set out in a passage in *Chitty* at section 13-047, which paragraph I read fully into this judgment, where there is a considerable citation from a judgment of Popplewell J, which although there have been subsequent cases in the area it is accepted by the parties, and which I accept, to generally represent the law. I read it into this judgment and will save time by not reading it out during this hearing; but it is as follows:

"**A summary of the applicable principles**

13-047

The principles applied by the courts to the construction or interpretation of commercial documents were helpfully summarised by Popplewell J. in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune")*[235] in the following terms:

"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."[236]

This summary can be broken into a number of components, namely (i) the objective nature of the assessment; (ii) the "factual matrix" or "available background"; (iii) the meaning of the language used by the parties; (iv) the need to have regard to the contract as a whole; (v) the significance of the nature, formality and quality of the drafting of the contract; (vi) what is to be done when there are two possible meanings of the disputed clause; (vii) the unitary and iterative nature of the process, and (viii) striking the balance between the various, potentially conflicting, principles."

94. I have also had cited to me in the context of the construction and effect of settlement agreements the decision in *BCCI v Ali* [2002] 1 AC 251. That decision was again delivered before subsequent important Supreme Court judgments, although it does not seem to me that anything is said in it which has been particularly revised or altered by them.

95. As far as that case is concerned, which considered a settlement agreement made on the termination of employment and which dealt with questions of matters not known to the relevant employees, but where the question was whether or not it included settlements of claims or breaches of the trust and confidence relationship between employer and employee as a result of various dishonest and dishonourable conduct engaged in by the relevant employer (the Bank of Credit and Commerce International) in its general activities but which were not known to the specific employees, this led the House of Lords to consider the approach to settlement agreements generally.

96. Lord Bingham in paragraph 8 stated that the settlement agreement was to be considered under the usual rules of construction of contracts, referring to the then leading case of *Investors Compensation Scheme* [1998] 1WLR 896. It does not seem to me that the matters he identified in that paragraph were any different from those which were identified in the *Chitty* extract.

97. In paragraph 9, he went to say that a party may at any rate in a compromise agreement supported by valuable consideration agree to release claims or rights of which he is unaware or of which he could not be aware, even claims which could not on the facts known to the parties have been imagined if appropriate language is used to make clear that this is his intention. Lord Bingham went on to refer to a number of authorities to that effect.

98. In paragraph 10 though, he went on to say that the:

> "long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that

> a party intended to surrender rights and claims of which he was unaware and could not have been aware …"

And then a substantial number of authorities are cited to that effect. That is of course a statement which is binding on me, although it seems to me to be relatively self-evident that ordinarily people do not intend a settlement to cover that which they do not know about, although of course they may choose to do so, in which case they are likely to use clear words.

99. It seems to me though -- which is not being considered by Lord Bingham in this particular judgment -- that the argument that a party is unlikely to be intending to give up claims of which it has no knowledge is even stronger in relation to the question of claims arising from matters which had not yet occurred and which it is the other party's choice as to whether or not they ever will occur. Again, strictly speaking it is possible in clear words to achieve such a result indeed by conferring a right upon somebody to do something which would otherwise be a wrong. That is precisely what very many contracts do. However, in general to be intending to allow somebody else to commit a wrong without the usual consequences attendant upon that it seems to me is something which a party is all the more likely to not be intending to achieve essentially by way of extension of the reasons given by Lord Bingham in relation to being deprived and suing in relation to matters which have already occurred that are unknown.

100. In paragraph 18, Lord Bingham turned to the particular agreements which had been made and the fact that as with agreement they stated that they were extensive and applied to any claims which might exist under statue, common law or equity.

101. Halfway through the paragraph, he went on to say that the defendants, the liquidators of BCCI:

> "accept that the language of the clause is subject to some implied limitations: where ex-employees have had deposits with the bank, the liquidators have not (very properly) sought to resist claims for repayment in reliance on the general release. Such claims, they say, fall outside the clause because they do not relate to the employer-employee relationship. That would be true, if employees were entirely free to make whatever banking arrangements they chose. But acceptance of these claims involves acceptance that the clause does not mean all it might be thought to say. What of a

> latent claim for industrial disease or personal injury caused to the employee by the negligence of the employer but unknown to both parties? Mr Jeans QC for the liquidators, in the course of an admirable argument, recognised the difficulty of submitting that such a claim would be precluded by the provision, even though it would relate to the employer-employee relationship. I would not myself infer that the parties intended to provide for the release of such a claim. The same would in my view be true if, unknown to the employee, the bank had libelled him as an employee. The clause cannot be read literally."

Lord Bingham then goes on to consider the relevant claims for stigma damages.

102. I have been taken to other parts of the judgments, but it does not seem to me that they take matters that much further, except that in paragraph 28 Lord Nicholls also considers the question of the limits to be put upon the relevant agreement and says in paragraph 28 as follows:

> "This approach, however, should not be pressed too far. It does not mean that once the possibility of further claims has been foreseen, a newly emergent claim will always be regarded as caught by a general release, whatever the circumstances in which it arises and whatever its subject matter may be."

That newly emergent claim is on the basis of something which already exists but has emerged as now being known.

103. Lord Nichols goes on to say:

> "However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter."

I pause to say that Lord Nicholls was saying the question as to what the parties are reasonably to be taken to have intended is because the question of construction depends on what the reasonable reader would see the agreement as meaning, not what the parties actually intended. Actual intention is a matter for rectification if anything, not construction.

104. Lord Nicholls then went on to say:

> "The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims arising in connection with the partnership business. It could not reasonably be taken to preclude a claim if it later came to light that encroaching tree roots from one partner's property had undermined the foundations of his neighbouring partner's house. Echoing judicial language used in the past, that would be regarded as outside the 'contemplation' of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not 'under consideration'."

105. Lord Nicholls goes on to say:

> "This approach, which is an orthodox application of the ordinary principles of interpretation, is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates."

106. It was this which has led Mr Eardley into accepting that there are limits to be put upon this particular settlement agreement. He says though that these limits are anything relating to the employment relationship and that the claimant's claims made in this particular claim form and particulars of claim do relate to the employment relationship and therefore are within the context.

107. The parties at one point in submissions referred me to the question of what would happen if an officious bystander had asked the individuals involved in the settlement agreement as to whether or not they intended this sort of claim to be covered by the settlement. I do not regard that potential question as being relevant. It seems to me that the officious bystander and what would have happened if the officious bystander had asked the parties a question, or rather as to what it would be thought would have happened if the parties had been asked, is part of the law of implication into contracts

not of construction of the contracts as they stand. On my raising that point, both sides disavowed any attempt to imply anything into the contract.

108. It seems to me that they were right to do so. The officious bystander test, and whether or not it makes any difference even under the law of implication, depends on the court asking itself the question: had the officious bystander posed their question, is there only one clear answer that both parties would have produced rather than one or both of them saying either no or maybe yes, maybe no?

109. The approach to construction is different. That is simply a unitary approach as to what the reasonable reader would see as being the most appropriate meaning to give to the contract in question, the court putting itself in the position of the hypothetical reasonable reader. It is not a scenario of an officious bystander asking a question. It is not a scenario of seeing in those circumstances how the parties might or would have answered.

110. I therefore approach this on the basis of the construction approach laid down in the case law. Applying that approach, I look first at the factual matrix. The relevant factual matrix is the settlement of the particular dispute regarding to determination of the employment in circumstances where the employee had raised a complaint of sexual misconduct, which complaint was not actually being determined. It was not a situation of anybody having made a complaint about unfounded complaints being made by the defendant.

111. I also bear in mind that in this particular factual matrix it is quite usual, although not inevitable, that there will be a clause in a settlement agreement relating to such an employment dispute that the parties will not thereafter derogate each other, and that is simply a usual protection which appears in settlement agreements of this sort and nature. That somewhat, but only somewhat, points away from clause 7 being designed to simply regulate absolutely everything that may happen in the event of a derogatory comment being made.

112. Secondly, I look at the words used. Mr Eardley points me to the use of the words "may have" as well as "has" in clause 1. I bear in mind the words "may have" do not

necessarily refer to future as such. Those words are often used to refer to the possibility of there being an existing claim, particularly in a situation where parties in a situation of Weavabel or the defendant do not wish to accept that the claimant actually has a claim.

113. On the other hand those words can relate to the future, although I do not see that they necessarily have to do so, notwithstanding that the claimant may (at least objectively and if she is assumed to know the law) “know” that either she has a claim or alternatively she does not have a claim, and so that in one sense "may have", if it only refers to the present, is meaningless. Nevertheless, it does seem to me that it can refer to the present and is often used simply to refer to the situation that a claim is being asserted but not accepted.

114. It also seems to me that those words can in principle be said to refer to a situation where a claim is potentially inchoate, that is to say it only exists if at all in part and is not complete, such as the situation of unactionable publication or presently unactionable publication that may become actionable upon a republication, or alternatively the situation where there has been a negligent act or omission but there has not yet been actionable damage sustained.

115. I do note which is slightly in Mr Reed's favour that the words which are commonly used of "now or in the future" do not appear before the word "have". On the other hand, I do bear in mind that I have to be cautious in terms of construing words which have been used by reference to words which have not been used but might have been used. It seems to me that sort of approach is one that can involve the court being in danger of applying hindsight when trying to construe a contract, and I am cautious as far as doing that is concerned and therefore place very little weight on that.

116. There are then the words which Mr Eardley particularly relies on being “whether arising out of her employment with the first defendant or its termination or from events occurring after this agreement has been entered into”, and in particular the words "or events occurring after the agreement has been entered into". At first sight, those words are very much more in favour of the defendant's construction. They seem to refer to a settlement of claims arising from events which have not yet occurred.

117. On the other hand, I do have to balance against that, that those words appear in the context of the preceding words “whether arising out of her employment with the first defendant or its termination". There is therefore a context of a relationship to the employment and also the termination. I also bear in mind that the word "or" can often be read as "and/or" or something else similar to "and". Therefore, while it can well be said that the words used apply to simple future events, it can also be seen as a matter of language that the wording is referring to the future as linked to the past. This is given added force by the fact that the parties can be thought to have been intending to deal with inchoate claims and liabilities of the sorts which I have already mentioned.

118. There is also the sentence beginning, "For the avoidance of doubt". Mr Eardley says there would not be any need to preserve such claims or particularly claims for enforcing the terms of this agreement unless the clause was intended to cover matters arising out of future events unless specifically accepted. There is some force in that. On the other hand, the sentence itself seems odd, because it begins with the words, "For the avoidance of doubt" where it seems to me to be quite clear that some of the claims which are set out in that particular sentence would be covered by the release and settlement unless specifically excepted, and I am very unclear as to what the “doubts” which it is sought to be avoided actually are in relation to such matters as existing unknown personal injury claims (which would be within the compromise unless specifically excepted).

119. I also bear in mind that a settlement agreement provision and settlement does not affect any claims to enforce the terms of the settlement agreement and which renders it somewhat mysterious why it was thought necessary to specifically except such in the “For the avoidance of doubt” sentence. However, whilst they may be seen by a purist lawyer as being wholly unnecessary, words are very often included by parties as a matter of torrential drafting; and there are various warnings in the case law as to the dangers of a court considering that simply because many words have been used the parties are actually trying to do something with them additional to what would otherwise be the case.

120. I turn then to the commercial purpose of the agreement. The commercial purpose is obviously to settle existing disputes but it also has some purpose to looking to prevent

future disputes, a point which supports Mr Eardley's construction. On the other hand, the aim is to settle matters arising from the employment relationship itself. That seems to appear both with regards to the words used in clause 1 and from the analysis which *BCCI v Ali* requires me to engage in with regards to such clauses and for the reasons given in *BCCI v Ali* and which I have given earlier in this judgment.

121. In principle, it is difficult to see why, as Lord Bingham has said in *BCCI v Ali*, a settlement agreement of this nature is intended to extend to claims in libel, but all the more particularly as to why it should be intended and desired to extend to claims in libel in relation to defamatory statements being published which defamatory statements have not yet been published and indeed may not yet have been written.

122. However, I also have to take into account, albeit covered to an extent already, other matters which would be in the mind of the reasonable reader. Firstly, as set out in *BCCI v Ali*, parties are not normally taken to intend to give up claims at all but all the more so claims about which they have no knowledge, albeit that they may do so by sufficient words or sufficient context. It does seem to me at first sight distinctly odd and unusual that someone in the position of the claimant as a party to this agreement would be intending to give up a claim for a future libel which does not arise in any way from an existing publication but is simply a separate act which takes place at some point in the future at the choice of the defendant.

123. In the context of this agreement, I bear in mind that the agreement values the claimant's claims at £30,000. It seems at first sight distinctly odd that the claimant would be intending to settle any libel claim which might relate to a statement about what had happened during the employment simply for a fixed figure of £30,000. That is possible but seems at first sight to be something of the nature a very blank cheque.

124. Secondly, it would seem odd in a settlement agreement that somebody should settle claims without knowing or having any possibility of knowing what they are and simply not be knowing what they would be letting themselves in for.

125. Thirdly, all clause 7 can be seen to be a protection in terms of contract. At first sight, it is a rather odd protection for someone to be freely agreeing to as depriving them of

their other rights in circumstances: firstly, that the damages were altogether different and the contractual damages potentially inadequate in terms of compensation and vindication; secondly, where libel publication is something which is peculiarly difficult to stop in advance simply because you are unlikely to be told that the libel is proposed to be published; thirdly, where in terms of a claim being brought under the contract, even the truth of the comment is in one sense irrelevant, because what is simply being prohibited is the derogation occurring, while in libel truth can be extremely relevant, and, even though a judge is not necessarily going to determine truth, the defendant either has to put up a truth defence or shut up with the result that a judgment will record that truth has not been asserted if indeed that is the case.

126. Secondly, applying *BCCI v Ali* I have to be concerned as to what are the limitations of the context. Mr Eardley for the defendant says the limit is by reference to the employment relationship and this is sufficiently related to the employment relationship. However, firstly *BCCI v Ali* did not regard an ordinary settlement agreement even between an employer and employee as extending to libel or tort (see at least Lord Bingham). Secondly, this is not a libel which arises from the employment relationship in terms of a libel occurring within the workplace itself. The only connection with the employment relationship is that the libel is said to be a libel whose subject matter refers to the employment relationship and that that is its context.

127. It seems to me that while this libel might be said to relate to the employment relationship, it does not seem to me in any way to arise from the employment relationship. It is very much freestanding. It seems to me that this is exactly the sort of matter which Lord Bingham would regard as being outside the relevant context at least in terms of a libel only published in the future. As far as private information is concerned and misuse of private information in the future is concerned, it seems to me that is simply outside the context altogether. There is nothing in this agreement which it seems to me would indicate that the parties were in any way intending to provide the defendant with a blank cheque to use, or rather misuse, any private information which he had from the claimant.

128. Thirdly, I consider how the reasonable reader would see clause 7 and whether clause 7 would be seen by that reader as effectively providing for and setting out the entire

future rights and obligations relationship with regards to this aspect. I do not think that a reasonable reader would see clause 7 as having that sort of status. Firstly, it does not actually provide for any particular remedies. It simply places a contractual obligation on the claimant not to do certain things. Secondly, it is about derogatory comments. It is not about libels. They are generally derogatory, but there is not necessarily any precise overlap, and in any event it is not about defamation as such. Thirdly, it does not seem to me to be the sort of clause which is designed to deprive somebody of a claim, rather as a sort of clause which is designed to protect the claimant (and for that matter possibly also Weavabel, although I am not deciding that). As I say, it does not seem to me that it is a clause which is designed to deprive. It is a clause which is designed to protect, and it would seem odd if by protecting it had the incidental effect of depriving someone of a valuable remedy which would otherwise exist. Fifthly, as far as private information is concerned, it does not seem to me to be concerned with private information at all.

129. I have to balance all these matters in my own mind and stand back as I do as the reasonable reader and ask myself in those circumstances what the reasonable reader would see as the most likely construction, whether it is a clause which settles claims of this particular nature or whether it does not. My view is that a reasonable reader would not see it as a clause which bars claims of this nature arising from subsequent publications by the defendant.

130. I can see as to how Mr Eardley puts his argument, which he does in persuasive form. It seems to me that it is less persuasive than the contrary argument. I have taken into account all the matters which I have covered and have been advanced to me by counsel, including the words "may have" and "events occurring after" and the latter, at least, of which, are both words of futurity. But, in the light of the other matters, I do not see that they in the defendant's arguments have sufficient force. I bear in mind in particular that it seems to me that strong words are required to give up a future claim arising from future facts which have not yet occurred and which facts are wholly within the control of the defendant as to whether it decides to act or not. If somebody has expressly or by implicitly, that is by all the words used, conferred a right on another to act in a way which would otherwise be wrongful, then there it is. But there is no conferring of such a right. In fact, clause 7 goes in entirely the opposite direction.

131. Secondly, it seems to me that notwithstanding the words used, those words are not as clear and their ordinary meaning in their particular setting, as Mr Eardley submits. Thirdly, applying a limit of subject matter context, it seems to me that this is simply outside the subject matter context for the reasons which I have given. Fourthly, in relation to private information, it seems to me the point is even stronger again for the reasons given.

132. I therefore reject the defendant's construction on the first basis of these strikeout of summary judgment applications.

133. It does seem to me there is one exception to this though, and that is in relation to any publications which took place before the July 2017 agreement. It seems to me at first sight Mr Eardley's arguments are much stronger in relation to that. Notwithstanding what Lord Bingham says in *BCCI v Ali*, it seems to me that in the light of the particular allegations of sexual misconduct which the claimant was making that it does seem to me that looking at matters in terms of subject matter context an employer and someone in the defendant's position would probably be seen as being likely to have bandied about, to use a colloquialism, assertions that the claimant's allegations were unfounded and being made up. It seems to me that is the classic sort of matter which might arise in this particular context. It therefore seems to me that the contract could potentially cover such publications made before the agreement was entered into, that is to say July 2017, probably 27 July.

134. Whether that matters depends on the conclusion which I come to in relation to Mr Eardley's other applications, but it does seem to me that as far as libel is concerned that the settlement agreement does catch that but not in relation to subsequent publications included in material which did not then exist at the time, though it is possible that some of it did at that point. That however does not extend to misuse of private information, which it seems to me is something which is simply outwith the limits of this settlement agreement.

135. The second set of arguments advanced by Mr Eardley are with regards to limitation. It is accepted by the claimant that under section 4A of the 1980 Act the ordinary six-year time limits do not apply to a claim for libel or slander and that no such action should be

brought after the expiration of one year from the date on which the cause of action accrued. Thus, in relation to the admitted publications the vast majority of the claims are out of time, only those emanating from January 2020 publications being within time, possibly December 2019 if there were any.

136. The claimant however seeks to disapply the section 4A time limit by having the court exercise its discretion under section 32A of the 1980 Act, which I read generally into this judgment. It reads as follows:

"32A Discretionary exclusion of time limit for actions for defamation or malicious falsehood.

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
(a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.

(2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
(a) the length of, and the reasons for, the delay on the part of the plaintiff;
(b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A—
(i) the date on which any such facts did become known to him, and
(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
(c) the extent to which, having regard to the delay, relevant evidence is likely—
(i) to be unavailable, or

(ii) to be less cogent than if the action had been brought within the period mentioned in section 4A…

(4) In this section " the court " means the court in which the action has been brought."

137. There are a number of cases dealing with section 32A of the 1980 Act, in particular the decision of *Steedman v BBC* [2001] EWCA Civ 1534, cited in *Bewry v Reed* and then *Bewry v Reed* itself. Those are said by Mr Eardley in paragraph 21 of his skeleton argument to give rise to a number of principles, which principles are generally although not entirely accepted by Mr Reed, but which nonetheless I find in general to be the case: (1) the court must consider the respective prejudice to the claimant/defendant and the specific matters in section 32A(2) as well as all the other circumstances; (2) an exercise of the direction under section 32A is always highly prejudicial to a defendant; (3) the expiry of the limitation period is always in some degree prejudicial to a claimant; (4) the extent of the prejudice depends on the strength or otherwise of the claim or defence, although the court should not make any determination of the merits; (5) if a delay as the fault of the claimant's solicitor, the fact the claimant may have a claim against the solicitor is relevant to assessing the prejudice to the claimant in refusing to disapply limitation, although a claimant in that situation could still suffer some prejudice albeit maybe perhaps minor; (6) the fact that the delay alone may not have had great impact on the defendant's ability to defend the claim is relevant but not decisive except where the limitation defence is a complete windfall; (7) a disapplication of the limitation period is exceptional because of the strong public policy considerations that require a claimant to pursue their claim with vigour; (8) the onus is on the claimant to make out the case for disapplication; the claimant who does not pursue their claim vigorously and then places vague or unsatisfactory evidence before the court for the reasons for the delay is unlikely to persuade the court that it is equitable to grant any or all their request; (9) it will be unreasonable to delay for the purposes of engaging in correspondence once the defendant has made it clear they are not accepting liability; (10) all the claimant's conduct from the point at which they became aware they may have a claim falls to be considered and which includes delay between issuing proceedings and making a section 32A application.

138. As I said, Mr Reed accepted most though perhaps not all of these. It does however seem to me that in general those propositions are made out on the case law. With regards to the question of delay in terms of making a section 32A application, I do note, as I have already recorded, that Kingsley Napley took the approach that section 32A could be raised by a reply. In one sense, that stance is understandable since that is an approach which is certainly adopted in relation to the somewhat parallel discretionary extension provisions at section 33 of the Limitation Act 1980. On the other hand, as far as section 32A is concerned, it seems to me to be the case that such an application should generally be made by application itself at an earlier stage as is appropriate, and that that is the approach taken by the Court of Appeal in the *Bewry* decision, to which authority I now come.

139. That was a decision of the Court of Appeal which can be regarded as being a strong decision, because notwithstanding that it was held that section 32A is a matter of discretion, the Court of Appeal held that on the full consideration of the matters before it that discretion had been wrongly exercised by the judge below in disapplying the time-limit and the exercise should be set aside. The Court of Appeal re-exercised the discretion in favour of upholding the section 4A time period.

140. Sharp LJ in the leading judgment in paragraph 4 read into the judgment section 32A as I have done in relation to this judgment. In paragraph 5, she referred to the fact that, "The discretion to disapply is a wide one and largely unfettered" referring *Steedman*, but then went on to say that:

> "However it is clear that special considerations apply to libel actions which are relevant to the exercise of this discretion. In particular, the purpose of a libel action is vindication of a claimant's reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications."

I bear in mind that this is not a media publication in this case.

> "These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why

> the disapplication of the limitation period in libel actions is often described as exceptional."

I bear in mind all that is said there about the nature of the discretion and the uniquely short limitation period.

141. In paragraph 6, she goes on to refer to *Steedman* itself and to a passage in a judgment of Brooke LJ where it was said, "it would be wrong to read into section 32A, words that are not there." However:

> "the [very] strong policy considerations underlying modern defamation practice which are now powerfully underlined by the terms of the new Pre-action Protocol for Defamation, tend to influence an interpretation of section 32A which entitles the court to take into account all the considerations set out in this judgment when it has regard to all the circumstances of the case."

142. I have not actually been taken by counsel to *Steedman* as such, although I have been taken to the modern pre-action protocol for defamation for MAC cases, which includes defamation. Sharp LJ went on in paragraph 7 to refer to the old protocol and its paragraph 1.4 which stated:

> "there are important features which distinguish defamation claims from other areas of civil litigation … in particular, time is always 'of the essence' in defamation claims; the limitation period is (uniquely) only one year and almost invariably a claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation."

143. Something very similar exists in the existing MAC protocol. Although Mr Reed in this regard relied on the present protocol, as I will come to, in terms of supporting his application in various ways and refers to the fact that Sharp LJ referred to the then protocol as being relevant in terms of section 32A applications, I do bear in mind the passage that she was citing from was a passage which emphasised the need for the claimant to progress matters very expeditiously, although she was also referring to the fact that the claimant needs to produce evidence to justify any period of delay.

144. She went on to refer to that again in paragraph 8 where she said,

> "The onus is on the claimant to make out a case for disapplication … Unexplained or inadequately explained delay deprives the court of the material it needs to determine the reasons for the delay and to arrive at a conclusion that is fair to both sides in the litigation. A claimant who does not 'get on with it' and provides vague and unsatisfactory evidence to explain his or her delay, or place[s] as little information before the court when inviting a section 32A discretion to be exercised in their favour … should not be surprised if the court is unwilling to find that it is equitable to grant them their request.'"

145. Her Ladyship then went on to consider the particular facts of the case. In paragraph 60, she referred to the fact that in that case the claim was not commenced until two years and four months after the words complained of were first published and some 11 months after the claimant had knowledge of all the facts necessary to bring a claim against both defendants. I note that in this case, a claim was brought in a similar period after many of the various publications and again 11 months after the claimant had discovered the facts, albeit it only as a result of the communication from solicitors who were not then acting for her and at a point in time when she was not at her usual home but working in Nigeria.

146. In paragraph 22 of the judgment, Sharp LJ referred to the fact that the application in that case to disapply the limitation period had only been made seven months after the proceedings were issued and shortly before a hearing of an application made by the defendant on *Jameel* grounds to strike out the case. In this particular case, the application was made some three and a half months after the issue of the proceedings, albeit that period included the Christmas and New Year period.

147. In paragraph 25, Sharp LJ referred to the fact that the defendant had contended that there had been serious and unexplained delay which was excessive in the context of a limitation period of one year in relation to a libel claim where special conditions applied, and the reasons given for the delay were vague and manifestly inadequate and certainly not of a sufficiently precise or compelling nature to discharge the heavy onus on the claimant as applicant under section 32A or to justify the judge's exercise of such an exceptional discretion.

148. Although Sharp LJ was there recording the defendant's contentions, in paragraph 26 she said that in her judgment the defendant's arguments were well founded. In paragraph 27 she said,

> "There was no dispute that the period of delay overall was substantial as the judge said. The question was why it had occurred. The first fifteen months were obviously accounted for by the fact that the claimant did not know about [the relevant publication] … What was … controversial, is why there was a substantial delay after that."

She was thus clearly regarding 11 months delay as being substantial.

149. In paragraph 28, she referred to the judge's conclusion that the delay had been justified because the claimant was seeking to resolve matters through negotiation, and in paragraph 29 her finding was that what the claimant was not really trying to do was to resolve by negotiation but rather the claimant was seeking something else peripheral, namely an investigation to be carried out. That is not a feature which exists as such in this particular case.

150. In paragraph 30, she referred to the fact that by July 2012, that is to say seven months before being issued with the proceedings in the *Bewry* case, the defendant there had been saying that they had taken all reasonable steps and were not going to take any further steps in establishing what had happened. By that stage at the latest, the claimant knew he would need to sue to progress his claim but he did not then do so. She regarded as being relevant, where there had been a negotiation process, the point by which the claimant knew they would have to sue in order to obtain the redress which they sought, and thus the particular delay after that point.

151. In paragraph 34, Sharp LJ dealt with contentions which had been made that the claimant, being a litigant in person, did not know about the short limitation period. In paragraph 36, she upheld a submission from the defendant that this was simply not relevant, the underlying point being that somebody who wished to take proceedings to defend or vindicate their reputation is, as a matter of law imposed by virtue of the short limitation period, under a duty to very actively progress their claim.

152. In paragraph 38, Sharp LJ referred to the fact that the judge below had made no reference to the delay between the issue of the relevant claim form and the making of the application for the section 32A discretion to be exercised. She said that the delay that occurred after the proceedings were issued was significant in her judgment.

153. It seems to me that she was laying down that there is a duty in effect upon the claimant not only to bring the proceedings promptly but also to issue the section 32A application promptly, although in that particular case that second delay was some six and a half months whereas it is only some three and a half months or slightly less in this particular case.

154. In paragraph 40, she stated her conclusion:

> "Looking at the matter afresh, and considering the balance of prejudice that arises from the loss by the defendants of their limitation defence, and the loss by the claimant of the time-barred parts of his claim, I do not think the claimant has made out a case for the disapplication of the limitation period in relation to his claim. We are now four years on from the initial publications, and the claimant has failed to provide any or persuasive evidence of the reasons for the delay between February 2012 and September 2013."

That is between first knowing of the claim and making the section 32A application.

> "This is not a case in my judgment, where the prejudice to the defendant from the loss of the limitation defence is so fortuitous that it is balanced out of existence, by prejudice to the claimant in losing a claim which the defendant ought in justice and fairness to meet."

She therefore concluded that she would not grant the application.

155. It seems to me that paragraph is of value in terms of stressing that it is for the claimant to make out the case, but the balance of prejudice has to be considered as indeed the section requires. The periods of time from the initial publications are themselves relevant, but in particular the court is looking at the justifications or the delay between the initial learning of the allegedly defamatory publications and the making of the section 32A application.

156. As I have said, the claimant relies on the pre-action protocol itself. The pre-action protocol is itself made under the general Practice Direction on pre-action protocols. I do bear in mind that although the Practice Direction provides that the purposes of protocols as set out in paragraph 3 of the Practice Direction are to enable the matter to be investigated with parties being able to understand each other's positions and consider forms of alternative dispute resolution; paragraph 17 of the general Practice Direction, makes quite clear that the Practice Direction and pre-action protocols do not alter statutory time limits for starting court proceedings; and that an appropriate way to do to deal with limitation is to issue proceedings and then seek to obtain some sort of stay or equivalent once they have been formally brought, if it is said that some pre-action protocol equivalent process should be undergone.

157. I have however also been taken to the MAC pre-action protocol itself, which in paragraph 1.4 contains something very similar to the limitation references which I have cited from Sharp LJ's judgment in *Bewry*. On the other hand, as Mr Reed has drawn my attention to, section 3 of the protocol makes very clear that generally in defamation cases there should be an exchange of pre-action letters of claim and letters of response. In paragraph 3.8, it is stated that court proceedings should be viewed as a last resort with alternative dispute resolution having been carefully considered. In paragraph 3.11, it envisages that there should be not only that procedure followed but the parties should take a stocktake after having followed it before they decide to issue proceedings. However, this is all of course potentially in the context of a claim where the initial primary one year is still running, and therefore there is time even under the primary limitation period for such steps to be taken.

158. The claimant submits in outline firstly that she only knew about the relevant publications in January 2021; secondly, she was then abroad having to very much read into and up on the matter in relation to events which had taken place in the past; that instructing solicitors takes time; that she regarded herself as being under some sort of obligation to engage with what the pre-action protocol set out and indeed she did so doing all that she could in the spirit of the protocol to seek to resolve matters; that she did in fact obtain substantial movement from the defendant and indeed at points in time seemed to be obtaining more movement on the question of damages that in fact the defendant was actually intending to convey; that she considered a sensible

cost-effective approach of joinder, which was frustrated by the listing delays within the court notwithstanding the court's active engagement; that the defendant, who had created these problems to start with, knew perfectly well what they were all about and could have carried out any investigations of his own if he wished to do so; and that the contractual remedies are simply inadequate in libel terms.

159. The defendant submits that there are lengthy and unexplained delays and that where delays are explained the explanations are simply not sufficient; that this is an exceptional jurisdiction where the claimant has to justify delays, and should have got on with matters and has simply not done so either at all or in a sufficient extent; that the claimant decided to take her own course in effectively seeking to litigate by correspondence in circumstances where she knew perfectly well from the start that the defendant would be relying on limitation; and that the issuing of a claim form making a section 32A application was not only unjustifiably and inexplicably delayed through spring 2020, it was then delayed through summer 2020, it was then delayed through autumn 2020, and even when the claim form had been issued making the application was still delayed until well into spring 2021. The defendant further submits that there is potential for prejudice in terms of factual matters and that the claimant, if she has a remedy, has a remedy against her own solicitors.

160. In terms of discussion and further analysis, I have to look at the particular words of section 32A itself. I bear in mind the question is whether or not it appears to the court that it would be equitable to allow the matter to proceed but that this is in all the context and through the lens of *Bewry*. This is in effect a matter of evaluation but the obligation is very much on the claimant to get on with matters.

161. Subsection 2 requires me to have regard to all the circumstances of the case. Subsection 2(a) is the length of and reasons for the delay on the part of the claimant. The claimant says that as far as up to January 2020 is explained, it seems to me correctly, by her simply not knowing as to what had occurred. As far as January to April is concerned, that is only explained on the evidence before me by her being abroad in a general need to instruct solicitors. As far as April to August is concerned, that is explained on the basis of seeking admissions and remedies from the defendant. As far as August to November is concerned, that is explained by listing delays and

pursuing the joinder route. As far as November to December is concerned up to the issue of the claim form, I cannot see that there is any particular explanation given at all. As far as December to March is concerned in section 32A terms, I do not see any explanation as being proffered apart from the fact that it was envisaged that perhaps a reply would be the appropriate course rather than application.

162. I do note this overall delay to issue is 11 months with another three and a half months thereafter. As far as the first period is concerned, it is similar to what happened in *Bewry*, the second period being substantial but not as long as in *Bewry*.

163. Subsection (b) of section 32A(2), where the reason or one of the reasons for the delay was that the facts relevant to the cause of action did not become known to the plaintiff under after the end of the section 4A period, which is the case here, requires me to consider (1) the date on which any such facts did become known, and it seems to me that they essentially became known in January 2020 even though they may have been subsequently clarified to a degree; and (2) the extent to which the claimant acted promptly and reasonably once they knew whether or not the facts in question might be capable of giving rise to an action.

164. Promptness depends on context as to its meaning, but promptness in this particular context is one of urgency and getting on with, as has been made perfectly clear by the *Bewry* decision. Reasonableness may bring in such matters as the pre-action protocol, but that is subject to the fact that limitation and the fact that the protocol does not disapply limitation, is made clear both in the Practice Direction itself, at paragraph 1.4 of the protocol itself but also in the *Bewry* decision.

165. It seems to me that from all that, once it is clear that there is a dispute which is going to have litigation or is going to require litigation being brought if you (the claimant) want to have a result in your favour, then you need to get on with that matter urgently in order to be acting reasonably.

166. I therefore turn to the particular periods. The first one is January to April 2020, the only explanations being that the claimant was abroad and needed to instruct solicitors.

It seems to me there is force from Mr Eardley's submission that there is no explanation of what was passing at this point in time.

167. I accept that the claimant is a litigant in person, but there is on any basis if one regards there is a need to vindicate one's reputation, a need as a matter of law from the matters which I have identified, to get on with it. I can see that a delay of one month in the circumstances would be perfectly understandable, but where Kingsley Napley were already acting and appeared to be, as they obviously have been, keen to co-operate with the claimant and act for her, notwithstanding that they are also acting for Weavabel, in the absence of any explanation as to difficulties or as to a statement as to what actually happened, it does seem to me that this is *Steedman* situation, where an explanation for continuing delay ought to be given if there was one, and that there seems to be at least some measure of lack of promptness and delay then.

168. There is then the period from April to the beginning of August and the various correspondence which I have identified. Here, there is, it does seem to me, some force in what the claimant says that she was seeking to engage in the process set out by the protocol and that the defendant seemed to be failing to engage with all the issues. On the other hand, I have to balance that against the urgency required by the litigation context as set out in *Bewry* and also the fact that the defendant had made very clear throughout that limitation points were going to be taken, thus requiring the claimant to be astute to make sure that she was acting promptly and reasonably.

169. Also, it seems to me to be perfectly clear throughout that, subject to one point I will come on to, the real issue between the parties is now and always has been as to whether or not the claimant will pay damages based on a libel assessment as opposed to damages based on merely a contractual assessment, and where damages on a libel assessment also involve considering what the relevant meaning is.

170. It seems to me that damages have always been the real issue, the question as to precisely what undertakings were to be provided being much more a matter of detail. However, the question of what was the true meaning of the published material was relevant to this. Although I am not deciding the question of meaning at this particular point or whether the actual right meaning is defamatory, the nature of the true meaning

could give rise to a potential major difference in damages. That at least is the matter which is key to the claimant and, on her meaning, she is potentially entitled to substantial damages, subject to other matters which the defendants would raise, as long as she can obtain them on a libel basis. However, on a contractual basis, and whatever the true meaning, the claimant faces the very real question as to whether contract law admits to such damages at all.

171. In circumstances where the question of damages is the real issue, it seems to me that it is difficult for the claimant to say that she is acting reasonably in not going down the court route in circumstances where the defendant is simply saying, "I am not paying you damages assessed on the libel basis."

172. I do have to balance against that though that while some of the letters from the defendant are clear in saying, "I am not going to do so" others of the letters are ambiguous, as I have recited whilst going through them. It does seem to me that at some points in time the defendant was being unclear, both as to what types (or bases of assessment) of damages were being proffered and what meaning was being accepted, and indeed leading the claimant to at least go down the wrong path during this period.

173. Therefore, it seems to me that while some criticism can be made of the claimant during this period, and this factors into questions of promptness, that one can see as to how the claimant could be said to have been acting reasonably. One then however comes on to the August to November 2020 period, the period of time during which the claimant was seeking joinder knowing and accepting that if she was to pursue that claim for substantial damages on a libel basis it would have to be in court rather than simply by negotiation.

174. The claimant seeks to blame this period of time on the court's delays in terms of listing. I do not see that as being a reasonable approach for two sets of reasons: firstly, as far as the court was concerned, this was not a delay in terms of the court failing to seek to co-operate and that the courts staff and indeed Master McCloud were doing their best in corresponding rather than remaining silent. Second, that otherwise this was simply a set of delays which were and are inherent within the court system and which should be known to persons such as the claimant (and her lawyers) as delays inherent within the

court system, delays which sometimes can be overcome and sometimes which cannot and which were, obviously, then exacerbated by the then COVID pandemic (and notwithstanding this division of the High Court has indeed very much managed to keep up to date).

175. It seems to me that the claimant was clearly taking a risk by pursuing the joinder route; that it was obvious that the application would take some considerable time before it could be listed, and all the more so where the claimant it seems to me clearly knew throughout that as far as joinder of defamation and misuse of private information claims were concerned, those were going to be resisted by the defendant.

176. Even more importantly, it seems to me that the claimant's going down the joinder route was misconceived, both as a question of reasonableness but also perhaps more importantly and even less disputably, in terms of promptness. The joinder application, if fully pursued, was obviously going to be seriously resisted, and it seems to me that it was going to be seriously resisted and, even if successful, be insufficient in itself on two particular bases. Firstly, if a joinder did take place, it would not obviate the need for a section 32A application. Section 35 of the Limitation Act may provide for relation back in relation to the claims being advanced by the party joining. But even if that is the case, it could only relate back to the date of issue of the Weavabel claim form. That was in January 2020. One year back from January 2020 is January 2019. The vast majority of the admitted publications were before then.

177. It seems to me that the section 32A application would still be required but was not in any way claimed within the joinder application. Thus, the key point being when the section 32A application was made, according to *Bewry*, the time was still running. The application simply was not being made and it is difficult to see as to precisely how it could be made in the particular situation of a joinder application. It does not seem to me that a joinder application is remotely appropriate to achieve the promptness that section 32A requires me to consider.

178. Secondly, I am not at all convinced that a joinder application is an appropriate way of dealing with an attempt to make claims even if they would be in time if relation back occurred. That gives rise to at best, as far as the claimant is concerned, very difficult

questions as to whether it is appropriate to allow somebody to join somebody else's action in order to bring in matters which are claims, namely in defamation and misuse of private information, which that other person cannot make simply because they arise out of similar facts to those already relied on by that other person.

179. At first sight, it seems to me that claim would be unlikely to work in law, but at best it is highly complex and likely to result in substantial delay, where the simple solution is simply to issue one's own claim form together with an application notice seeking to rely on section 32A (and then, if appropriate, seek to have the two claims managed together).

180. Even if that was not all correct, what of course actually happened was that the claimant did not pursue those particular applications but instead abandoned them with the result that section 32A is now being dealt with by me in May rather than at such a listing that could have taken place back in February 2021. I strongly suspect that they were abandoned precisely because the claimant came to the conclusion they would not work, but in any event they simply have been abandoned. The claimant has not proceeded down that particular route and there has been yet more delay. As far as I can see, this is simply neither acting reasonably, nor even more importantly, promptly.

181. I would add that I simply cannot see at the moment -- although this is a matter potentially for further submission in front of me -- as to why the relevant matters cannot necessarily be heard together or as to what the advantage or particular advantages of joinder would have been.

182. There is also the November to December delay between the abandonment of the joinder approach and the issue of the claim form. At the moment, it seems to me there is no explanation for that period of delay at all, even though it is only somewhere in the region of a month or a month and a half.

183. There is then the delay between December and March 2021. It is true that the claimant can say that this was all going to always arise as a result of the defendant's own application to strike out, but even that was only made in February, which was some considerable time after the issue of the claim form. It seems to me that *Bewry* regards

this period of being of distinct importance. *Bewry* does not regard the approach of not raising section 32A by way of application but by simply in a reply as being appropriate. It seems to me this is again a further lack of promptness and unreasonable delay.

184. I also there have to bear in mind under section 32A(2)(c) the extent to which, having regard to the delay, relevant evidence is likely to be unavailable or to be less cogent if the action had been brought within time. Bearing in mind that the claimant only learnt of the matter in January 2020, it seems to me that I am most concerned with the period of delays following that and the potential effect on the evidence. It does seem to me that there is some risk here that the evidence will be less cogent as a result of the subsequent delay. I bear in mind that the real issues here are with regards to damages, although in the context of whatever are the actual meanings of the matters of which complaint is made.

185. In order to consider damages, the question of extent of publication and to whom the material has been published does seem to me to be relevant. It is relevant for such matters as to whether or not the relevant people would have had any relationship or knowledge of the claimant. It also involves questions as to whether or not the relevant people would already, for reasons of their other reasons, have had no interest in the claimant or alternatively were singularly prejudiced against the claimant already. There are some dangers in this, because the extent to which that is relevant in terms of assessment of damages is limited. On the other hand, it is relevant to such matters as to whether or not serious harm is caused or is likely to be caused by any particular publication.

186. The defendant's evidence is that his ability to contact the relevant individuals may have diminished, his ability to say as to whether or not a publication was made to a particular individual in terms of what terms is diminished, that it is not only his own memory which may be affected in circumstances where he says he has difficulties with technology but also the memories of others, including as to whether or not they would say that relevant material had actually been published to them or read by them may also be affected by the period of time.

187. What also is relevant, which may be affected, is the claimant's allegation that those publishees would have republished to others. The question as to whether or not that can be established or should be inferred will again be affected it seems to me by the passage of time, where if that case is being advanced, which it is in the claimant's particulars of claim, there will be potential further difficulties in contacting those persons and witnesses after the passage of time and memories may have faded and documents may have been lost. This is all peculiarly fact-sensitive. I am unable to particularly investigate the matter, but it does seem to me that there is potential for prejudice, and I can only work off inherent probability.

188. I come back in the context of all of this to section 32A and the essential question, is it equitable to disapply having regard to the relevant degrees of prejudice. As far as prejudice is concerned, there is potential substantial prejudice to the claimant in terms of the loss in particular of a substantial damages remedy but also of certain opportunities of public vindication albeit that she may have a remedy against her lawyers.

189. I do have to bear that in mind, although the claimant has a certain degree of vindication in any event both by the admissions that if the claimant's meaning is correct that it is both defamatory and, which seems to me to be important, false. Secondly, that if the claim does proceed then the matter of meaning is likely to be determined, which I will come back to in due course, but I do consider that in the light of my eventual conclusion on that aspect.

190. I have to balance that against prejudice to the defendant. As *Bewry* makes the point clear, the defendant's prejudice in terms of losing an accrued limitation right is important, and I bear in mind that limitation is actually a right. It is not simply a windfall in the sense of avoiding a liability, although I do have to balance against that, as *Bewry* makes clear, the relevant strength or weakness of the case, and where at first sight the claimant’s case at least in terms of her meaning being something which is likely to cause her serious harm, has force, as I will turn to later.

191. I have balanced all these matters together. I bear in mind under paragraph 40 of *Bewry* that I have to have regard to all of the circumstances, and I do, and to ask myself, is it

equitable to disapply this particular limitation period in this case to allow the claimant to seek libel remedies not available in the contract claim? I have come to the conclusion that it is not so equitable, or rather that the claimant has not sufficiently satisfied me that it is so equitable.

192. I bear in mind everything that I have covered but especially that firstly, the claimant has known early on that the defendant is taking a limitation point, and secondly, that the claimant has been guilty in my view of substantial delays which are either unexplained or unreasonable, or where even though they have some justification they have involved taking real risks and placing the claimant under a further effective obligation to act speedily and promptly.

193. I have come to the conclusion that in the light of the overall delays, the claimant has not acted promptly and to a degree has not acted reasonably. I have also come to a conclusion that there is real potential for prejudice to the defendant in terms of evidential matters.

194. Section 32A is an exceptional jurisdiction which requires good justification, and it seems to me that this case simply does not have that. This is case is not entirely on all fours with *Bewry* but it is close to it in various respects, including the various delays. Having re-read paragraph 40 of the *Bewry* judgment, it seems to me that applying that paragraph the claimant has simply not made out the case for the exercise of this exceptional discretion.

195. I do note that the claimant will still be in a position, subject to what else I have to decide, to rely on later publications, but it seems to me that the mere fact that she will then again be raising the questions of meaning and defamation is not a reason for disapplying the limitation period with regards to the past. It was not in *Bewry*, therefore I do not see why it should be here.

196. I therefore do not disapply under section 32A. It follows in those circumstances the claims in defamation in the previous publications are going to fail and that they are either therefore an abuse or there are no reasonable grounds for them. I cannot see any compelling reason for the trial of them and both generally and especially where the

claimant has other remedies being sought available in the contract claim, and therefore I will strike them out insofar as a defamation case is based on them and also grant reverse summary judgment.

197. I can take the other two issues much more shortly. The third issue is whether or not what is left is sufficient to amount to serious harm for the purposes of section 1 of the 2013 Act, which requires the publications to have caused serious harm or to be capable of causing serious harm for them to be defamatory. I bear in mind that this is simply a summary judgment matter: does the claimant have real prospects of success? I think the claimant does have real prospects of success of showing that the statements have caused or are likely to cause serious harm.

198. Firstly, one starts on the basis that if the claimant's meaning is the correct one, which appears to me to be arguable but I have not yet decided, then the defendant accepts as admitted the statements are defamatory. That seems to me to include some sort of admission that the statements are of the potential to cause real harm, although in any event it seems to me that is relatively obviously correct for all the reasons which I gave earlier. They are very serious imputations and suggest that they may very well damage the claimant in the eyes of a reader.[1]

199. The defendant however says that if the only publications which could be relied on are to Ms Glasner and Lawrie Weremouth then they are people who simply have obviously no care whatsoever about the claimant's reputation, and therefore no harm will be caused. As against that seem to me to be a number of matters. Firstly, I only have the defendant's version as to what actually has been published and the defendant's version as to who those two individuals are and what they might think. I do not think that the possibility of material emerging on disclosure or investigation is so speculative as to amount to mere "Micawberism". Secondly, I have no evidence from them at all either as to whether they have republished or as to their view or lack of view of the claimant. Thirdly, the mere fact that they may think little of the claimant does not necessarily mean the claimant has not suffered serious harm. They may think even less of the claimant. They may be confirmed in a view which might otherwise have been an

[1] I refer to this aspect further in my subsequent oral judgments giving expanded reasons on Jameel and in relation to refusing permission to appeal.

ambiguous one. Fourthly, the claimant pleads republication. Ms Glasner may have republished for all that I know. It does not seem to me that the case has reached a position where one can say that it is clear that she has not and I do not think that the possibility of material emerging on disclosure or investigation is so speculative as to amount to mere "Micawberism". Fifthly, the defendant thinks Mr Weremouth will have republished at least to persons within the Plymouth Brethren Church organisation. The defendant says this does not matter because Mr Weremouth and those persons would be seeking to use the material against the defendant. That however is itself a matter of evidence, but even so those within the Brethren Church to whom republication may have taken place may eventually come to the conclusion that they believe the defendant or that they disbelieve the defendant as to what happened. They may well be left with the view at the end of the day that in some way the claimant was herself either a deceiver or at fault. This is all a matter for evidence. It is a matter for disclosure and witness statements. It is in any event a matter it seems to me where the claimant can properly say it requires and deserves investigation before the court comes to conclusions, which is not merely a matter of Micawberism. I do not think this is a case where the claimant has no real prospects of success on this point. [2]

200. There is also the point that the claimant is seeking injunctions to prevent further publication. At the moment, I cannot see as to why the usual rules against further publication injunctions should necessarily apply here. If I or another judge comes to the conclusion that the claimant's meaning is correct, then it is accepted both that it is defamatory and that it is false. In those circumstances, the usual reasons against *quia timet* injunctions may well not apply. Therefore, it seems to me that the claimant is in position where she may well be entitled to that particular remedy in defamation law. It therefore seems to me for all those reasons that I should not grant summary judgment or strike out on that basis.

201. The fourth issue which is raised by the defendant is as to whether or not this is a *Jameel* case of abuse of process, both in relation to such defamation claims as remain and with regards to misuse of private information. I have been taken to the decision of *Citation v Ellis Whittam* [2012] EWHC 549 at paragraphs 22 to 34. That was a case of

[2] I again refer to this aspect further in my subsequent oral judgments giving expanded reasons on Jameel and in relation to refusing permission to appeal.

a mild copyright infringement where the court came to the conclusion that undertakings had been offered which dealt with any problem for the future, and when asking itself the *Jameel* question of "is the game worth a candle?" in other words, does continuing the case justify the resource which would be put into it, came to the conclusion at paragraph 32 that there was no apparent damage at all and therefore there was simply no point in continuance.

202. Mr Eardley submits to me that this is the same sort of case, bearing in mind what remains. First, it is said in relation to defamation that the damage is simply trivial and there is simply nothing in reality in citation terms. For the reasons I have already given, I do not see that as being the case. I also conclude that there is a possibility or real prospects that I have already concluded of serious harm being sustained. It does not seem to me that I am in any way in a position to say that the damage is obviously trivial. It all depends.

203. As far as misuse of private information is concerned, Mr Eardley submits the relevant private information relating to previous matters within the claimant's history is relatively trivial and that damages would not flow from it. It seems to me to be inappropriate to go into this judgment, which is a public judgment, into what the private information actually is, but it does not seem to me that it necessarily follows, having considered it, that any damages awarded would necessarily be trivial. It seems to me that once the private information is of a category which attracts obligations of privacy in its own right and article 8, which the defendant effectively accepts is potentially the case, then it has the potential for damages to be awarded. I bear in mind that there is no limitation bar in relation to this aspect of the claim and that the private information has been circulated to at least 38 recipients, some of which recipients may have knowledge of the claimant.

204. It seems to me that this is all peculiarly fact-sensitive. To come to the conclusion that there is simply nothing which could justify a damages award seems to me to be going far too far, far too soon. I can go into this in more detail if Mr Eardley insists on some confidential judgment,[3] but it does seem to me that there are real prospects of success

[3] Mr Eardley did so insist and so I gave a judgment which expanded on my reasoning in this judgment and extends also to Jameel (and in consequence also serious harm) aspects in relation to defamation.

of obtaining some real damages award and that this simply, at this point, has not come within the *Jameel* process jurisdiction. It does not mean that it might not do so in the future, but at this particular point I do not come to the conclusion that the claimant has no real prospect of success or that the claim is sufficiently clearly an abuse of process on this particular basis.

205. The conclusion which arises from all of this rather lengthy judgment, but where at least I have been able to deliver it this afternoon, is that effectively the claims in defamation in publications more than one year from the date of issue of the claim form are struck out and reverse summary judgment given in relation to them. The rest of the claim stands.

Approved.  6.8.2021

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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