Neutral Citation Number: [2021] EWHC 3433 (QB)

Case No: QB-2020-004692

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2021

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

Between :

(1) ANAR MAHMUDOV
(2) NARGIZ MAHMUDOVA

Claimants

- and –

(1) MARIA LUISA GONI SANZBERRO
(2) EDITORA BALEAR S.A.
(3) DIARIO CORDOBA S.A.U.
(4) EL PERIODICO DE CATALUNYA S.L.U.
(5) EDICIONS INTERCOMARCALS S.A.
(6) LA OPINION DE LA CORUNA S.L.U.

Defendants

- -

Mr Justin Rushbrooke QC and **Mr Julian Santos** (instructed by **Discreet Law LLP**) for the **Claimants**
Mr Greg Callus (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendants**

Hearing date: 18th November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2pm on 17th December 2021.

Mrs Justice Collins Rice :

Introduction

1. The Claimants are the son and daughter of Eldar Mahmudov, former head of national security in Azerbaijan. The second to sixth Defendants are publishers domiciled in Spain, all subsidiaries of a single holding company, and owners of Spanish, Galician and Catalan language newspapers and websites. The Claimants wish to bring defamation proceedings over an article they published, by-lined by the first Defendant. It has to do with allegations about the origins of the family's wealth. The Claimants seek global damages and injunctive relief.

2. This, however, is the Defendants' application under CPR 11, contesting the High Court's jurisdiction to determine the claim and/or provide the remedies sought.

3. The challenge raises a disputed question of law, involving the fit between EU-origin and English law. The claim was brought on the last possible date on which, post-Brexit, it could raise such a question, so the legal dispute has limited wider application. But underlying the contest of law is a contest of two mainstream policies embodied in modern defamation law: on the one hand, the need for the law to keep up with the borderless realities of the internet, and on the other the need for international libel to be dealt with by the courts best able *fairly* to do so (or, to put it less neutrally, to prevent 'libel tourism').

Identifying the jurisdictional question

(i) EU-derived jurisdiction law: the BRR and the *Shevill* Rule

4. The starting point is EU Regulation 1215/2012 – the 'Brussels Recast Regulation' or BRR (and its predecessor texts). Its general rule is set out in Article 4.1:

> Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the Courts of that Member State.

The default rule, in other words, is that legal claims must be brought against defendants in their own country. All the Defendants in this case are domiciled in Spain.

5. But the BRR also provides for instances of 'special jurisdiction'. They include this, by Article 7(2):

> A person domiciled in a Member State may be sued in another Member State – in matters relating to tort, delict, or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

So an action for defamation (the tort of libel) may be brought in the High Court against a defendant domiciled in Spain if the 'harmful event' occurred in England and Wales.

6. The BRR's recitals explain further:

> The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
>
> In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action, or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

7. According to EU law principles of interpretation, the instances of special jurisdiction, being exceptions to the general rule, are to be construed narrowly. The Court of Justice of the European Union (CJEU) set out further guidance in a series of landmark defamation cases.

8. The CJEU had noted in *Handelskwekerij GJ Bier BV & Stichting Reinwater v Mines de Potasse d'Alsace SA [1979] ECC 206* that the 'harmful event' had two aspects: the 'event giving rise to the damage' and the occurrence of the damage – in other words, cause and effect. In a defamation case, that meant respectively the (first) publication of a libel, and the libel being read and the reputational harm resulting. In pre-internet times it all usually happened in one and the same country.

9. But the CJEU in *Shevill & Ors v Presse Alliance SA [1995]2 AC 18* had already noted that the 'place where the harmful event occurred' is hard to interpret in situations where the 'place of the event giving rise to the damage' and the 'place where the damage occurs' – cause and effect – are not in the same single country. It resolved the problem by focusing on what the BRR says about the 'particularly close connecting factor' between the action and the court, and 'the sound administration of justice and the effective conduct of proceedings', being the reasons for the special jurisdiction. It concluded:

> In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.

10. What became known as the *Shevill* Rule stated that claimants had a choice. They could *either* proceed against defendants where the latter are domiciled, for *global* remedies for all the harm caused; *or* they could proceed in any or all countries where there is actionable publication – a tort committed – for the harm caused by *that* completed tort in *that* country. If the latter choice was taken, it was the national law of that country which determined whether there was a completed tort and if so what could be recovered there. So a claimant had two routes to global remedies: the general jurisdiction based on defendant's domicile, or (if *all* of the 'harmful event' did not happen in a different single country) a cumulative mosaic of actions in different countries relying on the special jurisdiction. The latter might or might not be preferable to claimants depending on local defamation laws.

11. When *Shevill* returned from the CJEU to the UK courts, the House of Lords took the opportunity to reaffirm that what constituted the 'harmful event' was to be determined by the national court applying its own substantive law. In other words, the preliminary jurisdictional question for the High Court in a libel case brought against a non-domiciled defendant was whether a claimant could show to the requisite standard that all the components of a tort *actionable in the UK* were present (*Shevill v Presse Alliance (No.2) [1996] AC 959*).

12. The position was further clarified in *Marinari v Lloyds Bank [1996] QB 217*. There the CJEU held that the *Shevill* Rule did not extend the special jurisdiction to each and every place where *any* adverse consequence of the libel could be felt. It did not, in particular, include a country where a claimant had suffered financial loss *consequential* to damage arising elsewhere. The special jurisdiction in defamation, in other words, was limited to places where *direct* reputational damage caused by reading the libel occurred.

(ii) The internet and the *eDate* decision

13. With the advent of the internet, this analysis of international press libel became unsustainable. The internet reduced the usefulness of the criterion relating to place of publication, since the *availability* of the libellous material had become universal. It was not always possible to quantify distribution (readership) with certainty and accuracy in relation to any given country, or, therefore, to assess the damage caused exclusively within that country. These difficulties contrasted with the serious nature of the harm which may be suffered by the availability of online libel to a worldwide readership. The analysis of 'place' had to be reconsidered. The CJEU expressly recognised all of this in *eDate Advertising GmbH v X [2012] QB 654*.

14. *eDate* undoubtedly developed the law, but exactly how, and what it decided, is at the core of the dispute in this case. So it is necessary to consider the decision in some detail.

15. The CJEU began by reaffirming that the special jurisdiction is a derogation from the general rule that defendants are to be sued where domiciled, and is based on a particularly close connecting factor between the dispute and the courts of the place 'where the harmful event occurred'. The derogation is justified by considerations of the sound administration of justice and the effective conduct of proceedings which arises from that close connection. But it recognised that the 'mosaic' country-by-

country route to a global remedy had become virtually unworkable in cases of internet publication.

16. The court therefore concluded that the 'connecting criteria' justifying special jurisdiction had to be adapted to enable a libel claimant to bring an action '*in one forum in respect of all the damage caused, depending on the place in which the damage caused … occurred*'. The court continued:

> Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice…
>
> The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a member state in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that state.
>
> The jurisdiction of the court of a place where the alleged victim has the centre of his interests is in accordance with the aim of predictability of the rules governing jurisdiction … also with regard to the defendant, given that the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the persons who are the subject of that content. The view must therefore be taken that the centre of interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued…
>
> Moreover, instead of an action for liability in respect of all of the damage, the criterion of the place where the damage occurred, derived from *Shevill* …, confers jurisdiction on courts in each member state in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the member state of the court seised.
>
> Consequently, … the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability in respect of all the damage caused, either before the courts of the member state in which the publisher of that content is established or before the courts of the member state in which

> the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each member state in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the member state of the court seised."

17. In other words, without doing away with the 'mosaic' or country-by-country option, the court introduced a new route, via the special jurisdiction, to obtaining a global remedy. It was based on the core concept of the place of a claimant's 'centre of interests' (CoI).

(iii) The contending interpretations of *eDate*

18. The Claimants bring this claim, alleging exclusively online libel, for global damages and injunctive relief. They do so on the basis that the UK is where their CoI is. Their primary submission is that, as a result of *eDate*, they do so as of right on that ground alone. They say *eDate* gives CoI full jurisdictional status. There are now three, free-standing and independent, routes to full recovery for international internet libel. A claimant can choose to sue: (a) in the country where a defendant is domiciled, (b) in the country where a claimant has their CoI or (c) on the mosaic basis, in every country where a completed tort has occurred, for the harm caused in each country. They say there are no other relevant jurisdictional issues for them. Crucially, they do not have to establish anything about publication, harm or other events in the UK, nor, therefore, do they need to show an actionable tort committed in the UK at all. All of that is relevant only to the mosaic route. An alternative special jurisdiction is now conferred by CoI alone, pure and simple.

19. The Defendants, in bringing this application, say that cannot be right. They say there is still a binary choice, as per *Shevill*: to sue either (a) where a defendant is domiciled or (b) where a completed tort (the harmful event) occurred. The effect of *eDate*, they say, is that claimants taking the second route *in their CoI country* can now get global relief rather than being limited to compensation for harm arising in that individual state. CoI is not jurisdictional in the pure sense of introducing a freestanding basis for bringing an action somewhere; it is jurisdictional only to the limited or secondary (but nevertheless important) extent of the nature and quantum of the relief that may be sought.

20. The difference between the parties makes a difference to the correct primary jurisdictional question to be answered on this application. If the Claimants are right, the key question is whether their CoI is in the UK. If the Defendants are right, the key question is whether a 'harmful event', an actionable tort according to English law, has occurred in the UK. One or other of these questions must be answered in the affirmative to confirm that the High Court has any jurisdiction in this matter at all, but the issue is which one. On the facts of this particular case, there is a real possibility that the different questions may produce different answers as to the High Court's jurisdiction to try the claim.

(iv) Analysis – reading *eDate* in context

21. It is probably fair to say that of the various permutations before the Court in *eDate*, the one they did not have in mind was the one potentially in issue in the present case: namely, that the country of a claimant's CoI, and the country 'where the harmful event occurred' as explained in the CJEU caselaw, might not be the same country. The question therefore seems to come down to whether, reading the Court's analysis in *eDate*, it either *assumes*, or alternatively *proves*, the existence of a harmful event in a claimant's country of CoI.

22. The Advocate-General's opinion had set the scene for the Court by reminding it of what the BRR recitals say about the 'close connection' between the court and the *action* or *harmful event* being the reason why the 'sound administration of justice' justifies an exception to the general jurisdictional rule. That is essential context.

23. It is also notable that the Court was not being invited to engage in a 'radical reconsideration' of *Shevill*. It was looking at the practical problems of applying *Shevill* to internet defamation. In particular, it was looking at the problem of having to *quantify* and *divide* internet harm on a state-by-state mosaic basis as the only alternative route, other than defendant domicile, to global remedies. An alternative remained necessary because the court of a defendant's domicile might be remote, legally and factually, from the harm done, and another court, with closer geographic connection to that harm, might be able to hold a fairer and better-informed trial about it. At the same time global remedies were gaining enhanced importance. There was the new problem of quantifying global damages for publishing libels available to the world; and there was the fact that injunctive relief – directing the take-down of internet publication – had become a quintessentially global remedy. So a solution was needed that did not depend on a state-by-state mosaic.

24. The Court was invited to choose a claimant's CoI state (the place where an individual 'essentially carries out his life plan, if this exists') as a new locus for global remedies, as being the place a claimant 'will suffer the most extensive and serious harm' and hence the place a court is best placed 'to understand fully the conflict between the interests involved'. It had to be a place predictable to a defendant on the basis that publication 'arouses interest in a particular territory and, consequently, actively encourages readers in that territory to access it'. Hence the claimant's CoI is identified with the 'centre of gravity of the dispute' itself. It is because of that centre of gravity that the national court will have a close, indeed the closest, connection with the action.

25. The Court in *eDate* was trying to find a solution fair to both parties. It was trying to relieve claimants of an unsatisfactory choice between a potentially remote state of defendant domicile, or the new evidential difficulties of state-by-state mosaic compilation. There was a real risk claimants would fall between the two, and be unable properly to access a global remedy on any basis. But at the same time it was trying to relieve defendants of the unpredictability, and hence the oppressive and chilling effect, of being potentially subjected to actions from any and all quarters. That too is essential context.

26. If *eDate* is read in this context, and in the expectation it was doing the least necessary to give effect to the solution proposed for the problem identified, then the more

logical analysis of its decision is that it was doing away with some of the mosaic consequences, but not the primary jurisdictional basis, of the *Shevill* Rule. On this reading, the mosaic consequences of requiring courts to divide up – or to try and deal with the distribution of – internet harm along national boundaries was the problem. The solution was to give *one* of the courts in which the defendant might already be sued (on the basis of locus of harm) the power to provide global remedies for *all* of that harm. The mechanism chosen for identifying which court was to have that role was CoI, because if a claimant had a centre of interests somewhere then the impact of the defamation on those interests was likely to be the centre of gravity of the case, as against any other place where harm occurred. And that is in essence the Defendants' preferred analysis of *eDate*.

27. The Claimants' preferred analysis requires a reading along the following lines. The problem identified was that the harm of internet defamation always occurs everywhere, because it is an act of universal distribution to the world. 'Place where the harmful event occurred' needs to be given a new meaning altogether in such circumstances, otherwise universal jurisdiction would follow universal harm and the mosaic approach to full compensation becomes more or less impossible. The solution is to provide an escape from the mosaic altogether. The mechanism of CoI reflects not just the practical likelihood of maximum co-located harm, but also, by tracking a *claimant's* life-plans (at any rate where the claimant is a natural person), acknowledges that the relevant harm of defamation is harm to 'personality rights' underpinned by Article 8 ECHR. Therefore there is always an especially close connection between any defamation action and the place where a claimant's CoI is located. The combination of CoI and internet libel means that local harm and local actionability cease to be relevant issues because publication (cause) is always potentially universal and harm (effect) is always present and indivisible where a claimant is based.

28. I accept that is a statable reading of *eDate*. But it is less persuasive because it is considerably more radical, and that might have been expected to leave more of a trace in the judgment. It is a reading which comes close to, if not implies, an autonomous meaning of the 'place where the harmful event occurred' – that is, a meaning governed by EU law and not by national law – and that would have meant overturning the previous authorities. It comes close to, if not amounting to, a species of jurisdiction giving primacy or parity to the domiciling of the claimant as well as or instead of the defendant, which is not only dissonant with the scheme of the BRR but a proposition rejected in *Shevill*. And it is hard to find support in the *eDate* judgment for a proposition that harm may be jurisdictionally presumed or deemed from CoI *even where no tortious harm whatever has in fact been demonstrably sustained* by a claimant in that state because no-one there has read the publication or thought the worse of them, or is likely to. On the contrary, the new significance of CoI is attributed by *eDate* to its co-location, in practice not in theory, with the incidence of maximum harm. It is said to be the paradigm of, not a replacement for, a demonstrable foreign tort.

29. *eDate* is a judgment on the face of it preoccupied with derestricting courts in the place where the *most* harm is likely to have occurred and – *if proven* – enabling them to grant universal remedies. It is not noticeably concerned with extending primary jurisdiction to places where little or no local harm is in fact alleged. It is concerned

primarily with the centre of gravity of the harm, and secondarily with the centre of gravity of the claimant, rather than the other way around. If the centre of gravity of the harm caused is in another country, it is not obviously conducive to the 'sound administration of justice' for a claimant's 'home' court to be seised of it and have to grapple not only with evidence overwhelmingly dealing with foreign events but also with the propriety of global remedies the impact (and any chilling effect) of which will be felt elsewhere. Claimants trying to sue where *they* are rather than where the *tort* is would be disrupting the balance of fairness struck in the BRR itself. So the Defendants' analysis appears in these circumstances to be the better starting point in terms of reading *eDate* itself.

(v) The post-*eDate* caselaw

30. The CJEU looked again at the *eDate* decision in *Bolagsupplyningen OU v Svensk Handel AB [2018] QB 963*. It confirmed that the new CoI development, in the specific context of the internet, proceeded from the view that '*the alleged infringement is usually felt most keenly at the centre of interests of the relevant person, given the reputation enjoyed by him in that place. Thus, the criterion of the 'victim's centre of interests' reflects the place where, in principle, the damage caused by online material occurs most significantly.*' That allows both the claimant '*easily to identify the court in which he may sue*' and the defendant '*reasonably to foresee before which court he may be sued*'. That is of course, from the perspective of the defendant, a foreign court in the singular.

31. The Court emphasised that the *eDate* development is '*justified in the interests of the sound administration of justice and not specifically for the purposes of protecting the applicant*'. That is significant in the wider context of the BRR. It confirms that the *eDate* option is distinct from the standalone forms of special jurisdiction the BRR provides for relatively vulnerable claimants in relationships of imbalance of power (consumer case, for example). It is not therefore a species of claimant-specific jurisdiction; it remains a detailed development of the 'place where the harmful event occurred' criterion: '*The criterion of the centre of interests is intended to determine the place in which damage caused by online content occurs, and, consequently, the member state whose courts are best able to hear and to rule upon the dispute.*'

32. To support the Claimants' understanding of *eDate*, this passage has to be understood to be inserting 'conclusively' into 'intended to determine the place' – a rule of law that it is *always* in the interests of justice for cases to be brought in the CoI state. To support the Defendants' understanding, it has to be understood as an explanation of *why* global remedies will crystallise out in *some* 'place of harm' cases. The latter is in my view more consistent with the grain of what is an essentially explanatory analysis. Unless at least some harm has occurred in any given state, the courts of that state are not obviously the *best* place to conduct a trial of the issues. If a defendant has no basis for predicting extra-jurisdictional harm centred on another specific state, it cannot readily foresee that it may be sued in that state solely because a claimant may be based there at any given time. By contrast, if it is *always* in the interests of justice for the CoI court to be seised, then it is not easy to see why the mosaic option survives *eDate* at all – and none of the authorities is in any doubt that it does.

33. I was shown no EU or UK authority where jurisdiction has in practice been established for a national court based on CoI in the absence of a nationally-actionable

tort. On the contrary, the High Court at any rate appears to have consistently proceeded on the basis that the correct primary jurisdictional question for all cases brought against non-domiciled defendants is whether a nationally-actionable tort is sufficiently made out in all of its components, as defined by English law.

34. *Napag Trading Ltd v Gedi Gruppo Editoriale SPA [2020] EWHC 3034* is a good recent example. At paragraph 162, Jay J states in terms that CoI is a 'subordinate issue' – the primary jurisdictional issue is the question of the components of a nationally-actionable libel as defined by English law. Citing *Marinari*, he put the position in this way at paragraph 26:

> …even if the First Claimant's 'centre of interests' were held to be in England and Wales for present purposes, it would not automatically follow that its claims could be sustained. As a prior condition it would have to be established that there has been publication in England and Wales and that the First Claimant has suffered 'serious harm' (including 'serious financial loss') here, both being matters of domestic law…"

35. If for no other reason, this unambiguous statement is persuasive authority that I should continue to regard the primary jurisdictional question in an international internet libel claim brought against non-domiciled defendants as being whether the components of a tort actionable in England have been sufficiently made out. For the reasons given, I have concluded in any event that that is the starting place which better reflects the scheme of the BRR, the reasoning in *eDate* itself, and the decided authorities more generally.

Answering the jurisdictional question

(i) The test to be applied

36. On the basis that the correct jurisdictional question is whether the components of an actionable tort – in this case libel – have been made out to the relevant standard, then the authorities are clear that *each and every* element must be made out in relation to *each* publication complained of and in relation to *each* claimant.

37. The 'relevant standard' is well established – it is a 'good arguable case'. I have directed myself to what the Supreme Court said about that in *Goldman Sachs v Novo Banco SA [2018] 1 WLR 3683* at paragraph 9, and to the further guidance of the Court of Appeal in *Kaefer Aislamientos v AMS Drilling Mexico [2019] 1 WLR 3514*. Another way of putting the test is to ask whether a claimant has 'the better of the argument'. To address that, first, a claimant must 'supply a plausible evidential basis' that the components of the tort are present. Second, if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available 'if it can reliably do so' on at the interlocutory stage. Third, if no reliable assessment can be made, it will be sufficient if there is a plausible, albeit contested, basis for it. The test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced.

(ii) The components of libel

38. It is not in dispute in this case that each Defendant is responsible for publishing the article complained of. The article clearly refers to both Claimants by name. The questions about the remaining components of libel in issue in this case are therefore as follows.

39. First, was the article published, in each of its forms, in England and Wales? The authorities are clear that publication in defamation law requires that the article be read by someone other than its subject, but does not necessarily require that it be read by more than one such other.

40. Second, was it defamatory of each Claimant at common law? This is an element with a number of sub-components. A statement will be defamatory at common law if, in its ordinary and natural meaning, which is the meaning a reasonable reader would understand the words bear in context, it substantially affects in an adverse manner the attitude of other people towards a claimant, or has a tendency to do so (*Thornton v Telegraph Media Group Ltd [2011] 1 WLR 1985* [95]). 'Substantially' imports a threshold of gravity or seriousness. At common law, the presumption of damage that applied to defamatory publications meant that this issue was resolved by determining the meaning of the words and assessing their inherent tendency to damage someone's reputation, rather than their actual impact. The applicable law as to the determination of meaning is well settled (see for example the summary set out in *Koutsogiannis v Random House Group [2020] 4 WLR 25*, at paragraphs 11 and 12).

41. Third, was it also defamatory of each Claimant within the terms of section 1 of the Defamation Act 2013? Section 1 provides that '*a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant*'. This is a test of impact, which must be satisfied on the balance of probabilities in relation to each defamatory statement. The leading authority on how to apply the test is the Supreme Court in *Lachaux v Independent Print Ltd [2019] UKSC 27*. It does not require specific instances of harm to be evidenced; it can be based on inferences of fact from a combination of the meaning of the words, the situation of the claimant, the circumstances of publication and the inherent probabilities, to arrive at a conclusion about which precision is not expected. Relevant factors may include: the scale of publication within the jurisdiction; whether the statements have come to the attention of at least one identifiable person in the UK who knew the claimant; whether they were likely to have come to the attention of others who either knew or would come to know them in the future; and the gravity of the statements themselves.

42. The 'serious harm' component of libel contains an important causation element, which in turn has a number of aspects. Where multiple defendants have published the same libel, an individual defendant is responsible only for the harm caused by its own publication in the minds of its own readership. Since *each* publication must satisfy the test, it is not possible to aggregate or cumulate injury to reputation over a number of statements or publications in order to pass the threshold (*Sube v News Group Newspapers [2018] EWHC 1961 (QB)*). But at the same time, if such causation is established, it is not possible for a defendant to diminish the seriousness of the harm caused by pointing to the same publication by others, or else the claimant risks falling between the various stools (see the explanation of the so-called 'rule in *Dingle*' set out in *Wright v McCormack [2021] EWHC 2671* from paragraph 149 onwards).

(iii) Application to the facts

43. The core of this jurisdictional dispute, on the question as identified, is whether the Claimants have established a good arguable case on the element of serious harm as defined by English law. But since that in turn includes consideration of the gravity of what is imputed in the publication, and of extent of publication – and since both of those are contested – it is necessary to build the picture up from its constituent pieces.

(a) Publication

44. For there to be an actionable tort of libel in England and Wales, it is necessary to show at least one actual publishee in England and Wales for each version of the article. It is not enough that the article was simply available online – at least one person in each case must be shown to have read it. The Claimants' own evidence is that neither of them had been contacted by anyone in the UK asking them about the article (other than their own advisers, to whom they themselves had sent it) and '*we do not know of other people in England and Wales who may have read the article*'.

45. On the face of it, the absence of any evidence from the Claimants of publication in the jurisdiction might be thought fatal to the jurisdiction of the High Court. However, while mere availability on the internet does not itself establish publication in the jurisdiction, it is a matter which fairly calls for some investigation. The article itself appears in a total of seven publications, four in Spanish, two in Catalan and one in Galician. The Defendants have prepared some *maximum* figures for England and Wales online views in each case. These are said to be maximum figures for a number of reasons. Just because an item is opened, that does not mean it is read. Especially where a text is in a foreign language – and particularly where that language is itself a minority language within its country of origin – it may be that some persons accessing it get no further than ascertaining that they cannot read it. (The mere availability of online translation services does not assist - *Napag*.) Some readers may have accessed an article more than once, or more than one article. Some hits may be by persons acting on behalf of the Claimants.

46. With those caveats in mind, the maximum England and Wales viewing figures for each article are modest. The highest figure is 150, the next highest 66, and the lowest is 3.56. None of them, however, on the Defendants' own evidence, comes in at zero. That does not, for the reasons they give, necessarily mean that publication is made out. On the other hand, it might fairly be thought to furnish a 'plausible, albeit contested, basis' for concluding that, as between one reader and zero readers (which is the distinction in English law between publication and non-publication), the Claimants might be considered to have the better of the argument at this stage on this issue of the publication of each article.

(b) Defamatory tendency at common law

47. The standard approach to the determination of the meaning of a publication is well established. It requires a press article of this sort first to be read over once through, so that preliminary impressions can be recorded before looking at the rival meanings contended for by the parties. Those preliminary impressions then fall to be reconsidered and adjusted having heard what the parties have to say.

48. I am not of course making a determination of meaning at this jurisdictional stage, simply considering the 'good arguable case' test. Determination of meaning and defamatory tendency, however, while context-sensitive, do not rely on the establishment of external factors by evidence. Since I must take a view on the material available if I can reliably do so at this stage, I adopted the standard preliminary procedure for the determination of meaning by reading the article once through, in the English translation provided by the Claimants, and bore in mind the ordinary reasonable readership of a current affairs article in a reputable professionally-edited newspaper, accessing it online.

49. Much of the article is preoccupied with listing the business interests of the Claimants' family, including the Claimants themselves, and with chronicling the extent of their wealth. It attributes the foundation of this flourishing fortune to Azerbaijani oil.

50. The tone, however, is set by the opening paragraph which describes the 'downfall' of the Claimants' father – 'unceremoniously removed from his post' in connection with (a) the arrest of several of his colleagues at the Ministry on charges relating to corruption and extortion and (b) searches revealing 'glass jars full of diamonds and cardboard boxes packed with money from far-flung countries'. The meaning I took from this was that there were strong grounds to suspect that the Claimants' father had enriched himself in office by unlawful and reprehensible means. That set the scene for all that followed in the article.

51. What followed was, I thought, to the effect that the family wealth had to be regarded as tainted, including in the hands of the Claimants who could not be thought of as unknowing and innocent of the taint. This is insinuated, rather than stated directly. For example, the First Claimant is described as having set up an investment company 'at the tender age of 22' in partnership with two brothers who run 'a very well-connected law firm specialising in property transactions involving foreign citizens'. I thought that suggested, in context, an aura of suspiciousness about the enterprise and that the First Claimant was too young to have been a participant fully independent of his father. Again, the article refers to the First Claimant 'explaining away' deposits totalling nearly £14m in a bank in which eight accounts were linked to the family.

52. The nub of what the article says specifically about the Claimants is this:

> As well as explaining away their fortune as inheritance and good investment management, they seek to distance it 'from the position held by their father' in Azerbaijan. 'Our clients do not and cannot speak for their father' it says in the letter [from their lawyers], which invites us to 'speak directly to him' in order to address activities 'relating to his behaviour'.
>
> Anar Mahmudov and Nargiz Mahmudova maintain that their family wealth is inherited from their ancestor, the 19th century entrepreneur Aslan Ashurov. However, reporters were not able to find any information to back up claims of a family connection with Ashurov, nor were they able to find any signs of family wealth prior to Eldar Mahmudov's career as a public servant, which started in 1980.

I understood this, and the article as a whole, to be suggesting that the Claimants' wealth was, in their own hands, at best 'unexplained'; that they either evaded explanations or offered explanations which could not be substantiated; and that the most likely explanation was that that they owed their fortune to their father, who in turn had acquired it in the circumstances of suspicion set out at the outset.

53. Having formed and noted that view, I considered the Claimants' own pleaded meaning. It goes as follows:

> In their natural and ordinary meaning, the words published by the Defendants in the articles meant and were understood to mean that the Claimants acted as fronts for their father to secretly build up a family empire worth more than a hundred million euros by making very substantial investments into real estate and companies across Mallorca, the United Kingdom, Luxembourg and Lithuania, using illicit money acquired by their father through corruption and/or extortion conducted in his former capacity as Chief of National Security in Azerbaijan.

54. That is a more definitely crystallised and serious allegation than I had formed in my own mind. I have reflected further on the meaning of the article, but consider the better of the argument is that the Claimants' meaning is over-pleaded. I do not find support, against the benchmark of an ordinary person reading the article once through - and while not naïve, not 'avid for scandal' either – for the idea that the Claimants' complicity went beyond knowing and willing receipt of a suspiciously tainted fortune to 'acting as a front' for their father.

55. However, I have no difficulty in finding that the Claimants make a good arguable case that, in the ordinary and natural meaning I consider more probable, this article is defamatory of them at common law. It imputes knowledge of, or at the very least wilful blindness to, the strongly suspicious origins of their father's wealth, and a willingness to enjoy and profit from it regardless. It also imputes evasiveness or implausibility in their public accounts of the family wealth, which is not only evidence of that degree of complicity, but also reprehensible in its own right. All of this suggests contravention of society's norms, if not grounds for further investigation of the possibility of their own wrongdoing – matters obviously tending to make people think less well of them.

(c) Serious harm

56. I have directed myself to the guidance in *Lachaux*; I have noted the principal relevant matters to be taken into account, and also that the overall exercise is to a degree inferential and impressionistic, particularly at the interlocutory stage.

57. As to the gravity of the allegations, while I do not consider them to be so grave as the Claimants suggest, I do consider them relatively grave. I bear in mind that the principal imputation of the article is against the father, but the suspicions attributed to the sources of *his* wealth are strong and serious – matters of systematic and exploitative wrongdoing of a potentially corrupt and criminal nature. While I think the likely better view is that the Claimants are placed at somewhat more of a remove from these suspicions than they fear, nevertheless the source of the imputed taint is

serious enough to make even knowledge or wilful blindness an appreciably grave stain on their characters. Again, while the imputation against the Claimants is largely indirect and inferential, its very allusiveness gives an insidious plausibility to what is hinted at.

58. The real problems for the Claimants, however, are extent of publication, and causation. On the Claimants' own case, there is no evidence that the articles have 'come to the attention of at least one identifiable person in the UK who knew them', nor that they are likely to do so in future. There is some evidence of a single UK retweet (said by its author to have been done simply as a favour to a reader in Spain). Testing the probability of future readership with internet search terms does not appear to provide significant support for the Claimants' case on serious harm. Evidence of the scale of publication within the jurisdiction, put at its highest, appears to be really rather minor for any single version, and, in the case of some versions or the article, vestigial or negligible.

59. What the Claimants say about this, however, is that they are able, *as a matter of English law*, to rely on EU-wide publication and the effect of the article EU-wide, to support their case on serious harm. They say that section 1 of the Defamation Act 2013 does not itself have any express or implied limitation to serious harm caused within England and Wales. They rely on *Gubarev v Orbis [2021] EMLR 50* and *EuroEco Fuels v Szszecin [2018] 4 WLR 133*, as support for their position. I have looked at these cases.

60. In *Gubarev*, it appears not to have been in dispute that 'serious harm' had been caused to the claimants' reputation; the issue was whether the second claimant, a corporate body, also satisfied the requirement in s.1(2) of the Defamation Act 2013 ('*harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss*'). The court held it had not made good that claim on the facts and evidence. The court did indeed look at the question of financial loss across the breadth of EU publication. But so far as I can see that was as well as, not instead of, seeking to satisfy itself that serious reputational harm had been caused to both claimants within the jurisdiction. In any event, it was not so satisfied on any basis.

61. *EuroEco* was a case in which the claimants were pursuing the mosaic option. Publication in the UK was relied on, and the court found all the claimants to have established a good arguable case that they had each suffered serious harm (in the UK) as a result of the UK publications. Warby J (as he then was) is explicit in paragraph 70 of his judgment that 'serious harm' is a common criterion for all libel claimants and that s.1(2) of the Act imposes a further criterion on corporate claimants.

62. Neither of these cases appears to me to be authority for the proposition that, as a matter of the interpretation of s.1 and as a matter of English law more generally, it is not necessary to establish serious harm within the jurisdiction caused by publication within the jurisdiction. I was shown no other authority which supports such a proposition. *Napag* indicates to the contrary.

63. The Claimants' evidence does not clearly indicate *any* actual harm occasioned via readers *in the UK* and *as a result of publication in the UK*. The pleadings and evidence do make reference to some instances of actual harm (in the UK), for

example the closure of an account by a UK bank. I also heard about the faltering or failure of a UK-based restaurant business. The Claimants also fear future harm as a result of any 'due diligence' checks run on them. Whether any or all of this could amount to *serious* harm to *each* Claimant is contested. None of it is attributed to readership of any particular version of the publications complained of. Whether any such harm was caused by *any* libel as opposed to entirely independent factors is also in issue. I am not persuaded on the materials I have seen that the Claimants necessarily have the better of the argument (with a plausible evidential basis) on these specific examples.

64. But in any event the Claimants also face two daunting general contentions for alternative explanations for the causation of any harm in the UK. The first is that any harm conceivably sustained in this jurisdiction may well have been the result of publication *in Spain* which, on any basis, is the overwhelming locus of the readership of the article. Even allowing for some measure of grapevine effect in the UK, still the Claimants need to show that for there to be an actionable tort in this country the root as well as the fruit of the grapevine is to be found here.

65. The other alternative explanation is the fact that, as the article itself makes clear, it was published following a joint investigation involving journalists not just from the Spanish titles but also from UK titles including the Observer. The UK titles published four similar stories on the same day as the articles complained of in this action, all referring to the Claimants. It appears that the Claimants have not brought claims against the UK publishers; they evidently do not consider the English articles to be (as) defamatory. The English articles nevertheless contain the same themes of the Claimants' 'unexplained wealth' and the case for investigating it further in the light of their father's removal from office; they are shades of meaning on a clear continuum. As set out above, *if* the Claimants could show harm in the UK as a result of UK readership of the Spanish articles *then* the Defendants could not be heard to try to diminish their responsibility by showing that their readers had *also* read the story in the UK titles. But what the Claimants cannot do is work back from evidence of harm in the UK to an assumption that it was caused by the Spanish articles rather than the English articles. If the underground springs of the Claimants' UK reputation have been contaminated by suspicion, it does not follow that that must be attributed to the poison of the (defamatory) Spanish articles rather than the (if not defamatory, distinctly suggestive) English articles. From first principles, the latter are overwhelmingly the more likely cause of any reputational harm in the UK not specifically attributable to other particular publications, since they are (a) published to a far wider and audited national readership within the UK and (b) in English.

66. I have considered the Claimants' pleadings and evidence. I have noted the Defendants' challenge to them. I have sought to make due allowance for the limitations of the evidential process at this preliminary interlocutory stage. I do not in all the circumstances find the Claimants have made out a good arguable case, or that they have the better of the argument, that serious reputational harm has been *caused* or is likely to be *caused* in the UK by publication in the UK of the foreign-language versions of the articles or any one of them. The Claimants' evidence for both material publication in the UK and harm sustained in the UK is (at this stage) relatively weak from the point of view of supporting any inference of serious harm. And their evidence of a causal connection between such publication and such harm as is

evidenced is also itself weak, bearing in mind the strength of the alternative accounts contending to explain causation. I am not in these circumstances persuaded that the Claimants have established to the requisite standards that all the components of a libel actionable in England and Wales, and in particular serious harm, are present in their claim. Therefore I am not persuaded that the High Court should properly be regarded as having jurisdiction over their claim.

67. I test that conclusion by standing back to reflect more generally on the implications for the facts of this case of the BRR structure and caselaw analysis set out above. Even assuming that the Claimants could establish that their CoI is in the UK (which, on the conclusions I have reached, I do not need to, and do not, express a view about), the 'centre of gravity' of the 'harmful *event*' is undoubtedly in Spain, even on the Claimants' own case. That is where first publication occurred and where the overwhelming preponderance of the readership is located, and the Claimants wish to rely on that publication to make good their claim for global remedies. The Claimants are 'known' there: on their own pleadings they have substantial presence, business interests, contacts and investments there. Their economic and reputational interests in Spain are a, if not the, clear focus of the article complained of; the article has a local geographic slant – it is intended to 'arouse interest in' Spain and to encourage readers in Spain to access it. The Defendants would not readily expect to be sued on it in another country, or be subjected to another country's laws and legal system in relation to it.

68. Spain is also the country of domicile of the Defendants. It is simply not apparent that the Claimants have established an alternative or additional centre of gravity for this libel capable of providing enough power for it to escape the gravitational pull of the default jurisdictional rule. The High Court is not 'close' enough to the factual matrix of this libel claim to make it apparent that it is a suitable forum for a trial of the issues which is fair *to both sides*.

Conclusion

69. For the reasons given, I am not persuaded that the High Court has jurisdiction to try the Claimants' claim. The Defendants' application succeeds.