In the Supreme Court of the United Kingdom

Permission to Appeal

On appeal from

Court

The Court of Appeal

Date of decision being appealed

27 July 2022

In the proceedings between

[Claimant/Appellant in the Lower Court] Fiona George (Claimant/Appellant in the Court of Appeal)

and

[Defendant/Respondent in the Lower Court] (1) Linda Cannell (2) LCA Jobs Limited (Defendants/Respondents in the Court of Appeal)

For Court use only

UKSC reference	**Date of filing**

Details of the party appealing ('The Appellant')

Appellant's full name

(1) Linda Cannell (2) LCA Jobs Limited

Solicitor's name

Helen Otty

Solicitor's firm

Brabners LLP

Address

Horton House, Exchange Flags, Liverpool, L2 3YL

Email

Helen.Otty@brabners.com

Telephone number

0151 600 3055

Reference

HEO/NSA2/97412.1

Is the Appellant in receipt of public funding/legal aid? **Yes** ☐ **No** ☒

If yes, please provide the certificate number

Counsel's name

David Price KC

Address

21 Fleet Street
London
EC4Y 1AA

Email

dprice@dpsa.uk

Telephone number

020 7353 9999

Counsel's name

Jonathan Price

Address

Doughty Street Chambers
54 Doughty Street
London
WC1N 2LS

Email

j.price@doughtystreet.co.uk

Telephone number

020 7404 1313

Details of the party responding to the appeal ('The Respondent')

Respondent's full name

Fiona George

Solicitor's name

James Heath

Solicitor's firm

Thomson Heath

Address

3 Fleet Street
London
EC4Y 1AU

Email

jamesheath@atkinsthomson.com

Telephone number

020 7836 9300

Reference

JH/YMW/001696-0001

Counsel's name

William Bennett KC

Address

5RB
5 Gray's Inn Square
London
WC1R 5AH

Email

williambennett@5rb.com

Telephone number

020 7242 2902

Counsel's name

Godwin Busuttil

Address

5RB
5 Gray's Inn Square
London
WC1R 5AH

Email

godwinbusuttil@5rb.com

Telephone number

020 7242 2902

Details of additional parties (if any) are attached **Yes ☐** **No ☐**

The decision being appealed

Name of Court

Court of Appeal

Names of Judges

Lord Justice Underhill (Vice-President of the Court of Appeal (Civil Division))
Lord Justice Warby
Lord Justice Snowden

Date of Order/Interlocutor/Decision being appealed

27 July 2022

Date of Order refusing permission to appeal, if separate

28 July 2022

Neutral citation number of the judgment being appealed

[2022] EWCA Civ 1067

References to Law Report in which any relevant judgment is reported

[2022] WLR(D) 336, CA (Court of Appeal judgment)
[2021] 4 WLR 145 (High Court judgment)

What order are you asking the Supreme Court to make?

Order being appealed

☒ **set aside** ☐ **vary**

Original Order

☐ **set aside** ☒ **restore** ☐ **vary**

You should attach the following on a separate sheet(s)

- **Narrative of the facts**
- **Statutory framework**
- **Chronology of proceedings**
- **Relevant orders made in the Courts below**
- **Issues before the Court appealed from**
- **Treatment of issues by the Court appealed from**
- **Proposed grounds of appeal - To include Counsel's name or signature. Grounds of appeal exceeding 10 A4 pages must be accompanied by an explanation from Counsel. (PD 3.1.2(3))**
- **Reasons why permission to appeal should be granted**

Other Information about the appeal

Are you applying for an extension of time? **Yes** ☒ **No** ☐

If yes, please provide reasons

In communications with the Registry following the handing down of judgment on 27 July 2022 the Appellants' solicitor explained that their leading counsel (sole counsel in the Court of Appeal) was on annual leave until 30 August and would not be in a position to start work on the application for permission until his return. An extension was requested until 21 September. The Respondent's solicitor did not object to the extension. The Registry stated that an extension could not be granted in advance and should be sought in the application for permission.

Extension of time reasons are attached/continued on a separate sheet(s)
Yes ☐ **No** ☐

Have you previously been granted an extension of time pending public funding/legal aid by the Registrar? **Yes** ☐ **No** ☒

If yes, please provide a copy of the decision on public funding/legal aid and the letter confirming the extension of time

Does the appeal raise issues under the Human Rights Act 1998?
Yes ☒ **No** ☐

Are you seeking a declaration of incompatibility? **Yes** ☐ **No** ☒

Are you challenging an act of a public authority? **Yes** ☐ **No** ☒

If you have answered yes to any of the questions above, please give details

The appeal relates to the interpretation of section 3(1) of the Defamation Act 1952. The Appellants submit that section 3(1) of the Human Rights Act 1998 is relevant to the interpretation. Further explanation can be found in the proposed grounds of appeal.

Details are attached/continued on a separate sheet(s) **Yes** ☐ **No** ☐

Does this appeal involve the Court's Devolution jurisdiction?

Yes ☐ **No** ☒

If yes, please give details

Further details are attached/continued on a separate sheet(s)

Yes ☐ **No** ☐

Are you asking the Supreme Court to
Depart from one of its own decisions or from one made by the House of Lords? **Yes** ☐ **No** ☒

Make a reference to the Court of Justice of the European Union?

Yes ☐ **No** ☒

If you have answered yes to either of these questions, please give details

Details are attached/continued on a separate sheet(s) **Yes** ☐ **No** ☐

Is this a case where there was or should be a departure from any retained EU caselaw? **Yes** ☐ **No** ☒

If yes, please give details

Details are attached/continued on a separate sheet(s) **Yes** ☐ **No** ☐

Will any of the parties request an expedited hearing? **Yes** ☐ **No** ☒

If yes, please give details

Expedition reasons are attached/continued on a separate sheet(s)

Yes ☐ **No** ☐

Certificate of Service

The date on which this form was served on the Respondent(s)

21 September 2022

I certify that this document was served on

Name

Thomson Heath

By

Brabners LLP

Method of Service

Personal service and email

A certificate of service is attached/continued on a separate sheet(s)

Yes ☒ **No** ☐

Subject matter catchwords for indexing

Malicious falsehood, section 3(1) of the Defamation Act 1952, damages.

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The Supreme Court of the United Kingdom Parliament Square
London
SW1P 3BD
DX 157230 Parliament Square 4

IN THE SUPREME COURT
ON APPEAL FROM
THE COURT OF APPEAL (CIVIL DIVISION) **Appeal No: CA-2021-003377**
ON APPEAL FROM
THE HIGH COURT OF JUSTICE **Claim No. QB-2019-004612**
QUEEN'S BENCH DIVISION

B E T W E E N

FIONA GEORGE

Claimant/ Respondent

and

(1) LINDA CANNELL
(2) LCA JOBS LIMITED

Defendants/ Appellants

I certify pursuant to rule 12 of the Supreme Court Rules that the application for permission to appeal was served on Thompson Heath Solicitors by email and by hand on 21 September 2022.

Helen Otty
Partner at Brabners LLP, Solicitors for the Defendants/Appellants

Narrative of the facts

1. The narrative of the claim from which the proposed appeal arises is set out in detail in the judgment of Saini J. This presents a more balanced account of the parties' conduct than the summary in the judgment of Warby LJ, with whom Underhill LJ V-P and Snowden LJ agreed.

2. The facts as found by the Judge that are relevant to the issues of law raised by the proposed appeal can be stated shortly in paragraphs 3 to 15 below. There was no challenge on appeal to the findings.

3. The Second Appellant is a recruitment agency specialising in estate agents and property companies. In 2018 it had around 100 clients. The First Appellant is its owner. The Respondent was an employee from March to November 2018. Her terms of employment were set out in a Handbook. It contained a standard confidentiality clause but no post-employment restrictive covenant. Following the Respondent's departure, she assured the First Appellant that she would not solicit the Second Appellant's clients.

4. In January 2019 the Respondent commenced employment with Fawkes & Reece, a recruitment agency specialising in the construction industry. Her superior was Graeme Lingenfelder. He did not want the Respondent to deal with the Second Appellant's clients and had warned her against doing so at the start of her employment. This was not because of any contractual restraints.

5. The First Appellant discovered that the Respondent was soliciting the Second Appellant's clients. She sent an email to the Respondent at 16:30 on 21 January 2019 ("the George Email") in which she stated that she "would be writing to your employer advising them of your actions and seek their assurances that they will prevent you from abusing your post-employment restrictions".

6. The First Appellant did not honestly believe that there were any post-employment restrictions. She was aware that there was no restrictive covenant in the Handbook and did not honestly believe that the confidentiality clause had an equivalent effect.

7. The Respondent had the Handbook in her possession at the time that the George Email was sent. She went to find Mr Lingenfelder with the Handbook as soon as she received the Email.

8. At 16.37 the First Appellant sent an email to Mr Lingenfelder ("the Lingenfelder Email") which included:

> "I write to inform you that despite making clear to Fiona, both verbally and in writing, of her legal obligations under the terms of her employment with LCA, not to solicit business from our clients and candidates (and Fiona's absolute assurances that this is something she would never do), that she has been proactively approaching our clients for new business as well as contacting candidates of LCA."

9. The Respondent showed Mr Lingenfelder the Handbook so that he could see there was nothing preventing her from soliciting clients and he accepted that this was the case. He repeated the instruction not to contact them.

10. The allegation of breach of contract in the Lingenfelder Email did not cause the Respondent any financial loss because Lingenfelder knew it to be false and in any event did not want the Respondent to solicit the Second Appellant's clients.

11. The George Email stated that the First Appellant would be contacting the Second Appellant's clients to advise them of the Respondent's breach of her post-employment obligations.

12. The only client that the First Appellant informed was Matthew Butler of Balgores estate agents in the course of a telephone conversation on 21 January ("the Butler Words"). Mr Butler had already decided not to do business with the Respondent because of an issue relating to double-commission, having regarded her as "a nightmare from the start".

13. Accordingly, the allegation of breach of contract in the Butler words did not cause the Respondent any financial loss.

14. The Respondent resigned from Fawkes & Reece on 27 January. This was due to her erroneous belief that the First Appellant had contacted the Second Respondent's clients. She was aware that her "bosses" were "100% behind" her.

15. The Respondent commenced new employment on 25 February.

16. The Respondent commenced proceedings in the High Court on 19 December 2019 advancing claims in defamation and malicious falsehood in relation to the Butler Words, the Lingenfelder Email and publication to all of the Second Appellants' clients and specifically to Mr Gibbon, a colleague of Mr Butler's at Balgores.

17. The allegation complained of in defamation and malicious falsehood was that the Respondent had breached a non-solicitation restriction in her employment contract. The allegation that there was such a restriction was also relied on in support of the malicious falsehood claim.

18. The Appellants denied the elements of the claims other than the fact of publication of the Lingenfelder Email and defamatory meaning which had been determined prior to trial. They advanced substantive defences of truth and qualified privilege to the defamation claim.

19. A central issue at trial was the harm hurdle to be surmounted by the Respondent and the related issue of the extent of publication.

20. Section 1 of the Defamation Act 2013 required the Respondent to establish that one or more of the proved publications had caused serious harm to her reputation in order to make good her defamation claim.

21. In relation to malicious falsehood, it was necessary to prove special damage or rely on section 3(1) of the Defamation Act 1952 which provides:

> "3.— Slander of title, &c.
>
> (1) In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage-
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication."

22. The Respondent claimed £1,443 as special damage, relating her three weeks of unemployment.

23. She also alleged that the "falsehoods" – the existence and breach of a contractual restriction against solicitation – were calculated to cause her pecuniary damage. This was by "preventing her from obtaining business from the publishees and thereby preventing her from earning a commission", which was "more likely than not to occur because the publishees would not want to assist or be party to a breach of contract". She relied on "the fact that Balgores withdrew from dealing with her as a result of such publications".

24. The Judge found publication of the Butler Words, but not the other contested publications alleged by the Respondent. He rejected the defences of truth and qualified privilege and found that the allegations complained of were false and published maliciously.

25. He found that neither the Butler Words nor the Lingenfelder Email had caused serious harm to the Respondent's reputation (within the meaning of section 1 of the Defamation Act 2013) on the basis of the facts set out in paragraphs 3 to 14 above. Accordingly, the defamation claim failed.

26. The Judge rejected the special damage claim on the basis that the Respondent's resignation was not caused by the Butler Words or the Lingenfelder Email, but by the George Email which was not the subject of any claim.

27. Accordingly, in order to succeed in the malicious falsehood claim, the Respondent had to satisfy s.3(1).

28. The draft judgment circulated to the parties upheld the s.3(1) case. The Judge had understood that the Appellants did not take issue with the Respondent's case that s.3(1) was directed to the tendency of the words complained of without any form of causation-focussed factual inquiry as to the circumstances of publication.

29. On being notified by the Appellants' counsel that this was in issue, the Judge invited further submissions. The Appellants drew the Judge's attention to the relevant authorities and passages from *Gatley on Libel and Slander* (12th edition),

including the three previous cases to reach the Court of Appeal: *Sallows v Griffiths* [2001] FSR 15, *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152 and *Tinkler v Ferguson* [2020] 4 WLR 89, each of which involved an unrestricted causation enquiry. At the time, *Tinkler* was on appeal. The judgment of Nicklin J in [2020] 4 WLR 89 was approved in full by the Court of Appeal in [2021] 4 WLR 27.

30. Having analysed the authorities and *Gatley,* the Judge concluded that causation under s.3(1) must require an examination of the facts as they were before, at and after publication. This would be a more precise exercise in cases of limited publication than those involving mass media or other general publications.

31. The Judge concluded that his factual findings as to the circumstances of the publication of the Butler Words and the Lingenfelder Email were fatal to the s.3(1) case. No element of the pleaded pecuniary damage was caused by the publications. Further, if a claimant can satisfy the court that the words were, in the abstract, likely to cause pecuniary loss, it is open to the defendant to show that no loss was actually caused.

32. Alternatively, if the Judge was wrong in his interpretation of s.3(1), he would have awarded a nominal sum for general damages but some sum for injury to feelings where the Respondent had made an evidential case (subject to resolution of entitlement in law, which the Appellants contested).

33. The Respondent applied for permission to appeal on a number of grounds. The Judge gave permission solely in relation to the interpretation of s.3(1).

34. No further application for permission to appeal was made by the Respondent to the Court of Appeal.

Statutory framework

35. Malicious falsehood is common law tort other than section 3(1) of the Defamation Act 1952 cited above.

Chronology of proceedings

36. The claim was commenced on 19 December 2019; meaning was determined on 13 November 2020; the CCMC took place on 30 April 2021; the trial took place on 5 to 8 October with further written submissions on 19 October and 4 November; judgment was handed down on 9 November; a consequential hearing took place on 11 November; the notice of appeal was filed on 14 December; the respondent's notice was filed on 14 January 2022; the appeal was heard on 14 June; judgment was handed down on 27 July and the Court of Appeal's order was made on 28 July.

Relevant orders made in the Courts below

37. On 11 November 2021 the Judge entered judgment for the Appellants with costs and granted permission to appeal on the interpretation of s.3(1). On 28 July 2022 the Court of Appeal entered judgment for the Respondent on the malicious falsehood claim, set aside the Judge's costs order, ordered an assessment of damages (stayed pending an appeal to the Supreme Court) and refused permission to appeal.

Issues before the Court appealed from

38. The Respondent repeated the submission that s.3(1) was solely directed to the tendency of the words complained of and was therefore satisfied in relation to the Butler Words and the Lingenfelder Email.

39. The Respondent submitted that the Judge was wrong to find, in the alternative, that the Respondent would only have been entitled to nominal damages for pecuniary loss and that, in any event, there should be an assessment of damages for injury to feelings before a different judge.

40. The Appellants submitted that the Respondent's interpretation of s.3(1) was inconsistent with three binding Court of Appeal authorities (*Tinkler, Tesla* and *Sallows*), a number of other authorities, the relevant textbooks, the modern approach to freedom of expression and civil litigation; and the relevant principles of statutory interpretation including section 3(1) of the Human Rights Act 1998.

41. The Appellants submitted that the Judge was correct to hold that causation under s.3(1) required an examination of the facts as they were before, at and after publication and that where it was evident that no financial loss had been caused, the claim would fail.

42. Alternatively, the Appellants submitted by way of respondent's notice, that if the test was forward-looking from the time of publication all probative facts in existence were admissible and it was evident from these facts (set out in paragraphs 3 to 7 and 12 above) that the Butler Words and the Lingenfelder Email were not likely to cause financial loss.

43. Further alternatively, the Appellants submitted that, insofar as damages for injury to feelings were available in malicious falsehood, they were parasitic on the existence of financial loss. There was no principled basis to overturn the Judge's alternative finding of nominal damages or to expand it by an assessment of damages for injury to feelings. Further, there was no evidential basis for such an award as the Respondent knew straight away that Lingenfelder was supportive of her and any injury to feelings was based on the misconception that the non-solicitation allegation had been circulated to all the clients and the reputational consequences of this. Any further hearing would also be a *Jameel* abuse of process.

44. The Respondent's skeleton argument did not place any reliance on the references to "calculated" in *Ratcliffe v Evans* [1892] 2 QB 524 as relevant to the interpretation of s.3(1). Accordingly, it was not addressed in the Appellants' skeleton argument, which was primarily directed to the numerous post-Act authorities.

Treatment of issues by the Court appealed from

45. The Court of Appeal identified "two main options" as to what s.3(1) requires:

    45.1. With hindsight it can be seen that the false and malicious statement of which she complains probably caused her some financial loss. This was described as "the historic approach"; or

45.2. The statements were such that it was inherently probable that in the ordinary course of events they would cause the claimant some financial loss. This was described as "the forward-looking approach". It was said to be "broadly" the case for the Respondent.

46. The Court concluded that the purpose, and effect of s 3(1) was to relieve a claimant of the need to plead or prove any actual loss on the balance of probabilities as a matter of historical fact. The statutory test is forward-looking. It is enough for a claimant to prove the publication by the defendant of a false and malicious statement of such a nature that, viewed objectively in context at the time of publication, financial loss is an inherently probable consequence or, putting it another way, financial loss is something that would probably follow naturally in the ordinary course of events. This interpretation of s 3(1) respects the intention of Parliament, is consistent with authority, and Convention-compliant.

47. The Court considered the common law context, in particular *Ratcliffe v Evans* [1892] 2 QB 524, the Porter Committee Report (which led to the 1952 Act and cited *Ratcliffe*), the speech of the Bill's sponsor, Harold Lever MP and the wording of s.2. It concluded that Parliament was intending to make a false and malicious statement actionable *per se*, if it had a natural tendency to cause financial loss. This was not to be approached in entirely abstract fashion, detached from the circumstances of publication. Account must be taken of the "identity and essential characteristics" of the claimant, defendant and publishees.

48. The Court considered the s.3(1) jurisprudence which it described as "diffuse". In summary, it concluded that *Tinkler, Tesla* and *Sallows* were not binding authority in support of a historic test and there was no settled practice of its application.

49. The submission in the respondent's notice that the claim would fail even if the relevant facts were confined to those in existence at the time of publication was a refinement of the historic approach, based on after-acquired knowledge. It provided no answer to the forward-looking approach, which asks whether financial loss is an inherently probable consequence of publishing these

allegations about this claimant to her new employer and one of the customers she was dealing with in the new role.

50. The allegation to the Respondent's new employer and one of her customers that she had broken her contractual commitments to the Respondent had a natural tendency to cause financial loss to someone whose income is commission-based.

51. Accordingly, the claim in malicious falsehood succeeded in relation to the Butler Words and the Lingenfelder Email.

52. The appeal against the Judge's alternative finding of nominal damages failed as damages can only be compensatory and the claimant must identify some recognised type of injury. A successful claimant under s.3 cannot recover compensation for "the malicious publication itself" including the seriousness of the allegation, the quality of the publishees and the degree of malice. The nature of the injury for which compensation was sought was elusive, unless it was reputational harm which was outside the scope of the tort.

53. The Court relied on *Joyce v Sengupta* [1993] 1 WLR 337 and *Khodaparast v Shad* [2000] 1 WLR 618 to conclude that damages for distress were, in principle available to the Respondent. It concluded that, on the evidence, a substantial award to the Respondent could not be ruled out. An assessment of damages hearing would not be a *Jameel* abuse of process.

54. The Court's treatment is further addressed in the proposed grounds of appeal.

Proposed grounds of appeal and Reasons why permission to appeal should be granted

55. The proposed grounds of appeal are set out in paragraphs 56 to 67 below followed by the reasons why permission to appeal should be granted in paragraphs 68 to 77. Further explanation of the grounds of appeal is provided in paragraphs 78 to 107 in case it would be of assistance to the Court. The combined pages of the proposed grounds and further explanation of them do not exceed 10. Accordingly, it is assumed that no explanation is required under PD

3.1.2. For ease of reference, a stand-alone version of the proposed grounds of appeal is included at the end of this document.

Proposed grounds of appeal

56. The Court of Appeal was wrong to limit the inquiry in a s.3(1) determination to the inherent tendency of the words, with the "identity and essential characteristics" of the claimant, defendant and publishee(s) being the only admissible extrinsic facts. This will be described as "the tendency test".

57. The Court of Appeal wrongly characterised the tendency test as a "forward-looking approach". It is an abstraction. A genuine forward-looking test would take into account any relevant fact in existence at the date of publication in order to make a realistic assessment of what was likely to follow. The tendency test will give rise to arid and artificial debate about whether a fact obviously relevant to likely loss falls within the ambit of "identity and essential characteristics". In cases of limited publication, the publishee's existing estimation of the claimant or particular knowledge may be a far more reliable indicator of their likely reaction than their "identity and essential characteristics".

58. Words do not cause financial loss in the abstract. The conduct that constitutes the tort of malicious falsehood is the act of publication. There is no basis in the statutory wording, principle, logic or authority to limit the admissible facts as to the likely consequence of publication.

59. One of the two interpretations of s.3(1) set out below is correct. It requires the claimant to establish that:

59.1. At the time of the publication complained of, it is more likely than not that financial loss will be caused by it. This will be described as the "the forward-looking test". It is the more natural interpretation from the use of the present tense in s.3(1). Alternatively:

59.2. At the time of trial, it is more likely than not that financial loss has been caused by the publication, albeit that there is no requirement to quantify the

amount or any other perceived special damage requirement. This will be described as “the historic test”.

60. On both tests, there is no restriction on the admissibility of facts relevant to their determination (save as would generally apply in civil litigation).

61. On both tests, on the facts of the present case, s.3(1) is not satisfied.

62. Both tests satisfactorily address the s.3(1) mischief (publications causing very serious damage which, owing to technical rules of evidence, it is impossible to prove strictly as special damage).

63. The effect of the tendency test is that s.3(1) can be satisfied even in cases, such as the present, where no financial loss has been caused and none was likely at the date of publication. This goes significantly beyond the mischief and is inconsistent with the nature of an economic tort (which is to provide compensation for financial loss caused by the wrongful act) and the established Article 10 ECHR jurisprudence (which requires the interference arising from being sued and/or the imposition of liability to be justified by a sufficiently substantial countervailing interference with a claimant’s right).

64. It is implicit in the Court of Appeal’s reasoning that common law decisions on malicious falsehood prior to the 1952 Act had limited the determination of “calculated” to the tendency test. There had been no clear judicial interpretation of “calculated” as at the date of the Act, such as would engage the *Barras* rule of interpretation. Further, the reasoning in the leading decisions of *Ratcliffe v Evans* [1892] 2 QB 524 and *White v Mellin* [1895] AC 154 suggests that the courts would have taken into account any probative fact in existence at the date of publication, in particular, the extent of publication, in determining whether the publication was calculated to cause financial loss. The most natural interpretation of “calculated” that can be divined from these decisions is that it simply asks whether financial loss is likely at the time of publication in all the circumstances.

65. The historic test is to be preferred because it is possible under the forward-looking test for liability to be imposed notwithstanding that it is clear that no loss

has been caused. As the Judge noted at [209], this would be a strange outcome, inconsistent with malicious falsehood's position as an economic tort. In addition:

65.1. It is common ground that post-publication facts are admissible in the assessment of damages for malicious falsehood. There is no good reason why they should be excluded from the determination of liability.

65.2. It is easier to make a determination at trial as to what is likely to have actually happened than to determine what was likely to happen from the perspective of an earlier date, particularly where there is more than one publication complained of, it has continued over a period of time and/or there are a number of factors relevant to likely loss.

66. The available interpretative tools, including s.3(1) of the Human Rights Act 1998, are sufficient to enable the court to apply the historic test, notwithstanding the use of the present tense in s.3(1).

67. Alternatively, if the Court of Appeal was correct to hold that s.3(1) was satisfied on the facts, it should have limited any damages to a nominal sum and not ordered a further trial. Insofar as damages for injury to feelings are available in malicious falsehood, they are parasitic on the existence of financial loss. There is no principled basis on which damages for injury to feelings can be awarded where a defamation claim has failed due to an absence of serious harm to reputation and it can be demonstrated that no financial loss has been caused by the falsehood complained of.

Reasons why permission to appeal should be granted

68. The above grounds plainly raise arguable points of law. For the reasons set out below, they are of general public importance and ought to be considered by the Supreme Court now.

69. The appeal concerns fundamentally divergent interpretations of a statutory provision relating to the ambit of tortious liability. This will generally be considered to be a matter of public importance.

70. The Court of Appeal departed from the settled practice (including the three previous Court of Appeal decisions) of admitting all relevant factors on likely loss, whether the test is historic or forward-looking. It stated at [28] that the "issue" is a "new point" that has not been previously raised directly. It is correct that the tendency test has never been advanced as an interpretation of s.3(1) in the 70 years since the Act was passed, notwithstanding the many skilled advocates who have represented claimants who could have benefited from it. If it is a "new point" that militates in favour of Supreme Court consideration.

71. It is of public importance to keep tortious liability within its proper compensatory bounds so that people are not dragged into trivial litigation and potentially huge amounts of costs and court resources are not spent determining falsity and/or malice, where no loss has been caused.

72. The modern approach to freedom of expression mandates a meaningful harm hurdle to mitigate the chilling effect of threatened or actual litigation. This was the overt justification for the imposition of a serious harm threshold in s.1(1) of the 2013 Act in all defamation claims, which supplanted the common law tendency test. S.1 was stated to be a key provision in rebalancing the law in favour of freedom of expression. The chilling effect in relation to corporations was considered to be particularly acute, resulting in the serious financial loss requirement in s.1(2). The Court of Appeal at [69-70] significantly downplayed the general chilling consequences of an interpretation of s.3(1) that permits an individual or corporation to pursue a claim absent actual or likely loss. Previous s.3(1) cases have accepted that Article 10 ECHR is, in principle, engaged in the interpretative process (and the Court of Appeal did not disagree). This can only be because setting the bar too low would infringe Article 10.

73. Malicious falsehood claims are capable of wide application. The 13th edition of *Gatley* identified as a "major" tactical consideration that a malicious falsehood claimant avoids the serious harm requirement in defamation. The tactical advantage has been further significantly enhanced by the Court of Appeal's adoption in malicious falsehood of a tendency test, discarded in defamation. It would be contrary to the public interest if the policy justification underpinning the

serious harm requirement in defamation cases was to be undercut by resort to a claim in malicious falsehood.

74. A change in the circumstances in which damages for injury to feelings are available in tort is a matter of public importance. So too that the law on damages proceeds in a principled manner.

75. In *Fielding v Variety Incorporated* [1967] 2 Q.B. 841 Lord Denning MR held that damages for injury to feelings were not available in malicious falsehood. In *Joyce v Sengupta* [1993] 1 WLR 337 Sir Donald Nicholls V-C conducted a detailed review of the authorities (at pages 347-349). He stated that the recoverability of such damages "bristles with problems". He opined that "parasitic" damages for injury to feelings should be available but only when connected with financial damage inflicted by the falsehood. The Court of Appeal's reference to *Joyce* at [76] did not include the V-C's qualification on the availability of damages, notwithstanding its application to the present case. In *Khodaparast v Shad* [2000] 1 WLR 618 CA, reliance was placed on *Joyce* when upholding an award for injury to feelings, in circumstances where they were directly connected with the losses and harm caused by the falsehood. The judgment under appeal is the first time that it has been held that such damages are available absent any loss or harm caused by the publication complained of.

76. There is nothing in the Report of Lord Porter's committee or the speech of Harold Lever MP, assuming that they are admissible, to suggest that Parliament was intending to remove the connection between publication and likely financial loss, exclude facts relevant to it or expand the available damages where liability is established. Mr Lever's reference to "ethical and moral principles", cited at [45], is clearly linked to the injustice of not being able to recover for maliciously caused financial loss. Dishonest statements do not give rise to tortious liability unless they have caused harm.

77. The combination of the tendency test and the recovery of damages for injury to feelings absent loss fundamentally alters the established character of malicious falsehood as part of the family of economic torts.

Further explanation of the grounds of appeal

78. The Court of Appeal accepted at [56] that the question of whether "the words complained of are calculated to cause pecuniary damage is not to be approached in an entirely abstract fashion, detached from the circumstances of publication".

79. The justification for limiting those circumstances to "identity and essential characteristics" is said to be that they are the only factors extraneous to the words that can be taken into account in the common law tendency test in defamation. There are a number of difficulties with importing this approach. In particular:

80. First, a tendency test is explicable in relation to defamation because the likely estimation of right-thinking members of society is an abstraction directly connected with the imputation conveyed by the words. In contrast, financial loss is directly related to the circumstances of publication. As was noted in *Lachaux v Independent Print Ltd* [2020] AC 612 at [4-5], the interest protected in defamation is reputation, which has been treated differently to other interests protected by the law of tort.

81. Second, the "identity and essential characteristics" of the publishee have never been necessary elements of liability in defamation at common law. They are only possibly relevant factors in interpreting the meaning of the words. Where the words are defamatory and the claimant is named the tort is complete, at common law, on publication to any third party whether or not they have any knowledge of or relationship to the claimant. It was for this reason that the Respondent submitted that liability in malicious falsehood would be founded on publication of the non-solicitation allegation to a random person in the street who had no knowledge of the Respondent. The Court of Appeal baulked at this level of unreality. However, it is equally unreal to exclude other obviously relevant causation factors. It is unreal to state that the Butler Words were likely to cause financial loss simply because Butler was, in theory, a potential customer of the Respondent from whom she could gain commission, while excluding the fact that he had decided never to do business with her.

82. Third, as previously stated, there is nothing to suggest that references to "calculated" in the pre-Act malicious falsehood cases included such a limitation.

The pre-Act authorities

83. In *Ratcliffe v Evans* [1892] 2 QB 524 the plaintiff was a boiler maker in Flint and the claim related to a newspaper circulated in Flint and adjoining counties which stated that he had ceased business. The judgment contains an analysis of previous cases and many references to the nature and circumstances of publication being relevant to what is likely to occur. The fact that the imputation appeared in a widely read newspaper was manifestly the main reason why in the ordinary course of things it was likely to produce financial loss. The extent of publication is irrelevant to the tendency test. It will be satisfied by publication to one publishee with the necessary "identity and essential characteristics".

84. In the subsequent House of Lords decision in *White v Mellin* [1895] AC 154 Lord Herschell noted (at 160): "There is an entire absence of any evidence that the statement complained of had either injured or was calculated to injure the plaintiff". The case involved a label affixed by the defendant to the wrapper on the plaintiff's food when sold to the public which recommended the defendant's food. If the determination of "calculated" was limited to the wording of the label and the "identity and essential characteristics" of the parties and publishees, no such evidence would have been required and its absence would not therefore have been dispositive or even relevant.

85. In *Ratcliffe* and *White* "calculated" is used inter-changeably with "likely". References to "in the ordinary course of things" simply emphasise the objective nature of the likelihood test in the context of a general publication to the public. They do not purport to restrict the circumstances of publication that may be taken into account in determining what would be likely to happen in the ordinary course of things.

86. Related errors in the Court of Appeal's approach are the propositions at [34] that "actual damage" is different from "special damage" and at [51] that a historic test would render s.3(1) self-defeating. The pre-Act authorities do not identify a clear boundary between special and general damage. The words "special damage" and "actual damage" are used inter-changeably. The Court of Appeal was wrong to suggest that the pleading and proof of "actual damage", as it has been used in

the authorities, is equivalent to the likelihood of some unquantifiable loss having been caused. At a minimum, a "special" or "actual" damage claim required (and still requires) quantification of loss and a chain of causation in relation to it. In *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152, the claimant relied on special damage and s.3(1), as is common. As Moore-Bick LJ noted at [37] in relation to the latter:

> "Since the claim is for general damages it is unnecessary for the claimant to identify the amount of pecuniary of loss which it is said the falsehoods were calculated to cause. All that is required in order to make the nature of the case clear is identification of the nature of the loss and the mechanism by which it is likely to be sustained. In the ordinary course of things derogatory statements about any commercial product are likely to put off some potential customers with a consequent loss of revenue from sales and (depending on the nature of the business) increases in unit costs of manufacturing, storage and distribution."

87. This ability to rely on a generalised inference of likely loss is of material benefit to a claimant, even if the defendant can, in a case such as *Tesla*, rely on other factors to negative the inference. The benefit is likely to be greater in cases of publication to the public or a section of the public. As the Judge correctly recognised at [207], making findings as to the circumstances of publication in cases of limited publication is a different and more precise exercise than in those concerning wide publication. In the former case, the court is likely to have the opportunity of receiving evidence from or in respect of most publishees. There is therefore greater scope for proving specific financial loss if it has occurred.

The post-Act authorities

88. It is not possible in the available space to provide a detailed rebuttal of the Court of Appeal's analysis in [48]-[64] of the s.3(1) authorities. The analysis was mainly directed to the rejection of the historic test. Whereas the Respondents' submissions were mainly directed to the rejection of the tendency test. The Respondent accepted that some of the authorities were forward-looking. The point that they were seeking to make was that, even where the test had been treated as forward-looking, there had been no restriction on the admissibility of facts as to likely loss. The Respondents maintain that the tendency test cannot be reconciled with s.3(1) jurisprudence. In particular:

89. In *Tinkler v Ferguson* [2021] 4 WLR 27 the s.3(1) case failed due to previous and subsequent publications relating to Mr Tinkler's mismanagement which were held to be objectively much more likely to have caused pecuniary damage than the News Service Announcement complained of. The relevant parts of the judgment cannot be discounted as "a compendious and simultaneous analysis" of special damage and s.3(1), as is suggested by the Court of Appeal at [63]. The Judge was correct at [203]-[205] to regard *Tinkler* as demonstrating that causation under s.3(1) required "an examination of the facts as they were before, at and after publication".

90. The Judge was also correct at [203] to recognise that in *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152 the numerous time-barred broadcasts of the negative Top Gear review were plainly regarded as a fact inevitably bearing on the s.3(1) evaluation in relation to the later broadcast complained of. This was the reason why the s.3(1) case was found to have no real prospect of success. The decision cannot be explained away, as the Court of Appeal seeks to do at [59]-[62], by the alternative finding that the claim was a *Jameel* abuse of process.

91. The News Service Announcement and the Top Gear review would both plainly have satisfied the tendency test. Yet, it is apparent that both cases were struck out, among other reasons, for a failure on causation in relation to s.3(1).

92. In *Sallows v Griffiths* [2001] FSR 15 the Court's essential reasoning at [17] in rejecting the s.3(1) case was that it was necessary that "the statements in the circumstances in which they were made were calculated to cause damage" and "there was no evidence before the judge that the plaintiff would have been likely to suffer any other damage from publication to any of the three persons relied upon". It is possible that the case would also have failed the tendency test, solely on the basis of the identities of the publishees. However, its importance is the recognition of the causative link between the act of publication and damage and the need for evidence to support it. The Judge was therefore correct at [205]-[206] to rely on it in support of his rejection of the tendency test.

93. A further significant inconsistency between the tendency test and the s.3(1) authorities is that it fails to take into account what steps the publishee would

ordinarily take to establish the truth or falsity of the statement. It suffices that the publishee could be put off dealing with the claimant if the statement was true. A repeated theme in the authorities applying a forward-looking test is to consider what verification would be expected to be taken by the particular publishee. The enquiry is to the likely effect of the publication, not the inherent tendency of the words. For example, in *Stewart-Brady v Express Newspapers plc* [1997] EMLR 192 the s.3(1) case failed because the hospital would not have acted on the newspaper article without conducting an inquiry. In *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2021] EWHC 3432 (Ch) (see [631]) the potential investor would have established the falsity of the statement by contacting the company. In *Fage UK Ltd v Chobani UK Ltd* [2013] FSR 32 the regulator would not take steps likely to cause damage to a business without first conducting some investigation. As was stated by Briggs J at [151]:

> "Conduct is only calculated to cause damage within the meaning of Section 3(1) of the Defamation Act 1952 (which applies to malicious falsehood) if damage is, in the ordinary course of events, viewed objectively, likely to be caused by the conduct of which complaint is made".

94. By similar reasoning, an employer such as Lingenfelder would not be likely to act on the non-solicitation allegation, depriving his company of possible profit, without asking the Respondent about the alleged provision. The argument is far stronger on the facts of the present case, because at the moment of publication to Lingenfelder the Respondent was on her way to him with the contract which demonstrated the falsity of the allegation. Further, Lingenfelder had not wanted the Respondent to solicit the Appellants' clients, so the publication of the falsehood to him could not, in any event, have caused any loss of commission to the Respondent. It is not necessary to debate the extent to which a potential customer in Butler's position might enquire as to truth, as Butler was not, in reality, a potential customer.

95. To take account of such obviously relevant facts negativing likely loss as those involving Lingenfelder and Butler, cannot be dismissed as "a refinement of the historic approach, based on after-acquired knowledge", as was suggested by the Court of Appeal at [67]. The forward-looking authorities are consistent as to the objective nature of the test. Provided that the relevant fact is in existence, the

extent to which it is known by the parties is immaterial. Further, it is evident that the Respondent was aware of the relevant facts in relation to Lingenfelder. The extent to which she was aware of having alienated Butler was not determined. In any event, what matters is that she had done so.

96. The presence within a publication of a true allegation, not complained of, that would have the same impact as the false allegation complained of, is another obviously relevant causation factor recognised in the authorities (see, for example, *Niche Products Ltd v MacDermid Offshore Solutions LLC* [2014] EMLR 9 at [50]-[52] cited by the Judge at [193]). This would be excluded by the tendency test which is solely directed to notional impact of the allegation complained of.

Article 10 and section 3(1) of the Human Rights Act 1998

97. The need to take into account Article 10 in the interpretation of s.3(1) was first recognised by Gray J in *Ferguson v Associated Newspapers Ltd*, unreported 3 December 2001 (at page 15, lines 10-23) and restated by Tugendhat J in *Cruddas v Calvert* [2013] EWHC 2298 (QB) at [192]-[195] and *Tesla Motors Ltd v BBC (No 1)* [2011] EWHC 2760 (QB) at [7] and by Lewison J in *IBM v Websphere Limited* [2004] FSR 39 at [74].

98. The need for a meaningful harm hurdle has been a consistent theme of the Article 10 domestic and ECtHR jurisprudence. The problem is particularly acute in the United Kingdom because of the huge costs that are routinely recoverable in publication cases. For example, in the present case the Respondent submitted a costs budget to trial in the sum of £529,837 excluding vat, success fee (inevitably 100%) and ATE premium. This was reduced to £365,470. It still gives rise to a likely total costs liability to be claimed in excess of £1m, in a case involving a single email and telephone conversation, which it was apparent had caused no loss.

99. The problem has been addressed in different ways, most notably by s.1 of the Defamation Act 2013. It is inconceivable that Parliament would have retained a tendency test for malicious falsehood (if this had been the established interpretation), while abandoning it for defamation.

100. In *Andre v Price* [2010] EWHC 2572 (QB) at [97]-[105], Tugendhat J held that to interpret "calculated to disparage" in s.2 of the 1952 Act in a manner consistent with Article 10 it was necessary to consider the effect of the publication on the claimant's reputation in the circumstances in which it was made. Where the effect was trivial, liability could not be imposed consistently with Article 10.

101. The Court of Appeal dismissed at [56] the passages as "a passing reference in an extempore pre-trial ruling at first instance". However, the principle that it is an unjustified interference with Article 10 to impose civil liability on speech absent a sufficiently serious effect has been repeatedly expressed and reasoned by Tugendhat J. For example, in his landmark judgment in *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR (see, for example, at [60] to [63]) which led directly to s.1 of the 2013 Act. The principle is correct.

102. The fact of being sued with the consequent risk of the imposition of liability is recognised as a serious interference with Article 10. The greater the financial consequences (actual or potential) the greater will be the chilling effect on others by the threat of a claim (also itself an interference). Any such interference can only be justified by a sufficiently serious interference with a countervailing right of a claimant.

103. It is not necessary to debate the basis on which a malicious falsehood claim involving consequential loss could engage a Convention right. The Court of Appeal referred at [69] to "possessions" in Article 1 of the First Protocol and the general reference to the "rights of others" in Article 10(2). These would, at least, require some loss to be engaged. An interpretation of s.3(1) which rejected liability absent loss or likely loss would not engage any ECHR right of the claimant or offend the mischief of s.3(1). Accordingly, it cannot be necessary or proportionate, within the Article 10 jurisprudence, to permit an interpretation that would allow it.

104. The invocation in [69] of the "protection of morals" in Article 10(2) as potentially justifying the interference is a divergence from the jurisprudence on this issue which generally concerns the criminalisation of offensive speech. To apply it to malicious falsehood would further detach the tort from its

compensatory purpose. It would engage a concept – civil liability for moral turpitude – which is alien to the law of tort.

105. It is not possible in the available space to provide a detailed rebuttal of the assertions in [70] that malicious falsehood claims are relatively rare, malice is hard to plead and pleas are regularly struck out. The authorities referred to in the appeal demonstrate a wide variety of defendants consistent with the wide application of the tort. Malice in media publications is particularly difficult to strike out and commonly succeeds. The tort does not require any intention to injure and the pleading simply needs to set out an arguable case of an indifference to truth, which can be based on inference. The BBC's summary judgment application in *Tesla* did not extend to the malice plea. The malice plea succeeded in *Cruddas*, a Sunday Times investigation into political donations, and in *Thornton*, a Telegraph book review. Each of these cases also involved a defamation claim, reflecting the common practice of joining the two claims. Experience shows that claimants will invoke whatever available causes of action are of perceived tactical advantage.

106. In any event, a malice strike out application is unpredictable and involves cost risks and associated stress. It is not adequate protection. A similar point can be made in relation to *Jameel*, particularly if damages can be recovered for injury to feelings absent loss. The Court of Appeal's rejection of the application of *Jameel* to the present case demonstrates why it is not a substitute for an Article 10 compliant interpretation of s.3(1) that provides a meaningful harm hurdle.

107. S.3(1) HRA is a powerful tool with an unusual and far-reaching character. It is well within its proper ambit to interpret section 3(1) as requiring the claimant to establish that financial loss is likely to have been caused by the publication of the falsehood complained of, should other interpretative tools be insufficient.

David Price KC
Jonathan Price
21 September 2022

Proposed grounds of appeal (extracted from paragraphs 56 to 67 above)

1. The Court of Appeal was wrong to limit the inquiry in a s.3(1) determination to the inherent tendency of the words, with the "identity and essential characteristics" of the claimant, defendant and publishee(s) being the only admissible extrinsic facts. This will be described as "the tendency test".

2. The Court of Appeal wrongly characterised the tendency test as a "forward-looking approach". It is an abstraction. A genuine forward-looking test would take into account any relevant fact in existence at the date of publication in order to make a realistic assessment of what was likely to follow. The tendency test will give rise to arid and artificial debate about whether a fact obviously relevant to likely loss falls within the ambit of "identity and essential characteristics". In cases of limited publication, the publishee's existing estimation of the claimant or particular knowledge may be a far more reliable indicator of their likely reaction than their "identity and essential characteristics".

3. Words do not cause financial loss in the abstract. The conduct that constitutes the tort of malicious falsehood is the act of publication. There is no basis in the statutory wording, principle, logic or authority to limit the admissible facts as to the likely consequence of publication.

4. One of the two interpretations of s.3(1) set out below is correct. It requires the claimant to establish that:

    4.1. At the time of the publication complained of, it is more likely than not that financial loss will be caused by it. This will be described as the "the forward-looking test". It is the more natural interpretation from the use of the present tense in s.3(1). Alternatively:

    4.2. At the time of trial, it is more likely than not that financial loss has been caused by the publication, albeit that there is no requirement to quantify the amount or any other perceived special damage requirement. This will be described as "the historic test".

5. On both tests, there is no restriction on the admissibility of facts relevant to their determination (save as would generally apply in civil litigation).

6. On both tests, on the facts of the present case, s.3(1) is not satisfied.

7. Both tests satisfactorily address the s.3(1) mischief (publications causing very serious damage which, owing to technical rules of evidence, it is impossible to prove strictly as special damage).

8. The effect of the tendency test is that s.3(1) can be satisfied even in cases, such as the present, where no financial loss has been caused and none was likely at the date of publication. This goes significantly beyond the mischief and is inconsistent with the nature of an economic tort (which is to provide compensation for financial loss caused by the wrongful act) and the established Article 10 ECHR jurisprudence (which requires the interference arising from being sued and/or the imposition of liability to be justified by a sufficiently substantial countervailing interference with a claimant's right).

9. It is implicit in the Court of Appeal's reasoning that common law decisions on malicious falsehood prior to the 1952 Act had limited the determination of "calculated" to the tendency test. There had been no clear judicial interpretation of "calculated" as at the date of the Act, such as would engage the *Barras* rule of interpretation. Further, the reasoning in the leading decisions of *Ratcliffe v Evans* [1892] 2 QB 524 and *White v Mellin* [1895] AC 154 suggests that the courts would have taken into account any probative fact in existence at the date of publication, in particular, the extent of publication, in determining whether the publication was calculated to cause financial loss. The most natural interpretation of "calculated" that can be divined from these decisions is that it simply asks whether financial loss is likely at the time of publication in all the circumstances.

10. The historic test is to be preferred because it is possible under the forward-looking test for liability to be imposed notwithstanding that it is clear that no loss has been caused. As the Judge noted at [209], this would be a strange outcome, inconsistent with malicious falsehood's position as an economic tort. In addition:

10.1. It is common ground that post-publication facts are admissible in the assessment of damages for malicious falsehood. There is no good reason why they should be excluded from the determination of liability.

10.2. It is easier to make a determination at trial as to what is likely to have actually happened than to determine what was likely to happen from the perspective of an earlier date, particularly where there is more than one publication complained of, it has continued over a period of time and/or there are a number of factors relevant to likely loss.

11. The available interpretative tools, including s.3(1) of the Human Rights Act 1998, are sufficient to enable the court to apply the historic test, notwithstanding the use of the present tense in s.3(1).

12. Alternatively, if the Court of Appeal was correct to hold that s.3(1) was satisfied on the facts, it should have limited any damages to a nominal sum and not ordered a further trial. Insofar as damages for injury to feelings are available in malicious falsehood, they are parasitic on the existence of financial loss. There is no principled basis on which damages for injury to feelings can be awarded where a defamation claim has failed due to an absence of serious harm to reputation and it can be demonstrated that no financial loss has been caused by the falsehood complained of.

David Price KC
Jonathan Price
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