Neutral Citation Number: [2019] EWHC 162 (QB)

Case No: HQ17D00413

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2019

Before:

SENIOR MASTER FONTAINE

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Between:

(1) ALEKSEJ GUBAREV **(2) WEBZILLA B.V.** **(3) WEBZILLA LIMITED**	**Claimants**
- and -	
(1) ORBIS BUSINESS INTELLIGENCE LIMITED **(2) CHRISTOPHER STEELE**	**Defendants**

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Andrew Caldecott QC, 1 Brick Court and Ian Helme, Matrix Chambers (instructed by **McDermott Will & Emery UK LLP, 110 Bishopsgate, London EC2N 4AY**) for the **Claimants**
Gavin Millar QC and Edward Craven, Matrix Chambers (instructed by **Reynolds Porter Chamberlain LLP, Towerbridge House, St Katherine's Way, London E1W 1AA**) for the **Defendants**

Hearing dates: 7 November 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR MASTER FONTAINE

Senior Master Fontaine:

1. This was the hearing of the Claimants' application dated 27 April 2018 for an order pursuit to CPR 3.1(2)(i) that there should be a split trial in the proceedings. The application was supported by the third witness statement of Ziva Robertson dated 27 April 2018, responded to by the first witness statement of Christopher Steele dated 30 October 2018 and the third witness statement of Nicola Cain dated 30 October 2018, and replied to by the fourth witness statement of Ziva Robertson dated 2 November 2018.

2. In this judgment witness statements are referred to as "Surname number/paragraph" and documents in the hearing bundle as [tab no./page number].

Background to the Claim

3. The claim was issued on 8 February 2017 and accompanied by Particulars of Claim dated 3 February 2017. The Claim Form was amended on 13 July 2017 and Amended Particulars of the Claim served on 4 July 2018, Particulars of Special Damages provided on 19 June 2018 and an amended Defence and Response to Particulars of Special Damages served on 1 August 2018. A Reply had been served dated 30 June 2017 (no consequential amendments being required). Various requests for Part 18 information have been served and responded to.

4. The First Defendant, a company providing corporate intelligence services, was engaged between June and December 2016 by a consultancy based in Washington DC, Fusion GPS ("Fusion"), which provides research, strategic intelligence and due diligence services to clients. Their brief was to prepare a series of confidential memoranda based on intelligence concerning Russian efforts to influence the US Presidential election process and links between Russia and the then Republican Presidential candidate Donald Trump. Sixteen memoranda were produced by October 2016, prepared before the US Presidential election ("the pre-election memoranda"). A final memorandum ("the December Memorandum") was provided after the date of the election. The memoranda, including the December Memorandum, are referred to in the Amended Particulars of the Claim as "the Steele dossier". On 10 January 2017 that dossier was published by a news website, BuzzFeed, on its website. The Second Defendant was the author of that document in his position as Director of the First Defendant, and the First Defendant has admitted vicarious liability for any actions of the Second Defendant. The Claimants' libel claim is in respect of that publication in relation to one paragraph of the December memorandum (see Paragraph 6 of the Amended Particulars of the Claim). None of the pre-election memoranda contained any reference to or intelligence about the Claimants. The Defendants deny liability for the publication complained of and say that liability for such publication resides with BuzzFeed. There is a secondary defence of qualified privilege. The First Claimant has also brought defamation proceedings in Florida against BuzzFeed in respect of the same publication. The proceedings in this court relate to publication within the EU.

Issues for Trial

5. The parties have helpfully agreed a list of issues, save for one issue in dispute ((iv) below in square brackets). These are as follows:

<u>List of Issues</u>

Responsibility for Publication

i) Are the Defendants responsible as a matter of law for the publication of the December Memorandum on the Buzzfeed website?

Meaning

ii) What is the meaning of the words complained of?

Serious harm/[abuse of process]

iii) Have the Second and Third Claimants suffered serious financial loss because of such publication, and/or are/were they likely to do so?

iv) [Are any of the claims by any of the Claimants properly characterised as a *Jameel* abuse of process with the consequence that they should be stayed/struck out?]

Qualified Privilege

v) Did such publication take place on an occasion of qualified privilege?

Remedies

vi) What award of general damages (if any) should be awarded to each of the Claimants?

vii) What award of special damages (if any) should be awarded to the Second Claimant?

viii) Are the Claimants entitled to an injunction?

6. On 11 October 2017 the case came before Master Thornett for a costs and case management conference ("CCMC"). The CCMC was adjourned by Master Thornett but he ordered that the parties consider by 4pm on 1 December 2017, inter alia, whether the case is suitable for a split trial on liability (including consideration of section 1(2) of the Defamation Act 2013), and if so what directions may be suitable.

7. The form of split trial order sought by the Claimants is as follows:-

1 There shall be a split trial in these proceedings as follows:

1.1 The first trial ("the first trial") shall be of the following issues:

(1) The meaning of the words complained of:

(2) Whether the words are defamatory of the Second and Third Claimants having regard to section 1(2) of the Defamation Act 2013;

(3) Whether the Defendants and each of them are liable for publication of the words complained of;

(4) Whether such publication is protected by the defence of common law qualified privilege;

(5) What award of general damages (if any) should be awarded to the First Claimant; and

(6) What other remedies (if any) should be awarded to the Claimants in terms of non-pecuniary relief (save for any costs orders).

1.2 The second trial ("the second trial") in the event that it is necessary shall be of the following issues:

(1) What award of general damages should be awarded to the Second and Third Claimants (including what award (if any) to compensate the Third Claimant for the claimed general downturn of business);

(2) What award (if any) of special damages should be awarded to the Second Claimant;

(3) Any issues concerning interest on the above.

8. The application is resisted by the Defendants.

Summary of the Claimants' Submissions

9. The claim has changed and narrowed since issue, in that the Fourth Claimant ("XBT Holding S.A.") has withdrawn its claim and only the Second Claimant claims special damages. Both the Second and Third Claimant plead that they have suffered serious financial loss and/or are/were likely to do so, as required for corporate claimants by section 1(2) of the Defamation Act 2013 ("the 2013 Act") – Amended Particulars of Claim Paragraph 9 [9/88]. The Particulars of Special Damages contain a calculation of the Second Claimant's loss of profit in the sum of €940,587.36, and the Third Claimant provides particulars of its serious financial loss based on a general downturn in revenue and a cancellation of five EU customer contracts in 2017.

10. It is submitted that calculation of the Second Claimant's claim for special damages, and evidence to demonstrate the Third Claimant's general downturn in business to support its claim in general damages, will require expert evidence and substantial factual evidence. Thus, the main objective of the Claimants in the application is to "hive off" the issues that will be expensive to prepare and may not be required in the event that the Claimants failed to establish liability in respect of any of the issues which they seek to be determined on the first trial. It is submitted that this is a pragmatic, principled and proportionate manner of proceeding, supported by authority, which will ensure the best use of court resources and enable the case to proceed to substantive resolution as quickly as possible. It is submitted that once the first trial is completed and if the claim succeeds, it may be possible for the parties to reach resolution by ADR or other form of settlement negotiations.

11. The Claimants rely on the principles in relation to split trials stated in the guidance given by Hildyard J. in *Electrical Waste Recycling Group Ltd -v- Philips Electronics UK Ltd* [2012] EWHC 38 (Ch).

12. The Claimants also rely on a number of other authorities in relation to their proposal that the issues of general damages for the Second and Third Claimants, including any award to compensate the Third Claimant for general downturn of its business, and special damages for the Second Claimant, be determined separately from the liability trial, namely:

i) *Brett Wilson LLP -v- Persons Unknown* [2016] 4 WLR 69;

ii) *Pirtek (UK) Ltd -v- Jackson* [2017] EWHC 2834 (QB);

iii) *Euroeco Fuels (Poland) Ltd -v- Szczein and Swinoujscie Seaports Authority SA* [2018] EWHC 1081 (QB);

iv) *Burki -v- Seventy Thirty Ltd* [2018] EWHC 2151.

13. Those authorities make it clear that there is a distinction between "serious financial loss" as set out in section 1(2) of 2013 Act, and a special damages claim. Thus it is submitted that:

i) the evaluation of 'a tendency' to cause serious financial loss is fact sensitive, and will depend upon such factors as the nature of the Claimants' business, the relevance of the allegation to such business and the identity of the publishees;

ii) the substantial and complex evidence which will be required for the issues proposed to be dealt with in the second trial will be of an entirely different order and would not need to be dealt with before the trial judge at the first trial.

14. As a matter of common sense what is required to find an inference that serious financial loss has occurred or is likely to occur, is very different from the evidence required to quantify that loss. It is submitted that the document relied on at paragraph 11 of the Particulars of Special Damages in relation to the Third Claimant is confirmation that an allegation of the gravity of the publication relied upon is almost bound to cause, or be likely to cause, serious financial loss, subject to some basic evidence as to the location and extent of the corporate claimants' business.

15. It is submitted that if liability issues are determined as soon as possible then the Defendants' concern that delays are hampering their ability to respond to public criticism would cease from that determination of the liability issues, whichever party succeeds. The Claimants' concerns for prompt vindication, reflecting the primary reason for defamation claims, would also be satisfied. Further there is a public interest prompt determination of the liability issues, but there is no public interest in determination of the claims of general damages and actual loss to the Second and Third Defendants.

16. Further if the Defendants succeed on liability issues the costs of dealing with detailed causation and quantification issues will have been wholly wasted, and the delay which would inevitably be caused by listing a full trial of all issues will have been unnecessary. The financial cost, and the cost in terms of court time, is likely to be substantial. It is submitted that the issue under section 1(2) of the 2013 Act will not exercise the court for any length of time and that only the following would be required:

i) sufficient evidence of publication in a relevant jurisdiction;

ii) general evidence as to the nature and extent of the corporate Claimants' trading in a relevant jurisdiction at the relevant time;

iii) any further evidence would in any event be of a very limited scope.

Summary of the Defendants' Submissions

17. The Defendants consider that a split trial would risk causing a further unnecessary delay and additional costs for no corresponding benefit.

18. The Defendants complain of delay caused by the Claimants' conduct of the proceedings which has imposed a significant burden on the First Defendant and its employees, and on the Second Defendant and his family. The Defendants are anxious to ensure that the case proceeds to a final conclusion as soon as possible so that they no longer bear the costs and burden of dealing with the case.

19. The delay relied upon is:

    i) failure to serve a schedule of loss particularising the claims to special damages for more than ten months after the Particulars of Claim were served;

    ii) amendment of the Particulars of Claim some seventeen months after the original the Particulars of Claim were served so that the Defendants had to file an amended Defence;

    iii) a without notice application for an order requiring the deposition of the Second Defendant under the Evidence (Proceedings in Other Jurisdictions) Act 1975, which led to a substantial diversion of time and resources as Mr Steele was forced successfully to challenge the scope of the order made;

    iv) repeated failure to engage in a timely or constructive way with the Defendants' reasonable requests for basic information required in order to understand the basis and scope of the claims being advanced by the Claimants.

20. The Claimants' case has narrowed significantly since the proceedings began and a number of important averments in the Particulars of Claim have now been disavowed by the Claimants as the proceedings have progressed:

    i) The original Particulars of Claim included XBT Holding S.A. as a Fourth Claimant and stated that it had suffered serious financial loss as a result of the publication of the words complained of. That claim has been withdrawn, the Claimants confirming that XBT Holding S.A. is a non-trading "pure holding company" that had not suffered serious financial loss (Cain 3/36 [6/63]). It is not clear how in those circumstances serious financial loss affecting that company could have been alleged in the Particulars of Claim.

    ii) The First Claimant claimed serious financial loss and special damages in the original Particulars of Claim, and those claims have been abandoned in the Amended Particulars of Claim.

    iii) The Third Claimant also originally claimed special damages, whereas in the Amended Particulars of Claim the Third Claimant does not pursue special damages, and instead relies on significant downturn in revenue to support the claim for general damages.

21. The Defendants submit that this suggests that there was no proper basis for some of the allegations originally pleaded, where these have been withdrawn. The Defendants consider that the application for a split trial may have been made for tactical reasons to cause further delay in the ultimate resolution of the proceedings. Further they are concerned that the proposed deferring of the issues in relation to quantum of the Second and Third Claimants damages, if their claims succeed, is an attempt to avoid scrutiny of the quantum issues by the court determining the liability issue. It is suggested that this will unfairly pressurise the Defendants into considering settlement or will insulate questionable aspects of the Second and Third Claimants' claims being properly tested in court within a reasonable time frame.

22. It is accepted that it is clear from the authorities that "serious financial loss" under section 1(2) of the 2013 Act is a separate issue from a special damages claim. However, it is submitted that the position in this case is different from those in the authorities referred to. In both *Pirtek* and *Brett Wilson LLP* the defendant was not present or represented, so no contrary submissions were heard. In *Euroeco Fuels* the case came before the court on an interlocutory application for a stay under CPR 11, and the issue of 'serious financial loss' only came before the court on the question of whether the claimants had a good arguable case. In *Burki* the comments of the judge were in the context of a full trial on both liability and quantum, and he had all the evidence before him on both serious financial loss and special damages.

23. The Defendants also rely on the judgment of Hildyard J. in *Electrical Waste Recycling,* and on the decision in *Signia Wealth Ltd -v- Marlborough Trust Co Ltd* [2016] EWHC 2141 (Ch) where Chief Master Marsh at [24] confirmed Hildyard J's view, namely that the decision of the court is essentially a pragmatic one, taking into account a range of issues that will be bespoke for each case where the question arises.

24. It is accepted that the full extent of the evidence required for general and special damages will not necessarily be required to prove serious financial loss, but it is submitted that in this case there will be a substantial overlap in the evidence in terms of documentary evidence, evidence from witnesses of fact and possibly also expert evidence, such that the cost of attendance of witnesses at two trials and the consideration of the financial evidence for both trials would constitute an additional cost burden such that the two trials would be substantially more expensive than one trial dealing with all issues.

25. It is thus submitted that the proposal by the Claimants will lead to a fragmentation or bifurcation of issues across two separate trials which may render the result unreliable.

26. It is further submitted that there is not likely to be any settlement until the Second and Third Claimants are in a position to provide proper particulars and evidence supporting their claims for special damage and general damages relying on a downturn of business. Thus, even if the Claimants succeed there will be little saving in costs because this evidence would have to be prepared in any event.

27. Further it is submitted that the Claimants' proposals for a split trial have undergone a number of changes since first pursued in late November 2017, as follows:

    i) on 28 November 2017 the Claimants proposed to sever the issues of liability and quantum;

ii) shortly afterwards was a proposal by the Claimants' counsel that:

a) the first trial should address liability including serious harm, and any damages to be awarded to the First Claimant in the event that he was successful;

b) the second trial should deal with causation and quantification of damages for the Second and Third Claimants;

iii) on 1 December 2017 the Claimants reiterated the proposal for a clean split between the issues of liability and quantum, or as an alternative a first trial of the Defendants' liability for publication and their qualified privilege defence, with a second trial to deal with all other issues;

iv) on 13 March 2018 the Claimants returned to the proposals for separate trials of liability and quantum, and;

v) on 27 April 2018 the Claimants issued the application for a first trial dealing with liability, serious harm, quantum in respect of the First Claimant and all other remedies save for costs, with a second trial dealing with special damages in respect of the Second Claimant, general damages in respect of the Second and Third Claimants and interest on any sums awarded.

28. This suggests confusion on the Claimants' part as to the inter-relationship between the issues of liability and quantum, which reflects the impossibility of effecting a clean division of issues in the circumstances of this particular case. It is submitted that the question of whether a defamatory publication has caused/is likely to cause serious financial loss will require the court to consider the business and trading records of the corporate entity in much the same way that it will have to when determining quantum of general and special damages. This demonstrates the impossibility of effecting a clear division between issues relevant to liability and those relevant to quantum.

29. It is submitted that split trials would not be likely to result in very much saving of costs, and if the Claimants were to succeed in establishing liability the requirement to prepare for, and take part in, a second trial some months later is likely to result in significantly greater costs being incurred by both sides than if liability and quantum are dealt with together in a single trial.

30. Further, a split trial would impose unnecessary inconvenience and strain on witnesses who may be required in both trials, and in particular the Second Defendant.

31. It is denied that a single trial will be of such complexity or result in such diffusion of issues as to place an undue burden on the judge hearing the case. In other words, it is submitted that a single consolidated trial is likely to reduce the overall burden on judicial resources by avoiding the need for a judge to read into the case twice, hear two separate rounds of opening and closing submissions, deliver two judgments and possibly deal with two rounds of applications concerning permission to appeal and costs.

32. It is submitted that the evidential basis for the application is not made out by Ms Robertson's evidence. There is no indication as to whether expert evidence is in fact

required. There is no consideration as to the additional time required to determine the issues in the proposed second trial or as to the duplication of preparation work and judicial time that would result. There is no indication of what additional time would be taken by the issues in the second trial if they were dealt with in one trial of all issues. There is thus insufficient information as to whether a split trial would result in an overall saving of time and costs.

Discussion and Conclusion

33. Section 1 of the Defamation Act 2013 reads as follows:

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

34. Both parties agree that the following can be derived from the relevant jurisprudence:

i) "serious" is an ordinary English word to be given its ordinary meaning; it means something more weighty than "substantial". Whether loss is serious must depend on the context;

ii) the words "likely to" bear the meaning of liable to, or having a tendency to; the word cannot bear different means in two adjacent sub-sections;

iii) "serious harm" is not to be limited to special damage; see *Euroeco Fuels* at [71];

iv) "serious financial loss" in section 1(2) may, like other forms of "serious harm" be capable of inference from the evidence; see judgment of Davis LJ in *Lachaux –v- Independent Print Ltd* [2018] 594 at [72]; *Brett Wilson LLP* at [30-31] per Warby J.; *Pirtek* at [49-51] Warby J. and *Seventy Thirty Ltd v Burki* at [205] to [210].

35. The Claimants accept that more evidence is required in this case and they would not be relying at a first trial solely on inferences to be drawn from the Amended Particulars of Claim and Particulars of Special Damages. I agree that this must be the case, in particular I consider that the court would have to be satisfied that there was sufficient evidence to support serious financial loss by the Second and Third Claimants, taking into account the changing nature of the Claimants' case over the course of proceedings (see Defendants' submissions summarised in Paragraph 27 above).

36. In the light of:

i) the significant amount of special damages claimed by the Second Claimant (€940,587.36); and

ii) the extent to which the Third Claimant seeks the alleged significant downturn in its revenue from customers within the EU to be reflected in their general damages: included in the Particulars of Special Damages as approximately €1 million from 2016-2017, [10/95];

the Defendants' concern to obtain more information about the alleged losses, and to identify whether such information impinges upon the issue of serious financial harm at an earlier stage than after an initial trial is not unreasonable.

37. The primary questions on this issue are:

i) whether and if so, to what extent, the additional evidence required to establish special damages for the Second Claimant and general damages for the Third Claimant will overlap with that required to establish serious financial loss; and

ii) if there is a significant overlap, whether that suggests that it would be more cost effective to deal with all such financial evidence in one trial; and

iii) whether the evidence required for the Second Claimant's special damages claim and the Third Claimant's general damages claim will be too complex and burdensome for the trial judge to deal with at one single trial.

38. The Claimants' evidence on this issue is as follows. Robertson 3/14 [3/10] states that "...there are detailed issues as to the quantification of loss of profit." in relation to the Second Claimant's claim for special damages, but does not identify what these issues are nor the difficulties involved in such quantification.

39. With regard to the Third Claimant's claim for general damages to reflect its general down turn in business, in Robertson 3/15 [3/10] it is stated that this relies on three factors:

i) unusually poor figures immediately following publication;

ii) an unprecedented cancellation rate of contracts including seven in the first four months of 2017 without any reason given (with details provided at paragraph 10 [3/8]); and

iii) unprompted Skype messages about a year after publication (with details provided at paragraph 11[3/9]).

It is stated further stated that:

> "An assessment of this claim requires a detailed consideration of the Claimants' business."

40. Robertson 3/19 (2) [3/11] states that the Second and Third Claimants' claims are "likely to require extensive evidence". At Robertson 3/19 (4) [3/11] it is stated:

> "A claim for a general downturn in business, however sound in principle, usually requires a complex trial in view of the uncertainties in causation. Such a claim is by its nature incapable of precise assessment. Such claims commonly require expert

> evidence. In this case, I am of the opinion that expert evidence will be necessary."

41. In contrast it is said that what will be required to demonstrate serious financial loss, or the likelihood of it, at a trial of preliminary issues is:

> "…a general understanding of the Corporate Claimants' respective trading roles within the group and evidence as to the cancellations and other adverse trading reactions pleaded by the Second and Third Claimants as to the publications as distinct from quantification of the claims." Robertson 3/19(3) [3/11]

42. That is the extent of the evidence as to why it is said that the evidence required for the issues proposed to be left to a second trial is of such complexity and/or cost, that it would not be appropriate to include those issues in one trial of all issues.

43. However, although not submitted by the Claimants in support of this application for a split trial, exhibited to Cain 3 NC3 is Robertson 1 dated 4 October 2017, [7/67], made in support of the Claimants' application in October 2017 for permission to rely on the expert evidence of a forensic accountant to support the financial losses claimed by the Second and Third Claimants (not yet determined, as the CCMC was adjourned). That witness statement is now largely historic as it addressed the position as it was in October 2017, and the Claimants have now prepared and filed their Schedule of Special Damages. Nonetheless, it identifies some of the difficulties that may arise at trial in relation to such losses. Ms Robertson identifies:

    i) The need for an expert to consider the delineation between the corporate Claimants with related businesses (Para. 5(3)(b));

    ii) Loss of clients and withdrawals and/or changing of the Claimants' credit facilities (Para. 5(3)(c));

    iii) Delineating the Claimants' losses geographically, the losses in this claim being limited to those caused by publication throughout the EU (Para.5(3)(d); and

    iv) Potential issues surrounding the timing or period of losses (Para.5(3)(f). [7/68-69]

44. The cost of a forensic accountant's report was put at £128,000, and in the Claimants' Precedent H costs budget (prepared in August 2017) the total costs and disbursements for the expert phase is put at £206,025, a substantial sum, although I note that it is a relatively small percentage of the overall budget (incurred and estimated costs) put at over £1.7 million.

45. For determination of the issues in a first trial I consider that that the following would be required:

    i) documentary evidence in relation to the Second and Third Claimants' businesses sufficient to meet the threshold "serious financial loss" test in s. 1(2);

ii) oral evidence of witnesses of fact, namely the First Claimant and another officer of the Second and Third Claimants (identified in the Claimants' directions questionnaire as Mr Rajesh Kumar Mishra, who signed the Particulars of Special Damages), and the Second Defendant and his co-director of the First Defendant Mr Christopher Burrows.

46. It is unlikely that expert evidence would be required to establish serious financial loss, or the likelihood of it, and the Claimants would not seek permission for expert evidence on this issue.

47. For a second trial of remaining issues the following will be required:

i) Substantial documentary evidence in relation to the Second and, in particular, the Third Claimant's businesses;

ii) oral evidence from the same Claimants' witnesses of fact as for a preliminary issues trial; minimal or no evidence from the Defendants' witnesses; and

iii) potentially, (and the Claimants say necessarily) expert evidence from a forensic accountant.

Principles Governing Applications for Split Trials

48. The court has a case management power under CPR rule 3.1(2)(i) to order a separate trial of any issue. That power must be exercised in accordance with the overriding objective.

49. Both parties have referred me to the decision in the *Electrical Waste Recycling -v- Phillips* for guidance about how a court should approach an application to a split trial. At [5] of the judgment, Hildyard J helpfully sets these out as follows:

i) whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary;

ii) what are likely to be the advantages and disadvantages in terms of trial preparation and management;

iii) whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials;

iv) whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the judge hearing the case;

v) whether a split may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages);

vi) whether there are difficulties of defining an appropriate split or whether a clean split is possible;

vii) what weight is to be given to the risk of duplication, delay and the disadvantage of the bifurcated appellate process;

viii) generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.

50. He also added in [6] that other factors to be derived from the guidance given by CPR rule 1.4 may include:

a) whether a split would assist or discourage mediation and/or settlement; and

b) whether an order for a split late in the date after the expenditure of time and costs might actually increase costs.

51. The judge added (at [8]) that each case is to be assessed by reference to its own facts, features and peculiarities.

52. Taking Hildyard J's guidance as an aid to consideration of the relevant factors in this case I summarise those factors below.

Potential Cost Saving

53. The major costs saving of a split trial would be the costs of the investigation of the Second Claimant's special damages claim and the Third Claimant's downturn in business claim, which, if liability is not established, would not be required. The expert witness phase of such costs was estimated by the Claimants in mid 2017 as £206,000 (see Paragraph 44 above), and if permission for expert evidence is given the Defendants will also incur costs in relation to that. However, it is possible that the court could conclude that the Second Claimant's special damages claim and the Third Claimant's general damages claim could be dealt with by evidence of fact from the Claimants' finance director or accountant. The Claimants' budget for the disclosure phase, based on a full trial of all issues, is put at £178,757, and in the Defendants' budget £40,893, but I have no comparison figures for the disclosure phases for a split trial. In a claim of this nature those costs, substantial though they are, will not necessarily outweigh the increased aggregate costs of two trials rather than one. I have no evidence other than that referred to above to assist me on this latter point. I have been informed by the Claimants that a trial of the preliminary issues will be likely to take five days, but I note that in the Claimants' Directions Questionnaire completed in July 2017 a full trial of all issues was estimated at 5 days. I have not been provided with an updated estimate of how long a trial of all issues is likely to take nor any information as to how long a second trial is likely to take.

Trial Preparation and Management

54. The additional burden in terms of time and costs of preparing for a full trial would involve substantial additional disclosure, some additional evidence from the Claimants' witnesses, potentially obtaining expert forensic accounting evidence, and costs budgeting for a full trial. (As to the latter the parties have already prepared costs budgets on this basis, so they will simply need updating.) The court's management time will increase but not significantly. If two trials were to be required those costs would

be incurred plus the additional costs of all parties and their legal representatives preparing for and attending a second trial. Further court management time will be required for a separate directions and costs budgeting hearing, but this would not be significant.

Excessive Complexity

55. I do not consider that a single trial dealing with all issues would lead to excessive complexity and diffusion of issues, or place an undue burden on the judge hearing the case. The issues outlined to be included in the first trial are largely issues of law and whilst involving complex areas of law, would be heard by a judge of the Media and Communications List who will be very familiar with those specialised areas of the law. They would also be more than capable of and used to dealing with the detailed evidence required for the Second and Third Claimants' damages claims. I have no basis to conclude that the addition of such evidence that would be required for a single trial would place an undue burden on the judge hearing the case.

Potential Strain on Witnesses

56. The Claimants do not suggest that there will be any additional inconvenience or strain on their witnesses caused by a second trial.

57. The Second Defendant gives evidence in Steele 1/6-11 [5/54] of the strain and disruption caused by both these proceedings and his involvement in the US proceedings brought by the First Claimant. He says that these have necessarily presented a distraction from the business objectives of the First Defendant and had a significant impact on the First Defendant's employees as well as on his co-director Christopher Burrows and himself. He says that he and Mr Burrows have not felt able to speak publicly about the criticism that has been made of them and the First Defendant by the President of the United States, pending the conclusion of this litigation. He makes the point that he has thus been prevented from defending himself and the First Defendant in public on matters which he and the First Defendant believe were, and still are, of significant public interest. Thus, as long as the litigation proceeds he and the First Defendant will endure or will be likely to endure unfounded attacks without being able to publicly challenge such criticisms or set their records straight.

58. The Second Defendant also mentions the personal impact brought about by the litigation and other developments, including the proceedings brought by the First Claimant and others against Buzzfeed in the United States, and the comments made by their US Attorney in the context of that litigation. As a result, he has been the subject of significant and intrusive press attention and initially had to leave his residence for a prolonged period to avoid such attention and was unable to attend the First Defendant's office. He says that although that has now largely been resolved, whenever there is a development in proceedings media interest increases, which inevitably places a strain on his relationships with his family and friends, and takes a toll personally. He is therefore concerned that if there were to be a split trial and the Defendants were to lose on the issues in the first trial that would not be an end of the matter, so that it would be necessary to have a further trial, and that preparing for and undertaking that additional trial could take a considerable number of months and come at a significant additional expense. He anticipates that the need to prepare for and participate in a second trial

would cause further uncertainty and stress and ongoing media interest and could have a further negative impact on the business of the First Defendant and on its staff.

59. I note the submissions on behalf of the Claimants that a determination in favour of the Defendants at a first trial would mean that the litigation would be over sooner than a single trial, thus ending the stress and disruption for the Defendants sooner. But equally, if the decision at a first trial was in favour of the Claimants that would be likely to mean that the litigation would be completed later.

Prejudice

60. The Second and Third Claimants do not claim prejudice by deferring an award of compensation or damages and indeed it is of course they who seek the delay in assessing damages. There would be prejudice to the Claimants in a single trial, should they be unsuccessful on liability so that the evidence prepared for the special damages and general downturn of business claims would not be required and would have been obtained unnecessarily.

61. The purpose of a defamation claim is to obtain vindication, and that would be delayed if a single trial were ordered because the further evidence required would mean a delay in listing, compared to listing a preliminary issue trial. Thus there is a potential prejudice to the Claimants in the delay caused by listing a single trial of all issues.

62. There is the possibility that deferring the issues in relation to quantum of the Second and Third Claimants damages, if their claims succeed, will prejudice the Defendants if the court determining the liability issue is not able to give full scrutiny to the quantum issues. This may pressurise the Defendants into considering settlement because they do not want to risk the costs of a second trial when they do not know the true extent of the damages claimed and are unable to take an informed view as to whether the Second and Third Claimants would be likely to establish their losses.

63. There is potential prejudice to the Defendants in the further delay which would be caused if a second trial was required. The Second and Third Claimants' claims would not be fully tested in court for a longer period of time. It is also the case that even if they are successful in the first trial, they will have the uncertainty until the determination of the first trial, as to whether a second trial would be required, with the additional time and costs that would incur.

Whether a clean split is possible

64. The difficulties of formulating the issues for the proposed preliminary issue trial have been illustrated by the changes to the Claimants' proposals as to how the issues should be divided between the two trials since November 2017: see Paragraphs 27-28 above.

65. That does not necessarily mean that a split trial should not be ordered, indeed it probably demonstrates that the Claimants' advisors' understanding of the issues has progressed as they have continued to consider them. But where a split of issues is not obvious, the court perhaps needs to be more cautious in its approach. I take into account the many authorities which warn against trials of preliminary issues unless they are very carefully thought out, or involve a simple split between liability and quantum, and not necessarily always in those cases: for example, *Rossetti Marketing Ltd v Diamond Sofa Company*

Ltd [2012] EWCA Civ 1021 at [1] per Lord Neuberger MR (as he then was); *Bond v Dunster* [2011] EWCA Civ 455 at paragraphs 106-107; *SCA Packaging Ltd v Boyle* [2009] UKHL 37 at [9] per Lord Hope of Craighead).

The risk of duplication, delay and the disadvantage of the bifurcated appellate process

66. As I have indicated at Paragraphs 46-47 above, there would be a duplication of factual evidence, both documentary and witness evidence, to some extent. There will, of course, be delay in the split trial approach unless the Defendants succeed. The disadvantage of the bifurcated appellate process is also a factor to be taken into account and, if an appeal were pursued of any of the issues in either the first or second trial, would cause additional delay, but this is not a particularly weighty factor in this application, compared to other considerations.

Whether a split would assist or discourage mediation and/or settlement

67. A split trial may be likely to encourage mediation and/or settlement, as if liability had been determined in favour of the Claimants there would be some motivation for the Defendants to make an offer to save the costs of a further trial. But unless a purely commercial settlement was achievable, the Defendants would be likely to wish to see the evidence in respect of the Second and Third Claimants' damages claim before an informed offer could be made. I note that this issue has been a primary concern for the Defendants for some time and has been the subject of three Requests for Further Information, by letters dated 3 July 2017, by application dated 19 September 2017 (voluntarily complied with on 15 November 2017) and by letter dated 25 February 2018, although the Defendants have now been able to provide a Response to the Particulars of Special Damage. It is equally possible therefore that if the entirety of the evidence is provided for a single trial there may be more possibility of a settlement.

Late application

68. This is not a case where an application for a split trial has been made at a late stage, as there has been considerable delay since the claim was issued in February 2017 (not all of which is the responsibility of the Claimants; the Claimants blame the Defendants for some delay and some was caused by difficulties in listing the Claimants' application), so no substantial costs have yet been incurred in relation to the issues proposed to be determined in the second trial.

Conclusion

69. Taking into account all these circumstances in relation to this particular case, with its unusual features, I have concluded that on balance, a split trial is not appropriate. I consider that the best course to ensure the claim is adjudicated upon as fairly, quickly and efficiently as possible will be to proceed with a single trial of all issues. I reach this decision having factored in all the issues identified and considered above and balanced the competing advantages and disadvantages of the two approaches and to each party, and in particular as set out below.

70. I consider that there is a serious risk of disadvantage to the Defendants in not being able to consider all the evidence in relation to both serious financial loss and special

damages/downturn in business. This disadvantage relates both to their defence to the claim and their opportunity to negotiate terms of settlement.

71. The prejudice likely to be caused to the Defendants in not being able to test fully the serious financial loss requirement is likely to outweigh the prejudice to the Claimants in having to deal fully with their claims for special and general damages; in any event the evidence on which the Claimants rely has not been sufficient to persuade me that the prejudice to them in that regard would be greater.

72. I consider the duplication of work involved in two trials, and the potential delay caused to final resolution of the proceedings, are factors which on balance outweigh the advantages of a first trial and the possibility that a second trial will not be required. I do not have sufficient information to conclude with certainty that the potential costs saving of a first trial will outweigh the potential additional costs of two trials.

73. Further significant factors are the stress and disruption to business caused to the Defendants of the potential uncertainty as to when the litigation would come to an end, which would be caused by the possibility of a second trial, and the delay that could be caused before a final determination of these proceedings, if that were to be required. I consider that in the context of the factual background to this claim the Defendants' concerns ought to be given significant consideration.

74. The purpose of a defamation claim is to obtain vindication, and I recognise that would be delayed if a single trial were ordered because the further evidence required would mean a delay in listing. However, there has been delay in the conduct of this claim, and in the context of the delay so far, I do not consider that the additional delay entailed is likely to be so substantial as to unfairly prejudice the Claimants' wish for vindication.

75. There are public interest factors involved, given the content of the documents of which the December Memorandum formed part, but there is no particular reason, in my judgment, why the delay caused by listing a full trial would impact on those factors such that the balance in favour of a full trial would shift in favour of a split trial. The public interest factors in relation to this claim are likely to be secondary to the current investigation in the US in relation to the matters referred to in the December Memorandum and the resolution of those investigations, which will also no doubt take some time. The Foreign & Commonwealth Office, which intervened in the application brought by the Fist Claimant in the US letter of request proceedings (see Paragraphs 4 and 58 above), has not become involved, or expressed any view (as far as I am aware) in relation to these proceedings.

76. Accordingly, I direct that the parties consider an attempt to agree appropriate directions leading to a trial of all issues in the action, and if not capable of agreement these can be dealt with at a Case Management Conference. In any event, there has been no cost budgeting exercise carried out, and now that the issue of a split trial has been determined the parties can prepare revised costs budgets which, if not agreed, can proceed to a Costs Management Conference hearing.