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Case No: A2/2004/1540

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL APPEALS DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Hon Mr Justice Eady

Royal Courts of Justice
Strand, London, WC2A 2LL
3 February 2005

B e f o r e :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE SEDLEY
and
LORD JUSTICE JONATHAN PARKER

Between:

DOW JONES & CO INC	**Appellant**
- and -	
YOUSEF ABDUL LATIF JAMEEL	**Respondent**

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Gavin Millar QC & Anthony Hudson (instructed by Messrs Finers Stephens Innocent) for the Appellant

James Price QC & Justin Rushbrooke (instructed by Carter-Ruck) for the Respondent

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HTML VERSION OF JUDGMENT

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Lord Justice Phillips MR :

This is the judgment of the Court

Introduction

1. This is an appeal against four interlocutory rulings against the defendant ('Dow Jones') made by Eady J in two separate judgments on 6 July 2004. It was heard conjointly with an appeal against a preliminary ruling given by Eady J on 5 December 2003 in *Mohammed Abdul Latif Jameel and Abdul Latif Jameel Company Limited v The Wall Street Journal Europe SPRL* ('the *Mohammed Jameel* Action'). That action resulted in awards of damages in favour of each of the claimants. We heard other grounds of appeal against that result at an earlier sitting. In a judgment which we are handing down at the same time as this we have dismissed all the grounds of appeal in that action.

2. The claimant in this action is the brother of the first claimant in the *Mohammed Jameel* Action. Dow Jones is, we presume, affiliated with the defendant in the *Mohammed Jameel* Action. Dow Jones publishes *The Wall Street Journal* and *The Wall Street Journal On-line.* The latter is a publication made on a world wide web site, access to which is available to subscribers. In each action the individual claimants complain of publications implying that they have been, or are suspected of having been, involved in funding al Qaeda. In each action the defendants have not sought to justify the defamations alleged. Rather their case has been that they have been acting as responsible journalists in reporting statements made by the US authorities.

3. One of the rulings that we deal with in this appeal struck out from the defence a plea which attacked what has been described as 'the presumption of damage' on the ground that it is not compatible with Article 10 of the European Convention on Human Rights. More precisely, this plea was as follows:

> "The Defendant …will contend that Article 10 of the European Convention on Human Rights precludes [the Claimant] from relying on any legal presumption of damage to establish standing, injury or harm."

4. This attack was, of course, made in respect of a claim by an individual claimant. In the *Mohammed Jameel* Action what appeared to be a similar point was taken in respect of the claim by the corporate claimant. Because of this apparent similarity we dealt with the point in each appeal at the same hearing. In the event the arguments advanced in each appeal proved very different. The appeal in relation to the presumption of damage is brought with permission granted by Sedley LJ.

5. The second issue raised by this appeal is whether the claimant has any prospect of proving that the words complained of were written of and concerning him. Dow Jones contends that he has not and advanced this and other grounds in support of an application for summary judgment. The judge ruled in favour of the claimant on this point. Sedley LJ refused permission to appeal against this ruling. In the course of argument we invited Mr Gavin Millar, who appeared on behalf of Dow Jones, to renew the application for permission to appeal. He did so and we granted the application.

6. The other two issues raised on this appeal both arise out of the fact that the publication in this jurisdiction of which complaint is made was minimal. This led Dow Jones to include in their grounds for seeking summary judgment the contentions (1) that the claimant could not demonstrate that a real and substantial tort had been committed in this jurisdiction and (2) that this action was an abuse of process.

The claim

7. On 18 March 2003 Dow Jones posted on the world wide web servers of the *Wall Street Journal On-Line* in New Jersey the article complained of ('the article'). This enabled subscribers around the world, and in England in particular, to draw down the article. According to Dow Jones the article remained on the website until around 22 March 2003, when it was moved into an archive. It remained in the archive until July 2003, when it was removed altogether.

8. The Article began as follows:

> "WAR ON TERROR
>
> List of Early al Qaeda Donors Points to Saudi Elite, Charities
>
> By GLENN R. SIMPSON
>
> Staff Reporter of THE WALL STREET JOURNAL
>
> WASHINGTON – A cache of al Qaeda documents seized last year by U.S. agents in Bosnia identifies some of Saudi Arabia's richest and most influential families as among the first financial supporters of Osama bin Laden, and shows how al Qaeda used charitable arms of the Saudi government.
>
> An account of the roots of al Qaeda found on a computer used by a suspected al Qaeda front group contains a 1988 memorandum listing 20 Saudi financial backers of Mr bin Laden – "the Golden Chain," as the bin Laden organization called it. The list includes the families of three billionaire Saudi banking magnates, several top industrialists and at least one former government minister.
>
> The Golden Chain list, which doesn't indicate the size of the donations, was drawn up at a time when supporting the Afghan revolt against Soviet invaders – Mr bin Laden's cause at the time – was a top U.S. foreign policy objective, as well as a Saudi national cause with deep patriotic and religious overtones. The list doesn't show any continuing support for al Qaeda after the organization began targeting Americans, but a number of the Saudis on it have been under scrutiny by U.S. officials as to whether they have supported terrorism in recent years."

9. There was a box of text published as part of the article, headed "The Golden Chain", which read as follows:

> "See the list of donors originally filed under seal in U.S District Court for the Northern District of Illinois (*United States of America v Enaam Arnout*). The list was seized from the Benevolence International Foundation, an alleged al Qaeda front. According to a court filing, "BIF possessed a handwritten draft list of people referred to within al Qaeda as the "Golden Chain", wealthy donors to mujahdaeen efforts. At the top of the list is a Koranic verse stating 'And spend for God's cause'. The list contains twenty names, and after each name is a parenthetical, likely indicating the person who received the money from the specified donor. "

10. There was a hyperlink which would enable readers of the article to find the so-called list of donors. On that list appeared the words "In the name of God, the most gracious, the most merciful and spend for God's cause (Quraanic verse)", followed by the list. The name which appeared fourth on the list was "Yousif Jameel … (Baterji)".

11. It is pleaded in the particulars of claim that the words in the Golden Chain list accessible via the hyperlink, in their context, were defamatory of the Claimant and bore the following natural and ordinary or inferential meanings:

> "6.1 that the Claimant had been among the first financial supporters of the notorious terrorist Osama bin Laden and al Qaeda;

> 6.2 that there were reasonable grounds to suspect that the Claimant had continued thereafter to provide financial support to Osama bin Laden and al Qaeda, that he had financially supported such terrorism in recent years, and in particular that he supported those responsible for the September 11 attacks."

12. There was lively debate before us as to the precise circumstances in which the Golden Chain list came into the possession of Dow Jones. There is no need to go into this in detail. It is common ground that the list originated in Bosnia and was made available by a United States prosecuting attorney, pursuant to letters rogatory, to claimants in civil proceedings in Washington brought by 9/11 victims against several hundred defendants, mostly Saudi, who are alleged to have funded terrorists ('the *Burnett* action'). It is the claimant's case that this list should have been used exclusively for the purpose of the civil proceedings but that it was improperly made available to Dow Jones by those acting for the claimants. It is Dow Jones' case that no restrictions were placed upon the use that could be made of the list when it was released to the civil claimants and that the United States authorities were content that the list had been made public.

13. It is the claimant's case that the Golden Chain list was first put into the public domain by Dow Jones. It has since become a very well known document, although we did not understand Mr Price to submit that Dow Jones was responsible for this. There has been placed in evidence in this action a statement by the claimant in an action against Times Newspapers Limited which relates to an article in the Sunday Times on 8 June 2003 which, so it seems, concerned the litigation inspired by the Golden Chain list. It is the claimant's case that, as a result of the Golden Chain list he has become suspected of association with Osama bin Laden and al Qaeda when he has had no connection of any kind with either. On the strength of his name in the Golden Chain list he has been added as a defendant in the *Burnett* action. In these proceedings his objective is not to recover damages but to achieve vindication.

14. The claimant's solicitors wrote a letter before action on 15 April 2003 in moderate terms. They stated:

> "We understand that WSJ.com has several thousand subscribers within the English jurisdiction. Our client's reputation in England is of the utmost importance to him. … provided you agree to remove the Golden Chain list from your web site within 7 days, our client will not seek from you any compensation or the legal costs which he has had to incur in consequence of this matter."

15. Dow Jones declined to act as requested. After further correspondence the Claim Form was issued on 18 July 2003. Permission was obtained to serve this out of the jurisdiction and it was duly served in New York. The Particulars of Claim which were served with it alleged that there were between 5,000 and 10,000 subscribers to the web site in the jurisdiction. Paragraph 5 of the Particulars of Claim included the following:

> "The Claimant will (if necessary) invite the inference that a substantial number of readers of the main article as set out above will have followed the said hyperlink and read the page to which it led."

16. Dow Jones made no challenge to English jurisdiction. The Defence, served on 24 November 2003, asserted that the approximate number of subscribers within this jurisdiction was 6,000. The claimant issued an application to strike out four paragraphs of the Defence on 3 February 2004. The success of this application has given rise to the second, third and fourth issues with which we have to deal.

17. On 17 March 2004 Dow Jones' solicitors wrote giving notice that they intended to apply to have the action dismissed on the ground that it had no reasonable prospect of success. They alleged that Dow Jones had been able to ascertain that only four subscribers within the jurisdiction had followed the hyperlink and thereby accessed the Golden Chain list. They were subsequently to accept that they had, by error, overlooked a fifth subscriber. It is their case that there were no more. On grounds of confidentiality Dow Jones have not disclosed the identity of two of the subscribers, but have submitted evidence that neither of these knows of the claimant nor has any recollection of reading the claimant's name. The other three subscribers are Mr Andrew Stephenson, the claimant's solicitor, Mr Edward McCabe, a director of Hartwell PLC, a company with which the claimant has been associated, and Mr

Jonathan Edwards, a consultant who has worked for the Abdul Latif Jameel group over the last seventeen years. They are members of the claimant's camp, to put the matter colloquially.

18. The claimant has not been prepared to accept without further factual enquiry that only five subscribers in this jurisdiction accessed the Golden Chain list. Before us Mr Price conceded that, even if there were more subscribers, publication was likely to be slight. The judge recorded that

> "Mr Price does not accept that Ms Downey's evidence should be taken at face value or that more evidence will not be available in the light of disclosure and cross-examination. But for present purposes, he is prepared to respond to Mr Millar's arguments on the factual assumptions he wishes to make. He submits that the conclusions which Mr Millar seeks to draw from those factual assumptions are, in any event, fallacious and/or wrong in law."

The argument before us has also proceeded on the premise that Dow Jones case on the size of publication is correct.

The appeal in relation to the presumption of damage

19. In the *Mohammed Jameel* appeal Mr Robertson submitted that English law should be changed so as to place upon corporations the burden of proving special damage as an essential element in a cause of action for libel. This was necessary to accommodate the requirements of the Human Rights Act 1998 and Article 10 of the European Convention on Human Rights ('the Convention'). He made no submissions about the position of an individual claimant.

20. Mr Millar's submissions were very different. He accepted that where there is a significant media publication of a defamatory article damage to the reputation of the individual defamed can properly be inferred. That, he submitted, was very different to presuming damage as a matter of law. Where no inference of damage could properly be drawn it was an unjustified infringement of freedom of expression to *presume* damage as a matter of law. It was particularly objectionable that, as seemed to be the case on existing authority, the presumption of damage should be irrebuttable. In the present case Dow Jones were in a position to show that the very limited publication that had taken place had caused the claimant no damage. A principle of law which made them liable none the less was contrary to Article 10. When the Human Rights Act came into force on 1 October 2000 the courts became bound by section 6 to bring English law into line with the Convention.

21. Mr Price accepted that the presumption of damage was irrebuttable, although talk of the presumption of damage was somewhat misleading. He submitted that the gist of a claim for defamation was that a publication *tended* to damage the claimant's reputation not that it actually did so. Thus, once it was established that a defamatory publication had been made about an identifiable individual, the tort was made out. There was no need to prove that the publication had in fact damaged the reputation of the claimant in the eyes of anyone. Mr Price submitted that this was a desirable principle of law and one that was not in conflict with Article 10.

English law prior to 1 October 2000

22. In support of his contention that the tort of libel can be established even where the claimant's reputation has not in fact been damaged Mr Price relied first and foremost on *Duke of Brunswick v Harmer* (1849) 14 QB 185. The facts of that case were remarkable. On 19 September 1830 an article was published in the "Weekly Dispatch". The limitation period for libel was then six years. The article defamed the Duke of Brunswick. Seventeen years after its publication an agent of the Duke purchased a back number containing the article from the "Weekly Dispatch"'s office. Another copy was obtained from the British Museum. The Duke sued on those two publications. The defendant contended that the cause of action was time barred, relying on the original publication date. The Court of Queen's Bench held that the delivery of a copy of the newspaper to the plaintiff's agent constituted a separate publication in respect of which suit could be brought. (The law reporters do not indicate what the libel was, and no copy of the offending issue of the *Weekly Dispatch* appears to have survived. The volumes for 1830 in otherwise complete runs in British Library and the Library of Congress are missing. Other libraries have partial runs, but none of them include 1830. The proceedings seem to have had the intended chilling effect.)

23. It is plain that the publications sued on can have caused little or no damage to the Duke's reputation, indeed the facts set out in the short report raise serious doubts as to whether the Duke's agent even read the article. This doubt is accentuated by the following somewhat equivocal passage in the judgment of Coleridge J:

> "The defendant, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery: and its legal character is not altered, either by the plaintiff's procurement or by the subsequent handing over of the writing to him."

24. We do not think that this decision can stand as authority for more than the proposition that each separate publication gives rise to a separate cause of action. More pertinent is *Shevill v Presse Alliance SA* [1996] AC 959. The relevant plaintiff in that case was a young woman whose home was in Yorkshire and who was defamed by an article in *France Soir.* That newspaper had a circulation of about 200,000 copies in France, but only about 250 in England and Wales, of which perhaps 10 were in Yorkshire. The issue was whether the plaintiff could establish English jurisdiction under Article 5 (3) of the Brussels Convention of 1968 on the ground that, so far as the 250 publications were concerned, this jurisdiction was the "place where the harmful event occurred". The case was referred to Luxembourg, where the ECJ ruled that a claimant could bring an action for defamation before the courts of each state in which the publication was distributed and the claimant claimed to have suffered damage. The issue then arose as to whether the plaintiff had an arguable claim that the publication had caused her to suffer damage in England and Wales. In giving the judgment of the Court of Appeal, Purchas LJ said this:

> "The only idiosyncratic aspect arising from the law in England and Wales is the assumption of damage. I do not recognise this as a jurisdictional point. Whether or not there may be detected a publishee in England who both knew the plaintiff and read and understood the French evening newspaper may well arise in the course of the action and be relevant to the assessment of damages. In my judgment, however, to restrict the exercise of jurisdiction to cases where the existence of such a person is established would not be correct."

He went on to say that the judgment of Coleridge J in *Brunswick v Harmer* supported this proposition.

25. In the House of Lords Lord Jauncey of Tullichettle, with whom the remainder of the House agreed, approved the following proposition advanced by Mr Eady QC on behalf of the plaintiff:

> "Since under English law there is a presumption of damage in libel cases, the plaintiffs did not have to adduce evidence of damage arising from the publication of the article in question"

His Lordship went on to hold at p. 983:

> "Where English law presumes the publication of a defamatory statement is harmful to the person defamed without proof of special damage thereof that is sufficient for the application of article 5(3). An award of even nominal damages is recognition of some harm having been suffered by the plaintiff."

26. In *Berezovsky v Michaels* [2001] 1 WLR 1004 at p. 1012 Lord Steyn, after reviewing the relevant authorities, stated that the distinctive features of the English law of libel included the fact that it was not necessary for the claimant to prove that publication of defamatory words had caused him damage because damage was presumed.

27. *Shevill* and *Berezovsky* sufficiently establish that under English law publication of a defamatory article carries with it a presumption that the person defamed by it has suffered damage, without the need to

prove that anyone knowing that person has read the article. What neither case, nor *Brunswick,* establishes is that the presumption is irrebuttable.

28. What if an article defames a person who can plainly be identified by his name or description in the article but the defendant succeeds in proving that no reader of the article knew or knew of that person? In *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 737 Eady J expressed the view that an article defaming an identifiable individual would give rise to a cause of action even where no one reading the article had prior knowledge of the victim. While we are unaware of any authority that supports this proposition, it seems to us that it makes sound sense. There seems no reason in principle why a newspaper should not simultaneously create and besmirch an individual's reputation. To take an extreme example, imagine that an unknown American who was about to visit an English town was erroneously described in the town's local paper as a paedophile. Manifestly the law ought to afford him a cause of action in libel.

29. It follows that where a statement is published to a reader that is defamatory of an identifiable individual, it will not be possible for the publisher to prove that no damage has been caused to the individual simply by showing that the reader did not know the individual. If this remains good law after 2 October 2000 and if the article identified the claimant as the Yousef Jameel on the Golden Chain list, it follows that the publication of that list to the two unnamed subscribers caused the claimant some, albeit very modest, damage.

30. What of the three subscribers in the claimant's camp? We have no knowledge of their state of mind. What if Dow Jones were able to prove that they thought none the worse of the claimant after reading the article and the list? Would they then have succeeded in rebutting the presumption of damage? We do not believe that English law, prior to 1 October 2000, would so have held. Coleridge J in *Brunswick* came close to covering the point when he spoke of the defendant lowering the reputation of the principal in the mind of the agent "*so far as in him lies"*. In *Hough v London Express* [1940] 2 KB 507 at p. 515 Lord Goddard CJ said:

> "If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation and may even know it is untrue"

Lord Morris approved this statement in *Morgan v Oldhams Press Ltd* [1971] 1 WLR 1239 at 1253.

31. There have always been strong pragmatic reasons for proceeding on the premise that a defamatory publication will have caused the victim some damage rather than opening the door to the claimant and the defendant each marshalling witnesses to say that, respectively, they did or did not consider that the article damaged the claimant's reputation.

32. In summary, our conclusion is that, prior to 1 October 2000, the presumption that a defamatory publication caused some damage to its victim was, in practice, irrebuttable.

Has the Human Rights Act changed the law?

33. Mr Millar relied upon a number of principles well established under Strasbourg jurisprudence in support of the submission that the presumption of damage was incompatible with Article 10. The most pertinent of these were the following:

i) Freedom of expression, as protected by Art 10(1), is one of the *essential foundations of a democratic society* (*Handyside v UK* (1976) 1 EHRR 737), accordingly any restriction must be *convincingly established* under Art 10(2), the burden of proof being on the party seeking to justify the interference (*Sunday Times v UK (No 2)* (1991) 14 EHRR 229);

ii) Restrictions directed against the media should be particularly closely scrutinised, since the media have a special place in any democratic society as *purveyor of information and public watchdog* (eg *Prager and Oberschlick v Austria* (1995) 21 EHRR 245 (para 34));

iii) Where there has been an interference with the Art. 10(1) right, it is not sufficient that *its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute*

terms; the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it … (*Sunday Times v UK* (1979) 2 EHRR 245, para 65);

iv) In reviewing the necessity for the interference the Strasbourg Court will ask not only whether the standards applied by the national authorities were in conformity with Art 10 but also whether they *based themselves on unacceptable assessment of the relevant facts …* (*Zana v Turkey* (1999) 27 EHRR 667, para 51).

34. Mr Millar submitted that the presumption of damage infringed these principles for a number of reasons. He submitted that a necessity to hold a claimant liable in defamation where in fact his publication may have caused no damage cannot be convincingly demonstrated. On the contrary it is an unjustified interference with freedom of expression. The presumption operates against media defendants who are frequently defendants in libel actions and therefore any purported justification must be particularly closely scrutinised. The presumption is calculated to have a chilling effect on freedom of speech as claimants will be able to bring proceedings even though they do not know whether anyone has read the material complained of, or associated it with them. Insofar as it is necessary to provide a claimant who cannot prove damage with vindication in the face of a defamatory publication, English law could and should devise other ways, such as a declaration of falsity. He further submitted that the presumption of damage was likely to result in awards which infringed the principle in *Tolstoy.*

35. Mr Price's arguments in favour of the presumption of damage were essentially pragmatic. He submitted that, but for the rule, defamation actions would be even longer and more complex, to the detriment of the media. Witnesses would have to be called to testify as to the meaning that they attached to the words published, instead of leaving it to the jury to determine this. Leaving it to the jury to reflect the extent of the defamation by the size of their award of damages was more flexible and simple than would be requiring the judge to frame a declaration of falsity. The latter would often be totally impracticable.

36. Mr Price also made the point that the presumption of damage does not carry with it more than liability to pay a penny damages. There was no justification for the suggestion that it was liable to result in awards which infringed the principle in *Tolstoy.*

37. The presumption of damage has long been a principle of the English law of defamation. We are aware that it has received adverse comment in other jurisdictions. In recent times the English law of defamation has received detailed consideration in both the Faulks Report of 1975 and the Neil Report of 1991. The abolition of the presumption of damage has not been recommended. It seems to us that English law has been well served by a principle under which liability turns on the objective question of whether the publication is one which *tends* to injure the claimant's reputation. It would not be right to abandon this principle in the absence of a convincing case that it is in conflict with Article 10 of the Human Rights Convention

38. Mr Millar has admitted that, so far as media publications are concerned, it will be a rare case where the presumption of damage has any significance. Where, as will usually be the case, publication is significant, an inference that the claimant's reputation has been damaged will arise which it is impossible to rebut. The presumption has assumed significance in this case because it has proved possible to identify the five individuals who, on Dow Jones' evidence, are the only ones to whom the article was published in this jurisdiction. The harm done to the claimant's reputation by the publication to these five individuals is minimal. When the claimant commenced this action he had reason to believe that the publication was very much more substantial. Had he known the limited nature of the publication we find it hard to believe that he would have started an action in this jurisdiction. As Mr Price pointed out in argument, libel proceedings are extremely expensive and not lightly undertaken.

39. We believe that circumstances in which a claimant launches defamation proceedings in respect of a limited circulation which has caused his reputation no actual damage will be very rare. We reject the suggestion that the fear of such suits will have a chilling effect on the media. We have not been persuaded that the possibility of such suits calls for the radical change in English law for which the defendant has called. Nor do we accept the broader submission that, because damage does not have to

be proved, juries may award damages on a scale which offends against the principle in *Tolstoy.* Judges give juries appropriate directions as to their approach to awarding damages and if such directions are disregarded the Court of Appeal has jurisdiction to intervene.

40. We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. In such circumstances the appropriate remedy for the defendant may well be to challenge the claimant's resort to English jurisdiction or to seek to strike out the action as an abuse of process. We are shortly to consider such an application. An alternative remedy may lie in the application of costs sanctions.

41. For these reasons we are not persuaded that the presumption of damage that forms part of the English law of libel is incompatible with Article 10 of the Convention and that it must, accordingly, be swept away. The appeal in relation to this issue will be dismissed.

Identification of the claimant

42. Before Eady J Mr Millar submitted that the claimant had no real prospect of establishing that readers in England would have understood that the article referred to him. The judge rejected that submission. Before us Mr Millar indicated that he would seek to rely on this submission, not as an independent ground of appeal, but in support of his contentions that no substantial tort had been committed within the jurisdiction and that the action was an abuse of process. In these circumstances it seemed to us appropriate to grant Mr Millar permission to appeal against the judge's rejection of his contention that it could not be shown that English readers might have understood that the article referred to the claimant.

43. The starting point of Mr Millar's argument was that both Yousif and Jameel were common Muslim names (the first can be transcribed from Arabic as either Yousef or Yousif). This is correct. The claimant made this very point himself, when contending in his action against Times Newspapers Ltd that it did not follow that the Yousif Jameel on the Golden Chain list was himself. Mr Millar further relied upon Dow Jones' evidence that the publication of the Golden Chain list in England was limited to 5 subscribers.

44. In his judgment Eady J cited the statement in paragraph 7.3 in *Gatley* that:

> "Where the claimant is expressly identified by name, it is not necessary to produce evidence that anyone to whom the statement was published did identify the claimant"

He went on to hold that:

> "The Claimant's name appears in the relevant passage of the words complained of, and that is sufficient for [Mr Price's] purposes."

45. Taken on its own, that finding would not have justified the judge's rejection of Mr Millar's submissions. Where a common name is included in an article, the name itself will not suffice to identify any individual who bears that name. The context in which the name appears, coupled with the name may, however, do so. Reference by the judge to passages from *Hulton v Jones* [1910] AC 20 has satisfied us that the judge attached significance not merely to the publication of the name Yousif Jameel, but to the context in which it appeared. He concluded that the two together would, or might, lead those who knew Mr Jameel to identify him as the Yousif Jameel in the Golden Chain list.

46. We have concluded that the judge was right not to grant Dow Jones summary judgment on the basis that there was no reasonable prospect of proving that the name Yousif Jameel in the Golden Chain list identified the claimant. The article alleged that the list was of Saudi financial backers of Mr bin Laden in 1988. It may well be that the claimant was the only Saudi of that name who, in 1988, was sufficiently wealthy to feature on such a list. Furthermore it appears that the claimant has been widely identified as the Yousif Jameel on that list. This certainly lends support to the proposition that, applying an objective test, the claimant was one of those about whom the article was written.

47. For these reasons Dow Jones' appeal against the judge's ruling on identification is dismissed.

No substantial tort and abuse of process

48. It is convenient to take these two matters together, for they overlap. This action relates to libel in a publication effected by the internet. The article was posted on the web servers in New Jersey. Dow Jones pleaded in their Defence that it was this which constituted publication of the article, so that no publication occurred in England. The judge struck out that plea, holding that it was contrary to decisions which included *Loutchansky v Times Newspapers & Ors Nos 2 to 5* [2002] QB 783 and at page 813 and *Berezovsky*. Sedley LJ gave permission to appeal against this ruling. Mr Millar recognised that this court was likely to feel bound to follow the same authorities that had led to his defeat on this point at first instance and simply reserved his position in relation to it. Internet publication can, however, raise in an acute form the issues that we are now considering.

49. Where there is a worldwide publication of an allegedly defamatory article, whether in hard copy form or on the internet, difficult issues of jurisdiction may occur. Where the claim is governed by the Brussels and Lugano Conventions and the Judgments Regulation (Council Regulation 44/2001 of December 22 2000) a claim for all publications can be brought in the jurisdiction where the defendant is established or individually in each member state where publication has taken place in respect only of the publication within that member state: *Shevill v Presse Alliance* [1995] 2 AC 18. If the latter alternative is adopted, English jurisdiction in respect of the publication in England cannot be challenged on the ground that England is not the most convenient forum. Where the Conventions do not apply, a claimant can obtain permission to serve a foreign publisher out of the jurisdiction in respect of a publication in England, pursuant to CPR 6.20(8). In those circumstances the claim will be limited to the publications within the jurisdiction. Furthermore, the defendant can apply to have service set aside on the ground that there is an alternative jurisdiction "in which the case may be tried more suitably for the interests of all the parties and for the ends of justice": *The Spiliada* [1987] AC 470.

50. It is in the context of an application to set aside service outside the jurisdiction on such grounds that the question of whether 'a real and substantial tort has been committed within the jurisdiction' has been relevant. In *Kroch v Rossell* [1937] 1 All ER 725 the plaintiff brought libel proceedings against the publishers of a French newspaper and a Belgian newspaper. He obtained permission to serve each defendant out of the jurisdiction on the ground that a small number of copies of each newspaper had been published in England. The vast bulk of the publications had been in France and Germany. The defendants applied successfully to have the order giving permission to serve out set aside. Slesser LJ remarked at p. 729:

> "in no sense can it be said that there is any substantial importation of these papers in England, or that the libel which is said to affect the plaintiff in England is anything but a very minor incident of the substantial publication in France."

Scott LJ added:

> "I think that it would be ridiculous and fundamentally wrong to have these two cases tried in this country, on a very small and technical publication, when the real grievance of the plaintiff is a grievance against the widespread publication of the two papers in the respective countries where they are published."

51. More recently, in *Chadha v Dow Jones & Co Inc* [1999] EMLR 724at p. 732 Roch LJ stated:

> "In my judgment once it is established that there has been an "English tort" that is to say that there has been a significant publication of prima facie defamatory matter concerning the plaintiff within the jurisdiction, the English courts have jurisdiction with regard to that English tort. Where the perpetrator of the tort is not within the jurisdiction but is abroad, then leave to serve process abroad under Order 11 is required and the fundamental principle identified by the House of Lords in *The Spiliada* applies. If there is a substantial complaint with respect to the English tort, having regard to the scale of the publication within the jurisdiction and the extent to which the plaintiff has connections with and a reputation to protect in this country as against the inconvenience to the defendant in being

> brought here to answer for his alleged wrong-doing then service of the writ abroad is to be ordered."

52. Mr Millar submitted that these principles applied equally to his application to strike out the claim on the ground that the action was an abuse of process. He submitted that no substantial tort had been committed in this jurisdiction. The publication had been minimal and it had done no significant damage to the claimant's reputation. In these circumstances pursuing this expensive action was disproportionate and an abuse of process.

53. Mr Price conceded that, had Dow Jones objected to the jurisdiction on the grounds that England was not the appropriate forum he might have been hard pressed to justify exercise of an exorbitant jurisdiction. He contended, however, that by submitting to the jurisdiction Dow Jones had conceded that England was the 'forum conveniens' for the claimant's claim. From the outset, the claimant's only concern was to achieve vindication in respect of the defamation. English law recognised this as a legitimate reason for bringing a claim for defamation. The claimant had believed that there had been a substantial publication of the article together with the Golden Chain list in England. Dow Jones had not disabused him. It was far too late to take the point that there had been no substantial tort within the jurisdiction. In pursuing the English proceedings the claimant had acted to his detriment by permitting the possibility of bringing proceedings in an alternative jurisdiction to become time-barred.

54. Mr Price's submissions amount, so it seems to us, to asserting that Dow Jones' failure to challenge English jurisdiction estops them from relying at this stage on arguments that could have been advanced in support of such a challenge. We do not accept this. An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice. If Dow Jones have caused potential prejudice to the claimant by failing to raise the points now pursued at the proper time, it does not follow that the court must permit this action to continue. The court has other means of dealing with such prejudice. For instance, appropriate costs orders can compensate for legal costs unnecessarily incurred and relief can be made conditional on Dow Jones undertaking not to raise a limitation defence if proceedings are now commenced in another jurisdiction.

55. There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more pro-active. The second is the coming into effect of the Human Rights Act. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, insofar as it is possible to do so. Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.

56. We do not believe that *Brunswick v Harmer* could today have survived an application to strike out for abuse of process. The Duke himself procured the republication to his agent of an article published many years before for the sole purpose of bringing legal proceedings that would not be met by a plea of limitation. If his agent read the article he is unlikely to have thought the Duke much, if any, the worse for it and, to the extent that he did, the Duke brought this on his own head. He acquired a technical cause of action but we would today condemn the entire exercise as an abuse of process.

57. In *Schellenberg v BBC* [2000] EMLR 296 the claimant had settled defamation actions against the *Guardian* and the *Sunday Times* on disadvantageous terms, when it seemed likely that he was about to lose. He then pressed on with this almost identical action against the BBC. Eady J struck this out as an abuse of process. He rejected the submission that he should not do so as this would deprive the claimant of his 'constitutional right' to trial by jury. He said:

> "… I see no reason why such cases require to be subjected to a different pre-trial regime. It is necessary to apply the overriding objective even in those categories of litigation and in

> particular to have regard to proportionality. Here there are tens of thousands of pounds of costs at stake and several weeks of court time. I must therefore have regard to the possible benefits that might accrue to the claimant as rendering such a significant expenditure potentially worthwhile."

He added that the overriding objective's requirement for proportionality meant that he was bound to ask whether "the game is worth the candle". He concluded:

> "I am afraid I cannot accept that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources."

58. In *Wallis v Valentine* [2002] EWCA Civ 1034; [2003] EMLR 8 the Court of Appeal, in a judgment delivered by Sir Murray Stuart-Smith, endorsed Eady J's approach and dismissed an appeal by the claimant against the striking out of his claim as an abuse of process. That was an extreme case where the judge had found that even if the claimant succeeded his damages would be very modest, perhaps nominal, and not such as could justify the costs of an action which was estimated to last 14 days in circumstances where the claimant had no assets. Furthermore the claimant was not motivated by a desire for vindication, but was pursuing a vendetta.

59. In the present case there is no doubt that the claimant is seeking vindication. His complaint is that the media, including *the Wall Street Journal On-line,* have, without justification, treated the Golden Chain list as if it is a list of those who, in 1988, had contributed to funding Osama Bin Laden and who, in consequence, remained suspected of funding terrorism. Dow Jones had refused to state that the claimant was guilty of neither, or even to publish his own assertion to that effect. Dow Jones for their part do not assert that the claimant had in fact contributed to funding Osama Bin Laden sixteen or more years ago. They are not prepared, however, to publish a statement that he did not do so. They assert that they are entitled, by way of responsible reporting, to publish, without adopting, such comments as are made by the United States authorities in relation to the claimant's position. Whether that is all that they have done and whether that provides them with a defence of qualified privilege are issues raised in this action.

60. If vindication is the first object advanced by the claimant for pursuing this litigation, the second is to obtain an injunction restraining Dow Jones from repetition of the alleged libel. We must now consider each objective to see whether it justifies the continuance of this action.

Vindication

61. Mr Price accepted that the claimant's cause of action related only to the publications within this jurisdiction, which for purposes of argument are assumed to have been no more than the five individual publications that Dow Jones have identified. Yet the publication was a worldwide publication and at times Mr Price's submissions suggested that it was legitimate to have regard to the vindication that these proceedings would, if successful, bring about in relation to the worldwide publication. If the claimant obtains a favourable verdict from the jury in this action there will be nothing to prevent him from asserting that the verdict provides vindication in respect of the global publication. Two questions arise. First, where there has been a worldwide publication on the internet, can a claimant justify proceeding in a country where publication has been minimal on the ground that this is a good forum in which to seek global vindication? Second, to what extent are the present proceedings likely to result in vindication?

62. *Berezovsky* provides assistance in answering the first question. The plaintiff, a Russian, brought a libel action in respect of an article in the American magazine *Forbes.* 98.9% of the issue in question was sold in the USA, Canada or to US forces. The English circulation was about 2000 copies. The plaintiff obtained permission to serve proceedings out of the jurisdiction. On the application of the defendants the judge set this service aside, on the ground that the appropriate jurisdiction for the dispute was Russia. The defendants gave undertakings that ensured that the claimant would be able to pursue his claim in that jurisdiction.

63. The Court of Appeal reversed that decision [1999] EMLR 278. They held that the judge had erred in principle in approaching his decision as if the global publication was a single tort in respect of which an action could only be brought in a single jurisdiction. Each publication in England had to be treated as a separate tort. Where there was no complaint of substance in relation to that English torts, either because there was an insignificant English circulation, or because the plaintiff had no connection with or reputation to protect in England, or both, permission to serve out should not be given because the *Spiliada* test would not be satisfied. In the instant case the claimant had connections with and a reputation to protect in England and, having regard to the extent of the publication, there was a substantial complaint as regards the English torts. An appeal in respect of a second similar action was heard at the same time and followed the same course.

64. There was a further appeal to the House of Lords. The majority supported the analysis of the Court of Appeal. Lord Hoffmann viewed the matter differently. He said at pp 1023-4:

> "… the notion that Mr Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being lowered in the esteem of persons in this country who have heard of him is something which would be taken seriously only by a lawyer. An English award of damages would probably not even be enforceable against the defendants in the United States: see Kyu Ho Youm, "The Interaction Between American and Foreign Libel Law: U.S. Courts Refuse to Enforce English Libel Judgments" (2000) 49 I.C.L.Q. 131. The common sense of the matter is that he wants the verdict of an English court that he has been acquitted of the allegations in the article, for use wherever in the world his business may take him. He does not want to sue in the United States because he considers that *New York Times v Sullivan* (1964) 376 U.S. 254 makes it too likely that he will lose. He does not want to sue in Russia for the unusual reason that other people might think it was too likely that he would win. He says that success in the Russian courts would not be adequate to vindicate his reputation because it might be attributed to his corrupt influence over the Russian judiciary."

65. A little later Lord Hoffmann added:

> "The plaintiffs are forum shoppers in the most literal sense. They have weighed up the advantages to them of the various jurisdictions that might be available and decided that England is the best place in which to vindicate their international reputations. They want English law, English judicial integrity and the international publicity which would attend success in an English libel action."

Lord Hoffmann concluded:

> "My Lords, I would not deny that in some respects an English court would be admirably suitable for this purpose. But that does not mean that we should always put ourselves forward as the most appropriate forum in which any foreign publisher who has distributed copies in this country, or whose publications have been downloaded here from the Internet, can be required to answer the complaint of any public figure with an international reputation, however little the dispute has to do with England. In *Airbus Industrie G.I.E. v Patel* [1991] 1 AC 119 your Lordships' House declined the role of "international policeman" in adjudicating upon jurisdictional disputes between foreign countries. Likewise in this case, the judge was in my view entitled to decide that the English court should not be an international libel tribunal for a dispute between foreigners which had no connection with this country."

66. So far as concerns the issue currently under consideration there is no conflict between the view of Lord Hoffmann and the view of the majority. This action falls to be considered as relating exclusively to an independent tort, or series of torts, in this country. It is thus not legitimate for the claimant to seek to justify the pursuit of these proceedings by praying in aid the effect that they may have in vindicating him in relation to the wider publication.

67. To what extent will this action, if successful, vindicate the claimant's reputation? English law and procedure does not permit the court to make a declaration of falsity at the end of a libel action. Where justification has been pleaded the verdict of the jury will determine whether the defendant has justified the defamation. Where there is no plea of justification, the jury is directed to proceed on the presumption that the defamatory allegation is untrue. The damages that they award will indicate their view of the injustice that has been done to the claimant by the allegation that is presumed to have been untrue. To this extent an award of substantial damages provides vindication to the plaintiff. The presumption of falsity does not however leave the judge in a position to make a declaration to all the world that the allegation was false. In the present case, where the matter will not even be explored at the trial, the judge could not possibly be expected to declare, with confidence, that the claimant never provided funding to Osama bin Laden. There may well in due course be a finding in relation to this in the *Burnett* action, where the question will be directly in issue.

68. What will be in issue at the trial, if it proceeds, has not been explored before us. The judge summarised the position by saying that the Defence included "defences by way of qualified privilege on various bases". We anticipate that these defences are likely to prove cumbersome to try with a jury, involving a lengthy and expensive trial. At the end of the day the trial will determine whether the publications made to the five subscribers were protected by qualified privilege. If they were not, it does not seem to us that the jury can properly be directed to award other than very modest damages indeed. These should reflect the fact that the publications can have done minimal damage to the claimant's reputation. Certainly this will be the case if the three subscribers who were in the claimant's camp prove to have accessed the Golden Chain list in the knowledge of what they would find on it and the other two had never heard of the claimant.

69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.

70. If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort. Jurisdiction is no longer in issue, but, subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR.

71. Mr Price submitted that to dismiss this claim as an abuse of process would infringe Article 6 of the Convention. We do not consider that this Article requires the provision of a fair and public hearing in relation to an alleged infringement of rights when the alleged infringement is shown not to be real or substantial. Subject to the final issue, to which we now turn, and on the premise that there have only been the five individual publications within this jurisdiction, we would dismiss this action as an abuse of process.

The claim for an injunction

72. The claimant's objection to the publication in this case, and in other cases, is not to the reporting of the discovery of the Golden Chain list and the names on it, but to assertions that this list demonstrates that he was an early donor to Al Qaeda and a financial backer of Osama bin Laden and that he has been under scrutiny by the US officials as a possible supporter of terrorism. Mr Price contends that the continuation of these proceedings is justified because of the risk of repetition of these libels and the need to obtain an injunction against such repetition. He accepted that he could only seek an injunction restraining further publications within this jurisdiction, but contended that it is technically possible for

Dow Jones to restrict access to matter put on the world wide web so as to exclude from such access those within this jurisdiction.

73. Mr Millar challenged this last contention. He made Dow Jones' position plain:

> "Dow Jones, as major American news organisation, will assert, if I can put it this way, to the last breath of its advocate, its freedom to report both in the US and worldwide two things. First of all, the fact of the existence of a document of major public importance (that is the list; the golden chain list itself) and, secondly, what the US Government has repeatedly said about it in public, having itself, that is the government, put the document into the public domain. I emphasize, we are not talking here, if I can put it that way, about the stray comments of a stray US attorney in the odd case as Mr Price tries to suggest. The golden chain is a key piece of factual history, re the development of international Muslim terrorism, and is referred to repeatedly, as I have said, in, for example, the 9/11 Commission Report. It is therefore now part of the currency of the public debate in the US and, indeed, therefore worldwide surrounding the 9/11 tragedy."

74. Where a defamatory statement has received insignificant publication in this jurisdiction, but there is a threat or a real risk of wider publication, there may well be justification for pursuing proceedings in order to obtain an injunction against republication of the libel. We are not persuaded that such justification exists in the present case.

75. There seems no likelihood that Dow Jones will repeat their article in the form in which it was originally published. It has been removed from the web site and from the archive. If they do publish further material about the Golden Chain list, it is likely to be by way of reports about litigation in which the list features, or statements made about the list by the US Government or other authorities. It is quite impossible to predict whether any such future publication will be protected by privilege, or calculated to cause significant damage to the claimant's reputation.

76. In these circumstances, if this litigation were to proceed and to culminate in judgment for the claimant, it seems to us unlikely that the court would be able, or prepared, to formulate and impose an injunction against repetition of the defamation in terms that would be of value to the claimant. We do not believe that a desire for this remedy has been what this action has been about, or that the possibility of obtaining an injunction justifies permitting this action to proceed.

77. For these reasons we shall allow this appeal and make an order staying these proceedings.

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