IN THE SUPREME COURT UKSC 2022/0147
ON APPEAL FROM
THE COURT OF APPEAL (CIVIL DIVISION) Appeal Court Ref: CA-2021-003377
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
THE HONOURABLE MR JUSTICE SAINI [2021] EWHC 2988 (QB)

BETWEEN : -

FIONA GEORGE

Respondent/Claimant

- and -

(1) LINDA CANNELL
(2) LCA JOBS LIMITED

Appellants/Defendants

APPELLANTS' CASE: 11 JULY 2023

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A. Summary

1. The two issues on appeal[1] are (a) the correct interpretation of s.3 of the Defamation Act 1952 and (b) whether damages for distress can be awarded in malicious falsehood in the absence of financial loss and, if so, in what circumstances.

2. S.3(1) 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."

3. The evident purpose of the provision is to discard a requirement to allege and prove special damage. It does not otherwise seek to amend the common law economic tort of malicious falsehood.

4. It is common ground that "calculated" is to be determined objectively and that the standard of proof is more likely than not. The parties have advanced three possible interpretations of what must be shown to be more likely than not:

   4.1. As at the time of trial, that financial loss has been caused by the publication complained of, albeit that there is no requirement to quantify the amount or any

[1] Statement of Facts and Issues at [58].

other perceived special damage requirement. This will be described as **"the historic test"**. It was contended for by the Appellants at trial and applied by the Judge.

4.2. As at the time of publication, that financial loss will be caused by it. This will be described as **"the forward-looking test"**. It was contended for by the Appellants in their Respondent's Notice.

4.3. The words complained of have a natural tendency to cause financial loss. This will be described as **"the tendency test"**. It was the test applied by the Court of Appeal and contended for by the Respondent. The Court of Appeal accepted at [56] that the *"context and circumstances of publication"* are relevant, and that context may or must include the *"identity and essential characteristics"* of the claimant, defendant and publishee(s). No other factors were identified. The intended boundary of context and circumstances of publication is unclear. It is, nevertheless, apparent that the test will exclude obviously relevant facts on the likelihood of loss that will be taken into account in the forward-looking test.

5. The Court of Appeal wrongly characterised the tendency test as a *"forward-looking approach"*.[2] It is an abstraction. A genuine forward-looking test would take into account any relevant fact on likely loss in existence at the date of publication and the likely response of the publishee(s) in order to make a realistic assessment of the likely impact of publication.

6. The Court of Appeal wrongly characterised the Appellants' forward-looking test as *"a refinement of the historic approach, based on after-acquired knowledge"*.[3] It is conceptually discrete from the historic test and can only take into account facts in existence at the date of publication. Whether they were unknown (presumably to the defendant at the time of publication) is irrelevant, as the test is objective. It is only likely to result in a different outcome to the historic test where an unlikely fact relevant to the likelihood of loss occurs after publication. Other than the restriction on post-publication facts in the forward-looking test, both tests admit all probative

[2] At [5].
[3] At [67].

facts on the likelihood of loss (subject to such restrictions as would generally apply in civil litigation).

7. It is common ground that the present claim fails on the historic and forward-looking tests and only succeeds on the tendency test as formulated by the Court of Appeal.[4]

8. The claim succeeds on the tendency test because the only facts extrinsic to the falsehood complained of - the existence and breach of a non-solicitation clause - that it apparently takes into account are that the two publishees were Butler, a notional potential client, and Lingenfelder, the Respondent's line-manager. It excludes the three fundamental facts on likely loss which result in the claim's failure on the other tests.

9. First, Butler had already decided not to do business with the Respondent, regarding her to be a "nightmare". Accordingly, there was no prospect of the falsehood resulting in her losing an instruction from him from which she could have gained commission, which was the "inherently likely" financial loss under the tendency test.

10. Second, Lingenfelder 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. Third, at the time of publication to Lingenfelder the Respondent was on her way to see him with a copy of her employment contract with the Second Appellant which demonstrated that there were no post-employment restrictions. Accordingly, there was no prospect of the falsehood resulting in him instructing the Respondent not to deal with the Second Appellant's clients, thereby resulting in a possible loss of commissions.

11. It follows that the Appellants have no particular preference between the historic and the forward-looking tests or any variation on them that enables all relevant facts negativing likely loss to be taken into account. Their objective is the rejection of the tendency test as formulated by the Court of Appeal or any variation that excludes such facts. There is no justification for such exclusion in the statutory

[4] This was agreed as part of the process of agreeing the statement of facts and issues. Hence the absence of an issue relating to the application to the facts of the Appellants' forward-looking test.

wording or the authorities preceding or following the 1952 Act. It would also be inconsistent with the harm hurdle mandated by Article 10 ECHR.

12. Insofar as it is necessary for the Appellants to select between the historic and forward-looking tests, their case is that the historic test is to be preferred. It is preferable in principle and practice and is the only test consistent with the Article 10. It is accepted that the words "calculated to cause" are more consistent with a forward-looking test. However, if it is accepted that the historic test is the best possible interpretation and the only one consistent with the Article 10, this does not present an obstacle.

13. The second issue in the appeal, relating to damages for distress, is only material if the appeal on liability fails. The Appellants' primary case is that such damages are only available where material financial loss is likely to have been caused and the distress relates to it. Accordingly, there is no basis to award them in the present claim.

B. Financial loss is the gist of the tort

14. The purpose of the law of tort is to provide compensation for harm. The harm in an economic tort is financial loss. Such loss is the gist of all economic torts. There is no justification for imposing liability in malicious falsehood unless it is more likely than not that financial loss has been caused by the publication complained of. Relatedly, there is no justification for preventing the defendant from demonstrating the absence of financial loss in order to defeat the claim.

15. At the time of the 1952 Act there was a longstanding contrast between malicious falsehood and other economic torts, such as inducement to breach contract, in that only special damage could found a claim. The location of the boundary between general and special damage may have been unclear, but not its existence. A basic distinction that continues is that a claim for special damage requires quantification of the loss. In contrast, a claim in respect of general damage can be based on a highly general level of inference. As Moore-Bick LJ noted in *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152 at [37]:

"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."

16. An undoubted consequence of the distinction between general and special damage was that a malicious falsehood claim could fail at common law even though it was likely that publication had caused unquantifiable financial loss. This was the mischief to which s.3 was directed. The 1948 report of the Porter Committee on the Law of Defamation Cmd. 7536 – which is admissible for identifying the mischief – referred at [51] to publications causing *"very serious damage which, owing to technical rules of evidence, it is impossible to prove strictly as special damage"*.

17. A fundamental error in the Court of Appeal's rejection of the historic test is that its outcome would be no different from the position at common law following *Ratcliffe v Evans* [1892] 2 QB 524 and would therefore render s.3 self-defeating.[5] *Ratcliffe* identified the four elements of the tort as (a) falsity (b) malicious publication (c) calculated in the ordinary course of things to produce actual damage and (d) producing actual damage.[6] "Special" or "actual" damage were used inter-changeably in *Ratcliffe* and elsewhere. The Court of Appeal was wrong to suggest that "actual damage" involved some less specific form of proved loss.[7]

18. *Ratcliffe* permitted a plaintiff to rely on a general loss of business, as opposed to the loss of specific customers, as special damage. However, the distinction between special and general damage remained with the potential to restrict a plaintiff from recovering for financial loss that was likely to have occurred.

[5] See [34] and [51].
[6] At 527.
[7] See [34] and [51] as above.

19. This is evident from the two subsequent House of Lords decisions, *White v Mellin* [1895] AC 154 and *The Royal Baking Powder Company v Wright, Crossley & Co* (1900) 18 RPC 95. In the latter Lord Robertson cited *White* as authority for the proposition that the gist of the action was "*special damage, done maliciously*"[8] [emphasis added]. Having described *Ratcliffe* as a "*very interesting judgment*", he stressed the following passage from the judgment of Bowen LJ[9]:

    "The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of this sort has been insisted upon for centuries".

20. He then repeated the need for "certainty and precision".

21. There was no further relevant decision prior to the 1952 Act. In the circumstances, it must be assumed that Parliament was aware that the requirement in malicious falsehood claims to allege and prove special damage could prevent a plaintiff from recovering for general financial loss likely to have been caused that could be recovered in other economic torts.

22. It may be noted that every edition of *McGregor on Damages* since the 1952 Act has contained the following sentence after reference to *Ratcliffe*[10]:

    "On the other hand, there appears to have been no move by the courts to regard the damages at large and to draw an inference of pecuniary loss without proof of special damage, as has been done in the tort of inducement of breach of contract [f/n 56]".

23. The footnote refers to the paragraph[11] on inducement of breach of contract which states:

    "Although damage is the gist of the action [emphasis added], little exact detail can be given as to the measure of damages, as the courts have consistently endorsed Lord Esher's MR's pronouncement in Exchange Telegraph Co v Gregory, the endorsement appearing on many occasions over the next half-century, that "it is

[8] At 103 / 5.
[9] At 103 / 35 citing from 532 in *Ratcliffe*.
[10] 21st edition at [48-011].
[11] 21st edition at [48-005].

not necessary to give proof of specific damage" because "the damages are at large". Nevile J in Goldsoll v Goldman, stated the position in somewhat more detail. "The damage" he said:

> *"….may be inferred, that is to say, that if the breach which has been procured by the defendant has been such as must in the ordinary course of business inflict damage upon the plaintiff, then the plaintiff may succeed without proof of any particular damage that has been occasioned him."*

24. The passage from *Goldsoll* is similar to the wording used by Bowen LJ in *Ratcliffe*: *"calculated in the ordinary course of things"*.

25. There is nothing in the wording of s.3 to suggest that Parliament was seeking to discard the basic principle that financial loss is the gist of an economic tort.

26. The most plausible interpretation of s.3 is that it permits a malicious falsehood claim to be founded on an inference that financial loss is likely to have been caused by the publication complained of, which can be claimed as general damage.

27. The benefit to a claimant will be greater in cases of publication to the public or a section of the public, where an inference can be drawn in the manner indicated by Moore-Bick LJ in *Tesla*.

28. 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 specific proof that financial loss has or has not occurred.

29. There is nothing in the wording of s.3 or in principles of common law to prevent a defendant from relying on specific facts to negative the inference of likely financial loss relied on by the claimant, in order to defeat the claim. The Judge was correct at [209] to regard this as open to a defendant. *Tesla* is a good example. The claimant's pleading sufficiently identified a mechanism for loss - in the ordinary course of things derogatory statements about any commercial product are likely to

put off some potential customers - but the claim was doomed to fail because of the numerous previous broadcasts of the programme complained of which negatived the ordinary inference of likely loss.

30. The need to establish financial loss, at whatever level of generality, dovetails with the Article 10 jurisprudence. This is considered in detail in [93]-[120] below. The short point is that, in the absence of such loss, there is no justification for the interference with the Article 10 right arising from the initiation of a malicious falsehood claim and/or finding of liability. Any interpretation of s.3 that allows this must therefore be avoided, so far as is possible.

31. As previously stated, the forward-looking test will generally have the same outcome as the historic test. However, there are a number of reasons why the historic test is preferable given the nature of the tort:

    31.1. First, the relevant date for the assessment of damages is the trial. There is no good reason for having different assessment dates for the determination of liability and the assessment of damages, or for a post-publication fact being admissible for one, but not the other. The same applies to other harm-related determinations that commonly arise at trial. As in the present case, it is common for defamation and malicious falsehood claims to be brought together and for the claimant to rely on special damage and s.3. The following harm-related determinations are historic: (a) serious harm to reputation under s.1(1) of the Defamation Act 2013 (b) serious financial loss under s.1(2) and (c) special damage whether claimed in defamation or malicious falsehood.

    31.2. Second, it is more straightforward to make a determination at trial as to what is likely to have 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 (e.g. an online publication), and/or there are a number of factors relevant to likely loss.

    31.3. Third, the tests will result in a different outcome where an unlikely event occurs in the period between publication and trial which impacts on whether it is likely that financial loss has been caused. A forward-looking test will prevent this from being taken into account, thereby giving rise to potential injustice and

inconsistency with the gist of the tort. Liability could be imposed notwithstanding that it is evident by the time of trial that no loss has been caused. Relatedly, a claimant could be deprived of a remedy even where it is likely that financial loss has been caused, if the relevant event probative of such loss took place after publication.

32. Finally, the Court of Appeal was wrong at [43] to suggest that the additional requirement in s.3(1)(b) is indicative of a forward-looking test. This relates to oral falsehoods and requires the pecuniary damage to be *"in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication"*. The subsection is little used and there is no authority on it. On its face, it merely adds a further requirement that the "office etc" is held at the time of publication and that the loss is in respect of it. It does not mandate that the determination of the likelihood of loss has to be made as at the date of publication.

C. General submissions in opposition to the tendency test

33. The test is directed to the inherent tendency of the words complained of with the "identity and essential characteristics" of the claimant, defendant and publishee(s) apparently being the only admissible extrinsic facts.

34. The fundamental defect in the tendency test is that words do not cause financial loss in the abstract. The conduct that constitutes the tort of malicious falsehood is the act of publication. As was stated by Briggs J in *Fage UK Ltd v Chobani UK Ltd* [2013] FSR 32 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".

35. There is no basis in the statutory wording, principle, logic or authority to limit the admissible facts as to the likely consequence of the publication. The *"ordinary course of events"* is highly fact-specific.

36. The tendency test gives rise to arid and artificial debate about whether a fact obviously relevant to likely loss falls within the ambit of identity and essential characteristics.

37. For example, at what point does Butler's decision never to do business with the Respondent become part of his identity or an essential characteristic? The Court of Appeal described him at [72] as *"one of her customers"* thereby satisfying the tendency test. The Judge found at [197]: *"when the Butler Words were spoken to him, he was not a client, and would not be a client, of C by reason of C's own other actions"*.

38. In cases of publication to one person, such as the present, the publishee's existing estimation of the claimant or particular knowledge may be the most reliable indicator of their likely reaction. It would appear from the Court of Appeal's approach that these will not be regarded as part of their identity and essential characteristics.

39. 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 *Ratcliffe v Evans* and *White v Mellin* 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.

40. In *Ratcliffe* the plaintiff was a boiler maker in Flint and the claim related to an article in 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.

41. In *White* Lord Herschell LC 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.

42. In *Ratcliffe* and *White* "calculated" is used inter-changeably with "likely".[12] 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 what may be taken into account in determining what would be likely to happen in the ordinary course of things.

43. The Court of Appeal's justification (at [56]) for limiting the admissible facts to "context and circumstances of publication" and within that "identity and essential characteristics" of the parties and publishee(s) is said to be that they are the only factors extrinsic 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:

    43.1. 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, the likelihood of financial loss will generally depend on factors extrinsic to the imputation.

[12] See Lord Herschell in *White* at 157 citing Lopes LJ in the Court of Appeal -*"likely to cause another person damage"* – and at 158 where he changes *"calculated"* to "*likely"* from the citation on 157 of the judgment of Lindley LJ. In *Ratcliffe* Bowen LJ refers to *"reasonably likely to produce"* at 533.

43.2. Second, as was noted by Lord Sumption 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.

43.3. Third, the identity and essential characteristics of the claimant, defendant or publishee have never had the fundamental role in defamation that the Court of Appeal seeks to ascribe to malicious falsehood. They are not mentioned in the cited passages from *Bukovsky v CPS* [2018] 4 WLR 13 [13]-[16] or *Gatley* [3-030], relating to context and circumstances of publication. Context may be relevant in interpreting the meaning of words in cases of ambiguity, as is evident from the recent Supreme Court decision in *Stocker v Stocker* [2020] AC 593. The cases mainly concern the level of formality of the communication in issue. 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 or the defendant. 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. The Court of Appeal baulked at this level of unreality.[13] However, it is equally unreal to exclude other obviously relevant causation factors. It is unreal to proceed on the basis that publication to Butler was likely to cause financial loss simply because Butler was, in theory, a potential client from whom the Respondent could gain commission, while excluding the fact that he had decided never to do business with her.

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

43.5. Fifth, in *Andre v Price* [2010] EWHC 2572 (QB), considered further at [105] below, Tugendhat J correctly recognised that "calculated to disparage"

[13] Hence, the reference at [53] to accepting *"the defendants' submission that the statutory 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"*.

in s.2, relating to slander, had to be interpreted to take into account the likely effect of the publication on the claimant's reputation and this included such extrinsic factors as the extent of publication.

44. The Court of Appeal accepted at [46] that the intention of s.3 was to provide a remedy to persons who had suffered financial loss that could not be proved, not to those who could be proved not to have suffered any loss. It provided three answers to this at [47], none of which survives scrutiny.

44.1. First, that it was an *"inescapable consequence of the chosen method of dealing with the mischief; it is no more than a side-effect of the remedy"*. This is denied for the reasons previously stated. In any event, a modern statute would be subject to proportionality testing to avoid unnecessary side-effects going beyond the mischief that were capable of interfering with freedom of expression. This obligation is now placed on the court by reason of s.3 of the Human Rights Act 1998.

44.2. Second, that it will be rare for a publication that is inherently likely to cause financial loss not to produce any. The authorities demonstrate a variety of commonly occurring situations where this would be the case. In particular:

44.2.1. The tendency test excludes the fact that the imputation complained of has been repeatedly published previously and lost its capacity to cause loss. This is a particularly common feature of modern life as there is so much more available information.

44.2.2. 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 were 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.

44.2.3. It excludes the existence of a true imputation (not complained of) within the publication that is likely to cancel out the impact of the false imputation complained of.

44.2.4. As previously stated, 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.

44.3. Third, that the defendant will have told lies about the claimant from which financial loss would ordinarily flow and the imposition of liability can be seen as consistent with establishing *"a certain amount of ethical and moral principles"*. This is one of a number of examples in the judgment of an apparent detachment of the tort from its compensatory purpose. The citation is from the speech of Harold Lever MP, the sponsor of the Bill.[14] The reference to "ethical and moral principles" was 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.

45. The insouciance of the Court of Appeal to expensive litigation absent any loss is unjustified in any event. 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. This concern is evident as far back as *White v Mellin* and is given fresh impetus by the contemporary focus on proportionality in civil litigation and human rights.

46. There is no reference to "tendency" in the 1952 Act or in any of the malicious falsehood cases before or after it.

47. There is a passing reference in the Porter report at [53], cited in the Court of Appeal judgment at [40]: *"no action would lie except in respect of words having a natural tendency to cause actual pecuniary damage."*

[14] Hansard, Session 1951-52, cols 934-936.

48. It is questionable whether the Porter report (or the speech of Mr Lever) are admissible. If they are, there is no basis to suggest that either manifested an intention to remove the connection between publication and likely financial loss or considered the ambit of admissible evidence on the likelihood of loss.

49. More fundamentally, they cannot qualify the wording of the statute in the common law context referred to above or restrict the proportionality assessment required by s.3 HRA.

D. The authorities on s.3

50. This is the first case at House of Lords or Supreme Court level to consider s.3. The Court is not constrained by any previous decision. However, where a statutory provision has been in place for over 70 years and there are numerous lower court decisions in relation to its application that have not been the subject of any textbook or academic criticism, it is respectfully submitted that the Court should be wary of disturbing settled practice.

51. The Appellants' case in the Court of Appeal contained a detailed analysis of the authorities on s.3. It was mainly directed to the rejection of the tendency test. The Appellants accepted that some of the statements of principle in the authorities were forward-looking.

52. In contrast, the analysis in the Court of Appeal's judgment was directed to the rejection of the historic test. It did not therefore properly address the gravamen of the Appellants' case.

53. The gravamen is the existence of a settled practice of applying standard tortious principles of causation to s.3, thereby admitting facts extrinsic to the words complained of and (relatedly) considering likelihood of loss in practice, not in the abstract. There is no case prior to the Court of Appeal's judgment in which facts negativing the likelihood of any loss (whether occurring before or after publication) have not been taken into account.

Tinkler, Tesla and Sallows

54. The Appellants and the Judge relied heavily on the three most recent previous Court of Appeal decisions: *Tinkler v Ferguson* [2021] 4 WLR 27, *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152 and *Sallows v Griffiths* [2001] FSR 15. Each involved extrinsic facts which defeated the s.3 case.

55. Prior to the present case, *Tesla* was the leading modern authority on s.3 and was relied on in *Tinkler.* It was an application to amend the POC. Permission was refused on the ground that the case on special damage and s.3 did not have a real prospect of success or alternatively did not pass the *Jameel* threshold.[15]

56. The broadcast complained of was a *Top Gear* review which contained a number of criticisms of the performance of an electric car that, viewed in isolation, would have put off a potential purchaser. The reason that the s.3 case did not have a real prospect of success was that the review had been broadcast on numerous previous occasions (outside the limitation period) by the time of the broadcast complained of and it was likely that any loss arising from its contents would already have been caused.[16] This was an extrinsic fact, irrelevant to a tendency test.

57. At first instance Tugendhat J had also found that in relation to each false statement complained of in the programme there was a true statement not complained of relating to the same matter which was unfavourable and that this cancelled out any likely loss from the false statements. While the Court of Appeal disagreed on the facts, it did not question that, in principle, such an argument would be available to a defendant.[17] The truth of words not complained of is a further extrinsic factor. This is not simply because those words are not *"the words upon which the action is founded"*.[18] It is because the truth or falsity of words is distinct from any inherent tendency to cause loss.

[15] [28], [30], [46] re special damage, [47] - [50].
[16] [31], [36]-[37] & [47] - [50].
[17] [34]-[36].
[18] S.3(1)(a): "if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff…"

58. The Judge was correct at [203] to recognise that in *Tesla* the numerous time-barred broadcasts were plainly regarded as a fact inevitably bearing on the s.3 evaluation. It was the reason why the s.3 case was found to have no real prospect of success.

59. The decision cannot be explained away, as the Court of Appeal in the present case sought to do at [59]-[62], by the alternative finding that the claim was a *Jameel* abuse of process.

60. In *Tinkler* the publication complained of was an announcement to the Stock Exchange which was critical of the claimant's management. Nicklin J held that: *"If the Announcement had been the only thing of significance publicly to affect Mr Tinkler, then an inferential case based on a drop-off of offers of directorships or investment opportunities might have had some prospect of success"*.[19] However, it was only an early incident in a wider battle, played out in public, with other previous and subsequent incidents much more likely to have caused pecuniary damage to him.[20]

61. The Court of Appeal identified one of the two relevant s.3 questions as: "*is there an arguable case that they* [the "sorts of losses" relied on by the claimant] *were caused by the publication of the RNS Announcement?"*.[21] It relied on pre-existing and subsequent facts in answering in the negative and concluding, essentially for the reasons given by Nicklin J, that the s.3 case was not viable.[22] One of the facts relied on was an earlier announcement (not complained of) the effect of which would be impossible to separate out from the announcement complained of.[23]

62. The Judge was correct at [203]-[205] to regard *Tinkler* as demonstrating that causation under s.3 required *"an examination of the facts as they were before, at and after publication"*.

[19] [94(iii)].
[20] [94(iii)].
[21] [76].
[22] [77]-[83].
[23] [81].

63. The relevant parts of the judgment cannot be discounted as *"a compendious and simultaneous analysis"* of special damage and s.3, as is suggested by the Court of Appeal in the present case at [63].

64. The Stock Exchange announcement in *Tinker* and the *Top Gear* review in *Tesla* would both plainly have satisfied the tendency test. Yet, it is apparent that both claims were struck out, among other reasons, for a failure on causation in relation to s.3 arising from extrinsic factors.

65. Nicklin J's approach in *Tinkler* was replicated by him in *Peck v Williams Trade Supplies Ltd* [2020] EWHC 966 (QB) and *BHX v GRX* [2021] EWHC 770 (QB). Neither were addressed in the Court of Appeal's judgment in the present case, notwithstanding that they were the most recent decisions by the Judge in charge of the Media and Communications List[24] and the Respondent had submitted (correctly) that they were inconsistent with the tendency test.

66. In *Peck*, Nicklin J relied on *Tesla* [27] to state that: *""calculated to cause pecuniary damage" requires a claimant to show that it is more likely than not that s/he has been caused pecuniary damage by publication of the falsehood"* and then noted that *"the issue of causation remains important, whether a claimant relies upon a plea of special damage or upon s.3 Defamation Act 1952"*.[25]

67. In *BHX* he set out the relevant legal principles at [55(10)-(12)] (cited by the Judge at [190], [193], [203] and [214]). He relied on the post-publication conduct of the publishee to conclude that the s.3 case had no real prospect of success.

68. In *Sallows v Griffiths,* the Court of Appeal decision preceding *Tesla,* the plaintiff and first defendant were directors of a company and the second defendant was a shareholder. The defendants sought to procure the plaintiff's removal by making trumped-up charges of dishonesty which were communicated to him at a board meeting, also attended by the company's solicitor, at which he was dismissed. The malicious falsehood claim was based on publication to the solicitor and the

[24] The List has primary jurisdiction over malicious falsehood claims because they are commonly joined to defamation claims and engage Article 10. Warby LJ was formerly the judge in charge, but does not appear to been involved in any s.3 case on that capacity.
[25] [15].

company at the board meeting and a further alleged publication to the personal assistant of one of the defendants. A separate claim against the company for wrongful dismissal was subsequently settled with a payment of damages. The judge awarded £5,000 damages for malicious falsehood. The defendants appealed on the basis that neither the solicitor nor the personal assistant could cause loss to the plaintiff and that there was no separate publication to the company, or if there was, any loss was indistinguishable from the loss for wrongful dismissal, which had been fully compensated. The Court of Appeal accepted the defendants' submissions and allowed the appeal. Its essential reasoning is evident from the passage at [17] (highlighted by the Judge at [205]) and reproduced in headnote (1).

"Whilst the plaintiff did not have to show that he had sustained special damage, he did have to show that the statements in the circumstances in which they were made were calculated to cause damage to him in the way of his office, profession or business. Apart from the loss suffered as a result of his wrongful dismissal, 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."

69. The reference to "no evidence" mirrors what was said by Lord Herschell in *White v Mellin*[26] and necessarily contemplates the admissibility of extrinsic facts. The Appellants relied on (a) the absence of any limitation on the "circumstances" (b) the reference to "no evidence" and (c) that the post-publication wrongful dismissal damages were an essential part of the rejection of the claim in respect of publication to the company, that would be excluded on the tendency test.

70. The Court of Appeal's analysis of *Sallows* at [58] fails to engage with these points and wrongly suggests that the wrongful dismissal compensation preceded the publications complained of.

"I would analyse this as a case in which the claimant failed to discharge the burden of pleading and proving a basis for concluding that it was inherently likely at the

[26] See [41] above.

time that the offending publication would cause him pecuniary loss that had not already been compensated for."

Other Court of Appeal decisions

71. The Court of Appeal at [53] referred to three other Court of Appeal decisions: *Calvet v Tomkies* [1963] 1 WLR 1397, *Fielding v Variety Incorporated* [1967] 2 QB 841 and *Joyce v Sengupta* [1993] 1 WLR.

72. In relation to *Calvet* it stated: *"where the claimant's case was exclusively based on s 3, this court held that she [the plaintiff] was not bound to disclose documents showing whether or not she had sustained actual loss as this was irrelevant"*. This was relied on to support the opposition to the historic test.

73. As previously stated, "actual damage" is often used interchangeably with "special damage". The phrase "actual loss" was used once at the end of the judgment of Lord Denning MR. The judgment repeatedly distinguishes between "special" and "general" damage, the latter being sufficient to found a claim under s.3. This is consistent with the historic test.

74. The appeal turned solely on the limited nature of the s.3 averment and the consequent limited nature of disclosure.[27] There is nothing in the judgment that purports to limit the ambit of probative evidence to be relied on by a defendant in opposition to a s.3 case.

75. *Fielding* was considered by the Judge at [211]-[212]. Its defining feature is that judgment was by default. The Court of Appeal observed that the Court in *Fielding* was "untroubled" by there being no evidence" of pecuniary damage. But this was unsurprising given that the interpretation and application of s.3 was not in issue.

76. *Joyce* was also not directed to the interpretation or application of s.3. The Court of Appeal relied on a passing reference in the judgment of Sir Donald Nicholls VC to it relieving a plaintiff *"from proving damage".* This is capable of being understood as a reference to special damage. Other references in the judgment make clear the distinction between general and special damage noted in *Calvet*. In common

[27] "The argument before us depends entirely on what is relevant in these pleadings". At 1399.

with *Calvet*, there is nothing to suggest any limitation of facts on the likelihood of loss.

Cases which failed due to the likely verification by the publishee(s)

77. As stated in [44.2.2] above, it is sufficient under the tendency test that the imputation complained of, if true, has a tendency to cause a publishee to act in a particular way with the potential to cause loss to the claimant. The test does not accommodate the likely impact of publication of the imputation, in reality, and specifically, the likelihood of the publishee seeking to ascertain its truth or falsity before taking any action. A number of s.3 cases have failed on this basis. In *Stewart-Brady v Express Newspapers plc* [1997] EMLR 192 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) the potential investor would have established the falsity of the imputation by contacting the company, before pulling out.[28] 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.[29]

78. The approach in these cases mandates consideration of whether a manager, in Lingenfelder's position, would seek to verify a claim by a previous employer of a non-solicitation clause, before depriving his company of possible profit by instructing the relevant employee not to solicit. The likely ascertainment of falsity is unquestionable 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 employment contract which demonstrated the absence of any such clause. It is not necessary to debate the extent to which a potential client in Butler's position might enquire as to truth, as Butler was not, in reality, a potential client.

[28] See [631].
[29] See [151]-[152].

Other causation issues - Statements not complained of relevant to likelihood of loss

79. The courts have consistently enforced the "but for" / damnum absque injuria principle in respect of the falsehood complained of. For example, in *Ajello v Worsley* [1898] 1 Ch 274, as recorded in *Clerk & Lindsell on Torts*[30]*:*

"The defendant, a retail dealer, advertised that he had in stock pianos of the claimant's manufacture, which he offered for sale at wholesale prices. In fact, the claimant had refused to supply him because he habitually failed to charge the retail trade prices and thereby damaged the claimant's trade. It was held that as the cause of the damage was the offer for sale at wholesale prices, which was not unlawful, and not the false statement that the pianos were in the defendant's possession, the claimant had no remedy".

80. *Ajello* has been repeatedly cited in *Clerk & Lindsell*[31] for the principle that the damage must directly flow from the untruth of the statement complained of.

81. The admissibility of competing causes for likely loss gives rise to obvious conceptual difficulties in the tendency test because of its limited focus. For this reason, the Respondent sought to draw a distinction between s.3 and special damage, submitting that *Ajello* and the principle to be derived from it are only relevant to the latter.[32] No such distinction can be found in the s.3 cases.

82. The need to take into account the impact of imputations not complained of is an example of the application of the *Ajello* principle that has recently been recognised in two s.3 cases, that were relied on by the Appellants.

83. As noted in [57] above, the Court of Appeal in *Tesla* accepted that it was open to the defendant to rely on the likely impact of the true statements in the broadcast which were not complained of to cancel out the likely impact of the false statements complained of.

84. This was followed in *Niche Products Ltd v MacDermid Offshore Solutions LLC* [2014] EMLR 9, cited by the Judge at [193], where the words complained of were

[30] At [22-20] in the 23rd edition.
[31] See further at [92] below. It was also relied on by Nicklin J in *Peck* at [13], referred to in [65] above.
[32] Respondent's Skeleton Argument in the Court of Appeal at [53].

arguably likely to lead to lost sales of the claimant's product in favour of that of the defendant. The publication also contained statements commending the defendant's product which were not complained of, but which were likely to be a significant cause in any lost sales. Birss J accepted that the likely effect of the words not complained of was relevant to s.3 but concluded that there was a properly arguable claim that some real proportion of the likely lost sales were more likely than not to be caused by the words complained of.[33]

85. The Court of Appeal did not directly address the Appellants' submissions on this issue. There is no reference to *Niche Products Ltd.* It appears from the passages relating to *Tesla* at [60] and [62] that the Court was of the view that (a) words not complained of are not to be regarded as an "extrinsic factor" (suggesting that they can be taken into account) and (b) while their truth or falsity is an extrinsic factor (suggesting that it cannot be taken into account), it is irrelevant to causation.

86. The first point is questionable, as the tendency test is directed to "*the words upon which the action is founded*". This would appear to exclude the tendency of the words not complained of.

87. As regards the second, in *Tesla* the truth of the statements not complained of was evidently considered to be a necessary element of their ability to cancel out the likely effect of those complained of.[34] Truth or the absence of malice (a further extrinsic factor) would undoubtedly be relevant to causation if complaint was made of two statements in the same publication, both of which were likely to cause the same loss. The *Ajello* principle would arise if one was found to be false and malicious and the other was found to be true or non-malicious. It is difficult to see how the tendency test could allow for the latter to impact on the s.3 determination in respect of the former.

[33] [50]-[54].
[34] See the Court of Appeal judgment at [34]-[36] and the passages referred to in the judgment of Tugendhat J and in addition [83] from that judgment.

Other cases relied on by the Court of Appeal

88. It is accepted that the statements of principle in *Ferguson v Associated Newspapers Ltd*, unreported 3 December 2001[35] and *Quinton v Peirce* [2009] FSR 17[36] support a forward-looking test. Neither case involved any restriction on the ambit of relevant factors as to the likelihood of loss as at the date of publication. Insofar as is necessary, it is submitted that the brief obiter observations in *Quinton*[37] are wrong. The only route to the likely loss of the allowance was defeat in the election as a result of the leaflet complained of and there was no finding that, as at the date of publication, this was more likely than not to be its consequence.

Textbooks

89. There are clear and longstanding statements of principle in the textbooks that support the historic test and/or are inconsistent with the tendency test.

90. The Judge at [200] relied on the following passage in *Gatley on Libel and Slander* at [22-026] in the current 13th edition: *"Whether the claim is made for special damage or under s.3, the damage must be such as directly and naturally (or naturally and probably) results from the words. The defendant will not be liable where the damage is attributable not to his words but to some other unconnected fact or circumstance."*

91. *McGregor on Damages* 21st edition states at [48-012]: *"Section 3, by dispensing in these cases with the requirement of allegation and proof of specific pecuniary loss for success in the action, thus impliedly confirms the view that for all injurious falsehoods only pecuniary loss will ground the action, a view negatively supported by the absence of decisions awarding non-pecuniary loss, occasionally hinted at in the cases, and generally prevalent in this area of tort. The view now obtains positive support from Sallows v Griffiths, where no damages for malicious falsehood were awarded as there was a failure to show pecuniary loss"*.

[35] Cited by the Court of Appeal at [48]-[55].
[36] Cited at [53] & [54].
[37] At [85]-[86]. See also [50].

92. *Clerk & Lindsell on Torts* 23rd edition states at [22-20]: *"In order to succeed the claimant must be able to show that the damage suffered by him flowed directly from the untruth of the statements of which he complains. The damage complained of must be attributable to the falsehood"*.

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

The applicability of Article 10 to malicious falsehood and s.3 DA

93. It has been repeatedly recognised since the passing of the Human Rights Act 1998 that s.3 is a "restriction" on free speech within the meaning of Article 10(2), thereby giving rise to the duty to interpret it in a way that goes no further than is strictly necessary.[38]

94. More generally, as was stated by Morland J in *Charterhouse Clinical Research Unit Ltd v Richmond Pharmacology Ltd* [2003] EWHC 1099 at [14]:

"..it is the duty of the courts to keep claims alleging trade libels within their proper bounds, particularly having regard to s 12(4) of the Human Rights Act 1998 and Article 10 of the Convention..".

95. The Respondent did not directly challenge these authorities but submitted that Article 10 was adequately protected by the obligation to prove falsity and malice, there was no public interest in misinformation and commercial speech was accorded relatively low protection. This is misconceived. Article 10 is engaged in all forms of speech that may be the subject of a malicious falsehood claim and a meaningful harm hurdle protects non-malicious defendants, by allowing any potential defendant to avoid the costs and hassle of litigation, or if sued, to avoid the potentially substantial costs of rebutting a case on falsity or malice, by relying on an evident absence of loss. The level of protection to be accorded to the particular speech in issue is only relevant where there is the engagement of a countervailing right of a claimant and therefore a need to balance the two. For the

[38] The need to take into account Article 10 in the interpretation of s.3 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 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] QB 204 at [28]-[29] & [38], *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].

reasons considered below, no such right can be engaged absent material harm. Where none of the permitted restrictions in Article 10(2) are engaged, free speech "is a trump card which always wins".[39]

96. The consequence of the universal engagement of Article 10 in malicious falsehood claims is that the domestic court has a duty to apply the ECtHR proportionality test to the interpretation of s.3, resulting in a single interpretation that cannot vary because of the nature of the speech in issue or following a finding that the defendant was malicious.

97. The Court's approach to proportionality is summarised in its Guide on Article 10, 31 August 2022 update, at [96]-[97].

"96. The Court considers that in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned (Glor v. Switzerland, § 94).

97. Thus, in its analysis of proportionality, the Court attached importance to the fact that the national judge chose the least restrictive of several possible measures (Axel Springer SE and RTL Television GmbH v. Germany, § 56; Perinçek v. Switzerland [GC], § 273; Tagiyev and Huseynov v. Azerbaijan, § 49) or ensured the minimum impairment of the applicant association's rights (Mouvement raëlien suisse v. Switzerland [GC], § 75)."[40]

The threshold of seriousness

98. The modern approach to freedom of expression mandates a meaningful harm hurdle in all torts involving publication in order to satisfy the proportionality test and mitigate the chilling effect of threatened or actual litigation. The fact of being sued with the consequent need to incur legal costs and risk of imposition of liability is recognised as a serious interference with Article 10.[41] The greater the potential

[39] As was memorably stated by Hoffman LJ in *R v Central Independent Television Plc* [1994] Fam 192 at 203E
[40] Extract from the Court's Guide on Article 10, 31 August 2022 update.
[41] See, for example, *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR at [60] to [63] and *OOO Memo v Russia* [2022] ECHR 229 at [23] and [43], both cited below.

financial consequences, the greater the chilling effect arising from 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.[42]

99. Such concerns were emphasised in the recent ECtHR decision in *OOO Memo v Russia* [2022] ECHR 229, which cited[43] the Human Rights Comment by the Council of Europe Commissioner for Human Rights "Time to take action against SLAPPs" [Strategic Lawsuits against Public Participation] of 27 October 2020. There are potentially more specific remedies for SLAPPs. But they are not a substitute for the adoption of a meaningful harm hurdle in all torts involving publication, as part of "the positive obligation to secure the enjoyment of the rights enshrined in Article 10".[44]

100. The need to avoid freedom of expression being *"unjustifiably impeded by actual or threatened libel proceedings"* was the stated justification for Parliament creating the serious harm threshold in s.1(1) of the 2013 Act in all defamation claims, supplanting the common law tendency test.[45] It was recognised that the disconnect between the tendency test and actual harm to reputation allowed trivial claims to proceed.[46] This was considered to be a particular problem in respect of trading corporations, resulting in the serious financial loss requirement in s.1(2). For example, the Joint Committee on the Draft Defamation Bill - First Report, 12 October 2011 stated at [114].

"It is unacceptable that corporations are able to silence critical reporting by threatening or starting libel claims which they know the publisher cannot afford to defend and where there is no realistic prospect of serious financial loss."

[42] See, for example, *Axel Springer AG v Germany* [2012] EMLR 15 at [83] in relation to Article 8: "*In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see A. v. Norway, cited above, § 64)".*
[43] At [23].
[44] See the Comment cited at [23].
[45] See, for example, the Ministerial Foreword to the draft Defamation Bill published in March 2011.
[46] See, for example, [1]-[6] of the explanation to the draft Defamation Bill published in March 2011.

101. 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.

102. A threshold of seriousness directed to actual impact, has also been recognised in misuse of private information and is implicit in other torts involving speech.[47]

103. The seriousness of the interference arising from being sued and the related chilling effect of threatened or actual litigation 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 to the end of trial, in a case involving a single email and telephone conversation, which it was apparent had caused no loss. At the hearing on costs the Judge observed: *"it is difficult to see how a system which allows costs of these potential sums to be recovered is really in the interest of justice"*.

104. Malicious falsehood now falls within the jurisdiction of the High Court's Media and Communications List. The perceived complexity and specialist knowledge required of cases in the List is used to justify the recovery of large costs, making it all the more important that the tort is kept within proper bounds. The maintenance of a meaningful threshold of seriousness is fundamental to this objective.

105. In *Andre v Price* [2010] EWHC 2572 (QB) at [97]-[105], Tugendhat J held that to interpret "words calculated to disparage" in s.2 of the 1952 Act in a manner consistent with Article 10 it was necessary to consider the likely effect of the publication on the claimant's reputation in the circumstances in which it was made. Where it was trivial, liability could not be imposed consistently with Article 10. The case involved words spoken to a studio audience prior to broadcast and the s.2 claim was struck out, in part, due to the relatively small number of people present. *Andre* has now been superseded by s.1 of the 2013 Act. However, that does not diminish its obvious relevance to the present case.

[47] See, for example, *ZXC v Bloomberg LP* [2022] AC 1158 at [35].

106. The Court of Appeal dismissed at [56] the passages in *Andre* as *"a passing reference in an extempore pre-trial ruling at first instance"*, which was not authority for the admission of evidence as to what, if any, harm resulted in the event. The Court did not directly address the principle recognised by Tugendhat J, that Article 10 imposes a threshold of seriousness to the determination of "calculated", going beyond the inherent reputational tendency of the words, which takes into account the reality and substantiality of likely harm.

107. There were no relevant post-publication facts to be taken into account in *Andre.* There is nothing in the judgment to suggest that they would necessarily be excluded.

108. 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, see his landmark judgment in *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR[48] which led directly to s.1 of the 2013 Act.

109. The threshold of seriousness in a tort that seeks to compensate for financial loss must be, at a minimum, the likely existence of such loss.

No justification for interference / restriction in the absence of loss

110. It is not necessary to debate the basis on which a malicious falsehood claim where financial loss is likely to have been caused 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 which rejected liability absent any loss would not engage any ECHR right of the claimant or offend the mischief of s.3. Accordingly, it cannot be necessary or proportionate, within the Article 10 jurisprudence, to permit an interpretation that would allow it. The Court of Appeal did not approach its interpretative role from this perspective.

[48] In particular at [60] to [63] and the cases cited there.

111. 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.[49] The relevant words are "the protection of health or morals". The cases generally concern prohibitions on potentially dangerous or offensive speech. It has never been used as an alternative means to justify a civil claim in tort where the "rights of others" are not engaged. 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.

112. There are further errors of principle in [70]:

> *"70. I accept that being sued at all is an interference with freedom of expression. But the point has scant attraction in cases such as this. The remedy for those in the position of these defendants is to avoid conspiring to utter false, malicious, and financially damaging statements, or to settle the claim promptly if discovered to have done so.*

113. Leaving aside the potentially punitive element, this approach does not accord with the proportionality test, as conventionally applied in the Article 10 cases. The accepted interference of being sued – generally regarded as serious – must be avoided unless it is the only way to achieve a legitimate end. The issue is not whether a defendant deserves to be sued, but whether it is necessary for the protection of the claimant's rights or any other permitted aim.

The chilling effect

114. [70] continues:

> *"I am not persuaded that giving s 3 its natural meaning is likely to have a significant chilling effect on truthful and honest speech."*

[49] See the ECtHR's Guide on Article 10, 31 August 2022 update at [601] to [613]. Two cases are cited at [607] for the proposition that "Contracting States have a wide margin of appreciation with regard to speech in commercial matters and advertising". *Sekmadienis Ltd. v. Lithuania* [2018] ECHR 112 involved a fine (held to be a violation of Article 10) in respect of an arguably blasphemous advert. *markt intern Verlag GmbH and Klaus Beermann v. Germany* App. No. 10572/83 (1989) involved criticism of a product where the government did not pursue its reliance on the protection of morals (see [31]).

115. The existence of any chilling effect on such speech, significant or otherwise, must be avoided unless necessary. The ECtHR sets a relatively low bar before this possibility becomes a matter of real concern. The issue is whether the measure is "capable"[50] of having a chilling effect, in which case it requires the "most careful scrutiny". Given the reasons for Parliament discarding the tendency test in defamation and the huge costs of defending publication cases, this capability should be obvious. It is further demonstrated by *Gatley,* the leading practitioner's guide, invoking as a "major" tactical consideration that a malicious falsehood claimant avoids the hurdles presented in defamation by s.1 of the 2013 Act.[51] The tactical advantage has been further significantly enhanced by the Court of Appeal's adoption of the tendency test.

116. The assertions in the remainder of [70] - that malicious falsehood claims are relatively rare, malice is hard to plead and pleas are regularly struck out – do not withstand proper scrutiny and, in any event, cannot justify an omission to seek to minimise the accepted chilling effect. 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 v Calvert* [2013] EWHC 2298 (QB), a Sunday Times investigation into political donations, and in *Thornton*, a Daily 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.

117. 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

[50] The most cited statement of principle is that the most careful scrutiny is called for when sanctions imposed by the national authority are capable of discouraging participation in debates by the media over matters of legitimate public concern (see, for example, *Bladet Tromsø v Norway* (2000) 29 EHRR 125 [64]). It is recognised that this principle now extends beyond the media to anyone communicating on a matter of public interest (see, for example, *OOO Memo v Russia* [2022] ECHR 229 at [23]).
[51] At [22-003].

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 that provides a meaningful harm hurdle.

The application of s.3(1) HRA to the competing interpretations of s.3 DA

118. The only way to ensure that there is no liability without harm is by requiring the tribunal of fact at trial to find that such harm is more likely than not to have been caused. The historic test is the only way to ensure compliance with this principle in malicious falsehood cases. The tendency and forward-looking tests both allow for liability to be imposed, notwithstanding that it can be demonstrated that no loss was caused. For the reasons previously stated, the risk is far greater on the tendency test.

119. That leaves two remaining questions. First, does the historic test unjustifiably interfere with any right of a claimant or frustrate the mischief of s.3 of the 1952 Act? It does not, for the reasons previously stated. Second, on the assumption that the principles of interpretation other than s.3(1) HRA do not result in its adoption, is it a possible interpretation? At most, it would require "calculated to cause" to be read as "calculated to have caused" or "likely to have caused". This is well within "the unusual and far-reaching character" of the s.3(1) power in relation to a statute that significantly pre-dates the HRA and would "go with the grain of the legislation".[52]

120. Alternatively, if the contest is between the forward-looking test and the tendency test, the forward-looking test must be adopted. From the perspective of Article 10, there is no necessity to impose liability absent a likelihood of loss and, relatedly, no justification for any limitation on the admissibility of facts negativing such likelihood.

[52] See *Bennion, Bailey and Norbury on Statutory Interpretation* 8th Edition, Chapter 29.

F. Damages for distress absent financial loss

121. The Appellants' case on this issue is that distress damages are only available where material financial loss is likely to have been caused and the distress relates to it. Accordingly, there is no basis to award them in the present case.

The relevant principles

122. Various torts provide for recovery for distress consequential on the tortious act and related to the interest protected by the tort. However, it is a transient and less significant type of mental injury, the recoverability of which needs to be kept within proper bounds, including a meaningful substantiality threshold. The availability of such damages does not follow simply because the tortious act has upset the defendant.

123. The starting point as regards malicious falsehood is that compensation for distress or other mental injury is not the (or a) purpose of the tort. So far as the Appellants are aware, there is no case in any tort which does not have such a purpose in which distress damages have been held to be available in the absence of any loss or harm to which the tort is directed. To award such damages would be inconsistent with the compensatory principle, as applied to the particular tort.

124. Relatedly, so far as the Appellants are aware, there is no case in any such tort in which distress damages have been awarded consequent on an erroneous belief that such loss or harm has been caused. This would also be inconsistent with the compensatory principle.

125. Even where the damages are "at large" in an economic tort, it is well established that any non-pecuniary element must be "based" on the pecuniary loss. As was stated by Lord Devlin in *Rookes v Barnard* [1964] AC 1129 at 1221 (involving the tort of intimidation):

"It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined

to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconveniences caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved".

126. S.3 does not alter the basic character of the tort of malicious falsehood, to provide compensation for financial loss. Where material financial loss is likely to have occurred, there is a principled basis for awarding damages for material distress related to it.

127. Where it is proved that no such loss has occurred, there is no principled basis for awarding damages for distress.

128. Relatedly, in the absence of financial loss, if there is any distress relating to it, it will inevitably be based on a misconception as to the extent and/or effect of publication.

129. It is well established that damages for distress are recoverable in defamation. If such damages are also available in malicious falsehood, they cannot relate to concern over reputational harm, which is generally the main cause of distress arising from a false statement.

130. There may be an overlap between distress in relation to reputational harm and distress in relation to financial loss, where the injury to reputation is sufficiently serious to cause such loss. If the publication complained of also gives rise to a viable claim in defamation, distress damages can be claimed as part of the defamation damages and there is no need to separate out any element relating to financial loss.

131. Where the statement is defamatory in nature, but the claim fails due to the absence of serious harm, it will be difficult, if not impossible, to extract an element of recoverable distress relating solely to malicious falsehood.

The authorities in relation to distress damages in malicious falsehood

132. There are three previous cases, each in the Court of Appeal: *Fielding v Variety Incorporated* [1967] 2 Q.B. 841, *Joyce v Sengupta* [1993] 1 WLR 337 and *Khodaparast v Shad* [2000] 1 WLR 618 CA.

133. In *Fielding* Lord Denning MR held at 850C that damages for injury to feelings were not available in malicious falsehood. A case could be made to this effect. However, it is not necessary for the Appellants to advance it.

134. *Joyce* involved an abuse of process strike out application, where a relevant issue was the level of damages to which the plaintiff might be entitled at trial. In this context Sir Donald Nicholls V-C gave detailed consideration to the availability of damages for injury to feelings (at pages 347-349) without expressing a decided view. In summary, he opined that ""parasitic" damages"[53] for injury to feelings should be available when connected with financial damage inflicted by the falsehood. He gave the following example, far removed from the present case:

"Take the example I gave earlier of a person who maliciously spreads rumours that his competitor's business has closed down. Or the rumour might be that the business is in financial difficulty and that a receiver will soon be appointed. The owner of the business suffers severe financial loss. Further, because of the effect the rumours are having on his business he is worried beyond measure about his livelihood and his family's future. He suffers acute anxiety and distress. Can it be right that the law is unable to give him any recompense for this suffering against the person whose malice caused it? Although injury to feelings alone will not found a cause of action in malicious falsehood, ought not the law to take such injury into account when it is connected with financial damage inflicted by the falsehood?"[54] [all underlining added]

135. Sir Donald then considered the position in analogous torts:

"One turns to analogous torts for guidance. Inducement of breach of contract is another tort in which proof of damage is an essential ingredient. In Pratt v. British

[53] At 347G.
[54] 347H--348B.

Medical Association [1919] 1 K.B. 244, 251, McCardie J. took humiliation and menace into account when assessing the damages. Likewise in conspiracy: see the direction to the jury in Quinn v. Leathern [1901] AC 495, 498. A close analogy is that of slander in a case where it is actionable only on proof of pecuniary damage. In Lynch v. Knight (1861) 9 H.L.C. 577, 598, Lord Wensleydale said:

> *"Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should overlook the feelings of the party interested".”*[55]

136. Sir Donald's analysis appears to proceed on the basis that proof of damage is a necessary element of liability in malicious falsehood. Submissions on this issue in the present appeal necessarily proceed on the basis that it is not. This enhances the significance of the repeated references in *Joyce* to the necessary connection between the financial loss and the distress.

137. The final point of relevance is the recognition in the next passage that not all non-pecuniary losses can be recoverable simply because they are consequential on the publication complained of. In particular, that injury to reputation is not recoverable.

> *“The point bristles with problems, not all of which were explored in argument. One possibility is that in an action for malicious falsehood damages are limited to financial loss. That would mark out a clear boundary, but it would suffer from the drawback of failing to do justice in the type of case I have mentioned. I instinctively recoil from the notion that in no circumstances can an injured plaintiff obtain recompense from a defendant for understandable distress caused by a false statement made maliciously. However, once it is accepted there are circumstances in which non-pecuniary loss, or some types of non-pecuniary loss, can be recovered in a malicious falsehood action, it becomes extremely difficult to define those circumstances or those types of loss in a coherent manner. It would be going too far to hold that all non-pecuniary loss suffered by a plaintiff is recoverable in a malicious falsehood action, because that would include injury to reputation at large.*

[55] 348B-D.

The history of malicious falsehood as a cause of action shows it was not designed to provide a remedy for such injury: the remedy for such loss is an action for defamation in which, incidentally, damages for injury to feelings may be included in a general award of damages: see the Fielding case, per Lord Denning M.R. at p.851 and Salmon L.J. at p.855."[56]

138. In *Khodaparast*, reliance was placed on *Joyce* when upholding an award for injury to feelings. The case is of little assistance, as the injury was directly connected with the serious losses and harm caused by the falsehood.[57] In addition, the judgment proceeded on the mistaken assumption that malicious falsehood is *"a species of defamation"*.[58]

The approach of the Court of Appeal in the present case

139. This is set out in [74]-[79]. It is not possible to discern any specific limitation in the recovery of distress damages or guidance to trial judges as to the correct approach in *"the infinitely variable factual circumstances of the cases that come before them"*. The justification for this apparently unrestricted potential recovery is that liability is grounded on a tendency to cause financial loss and distress is likely to be a foreseeable consequence of a publication with such a tendency.

140. This approach is wrong in principle, given the Court's (correct) finding at [73] that there was no "recognised type of injury" that justified any compensation i.e., no type of injury recognised in the tort of malicious falsehood.

141. Alternatively, if reliance on a mere tendency to cause financial loss is a sufficient basis for a potentially substantial award of damages for distress, this would still require the distress to be directed to the potential financial loss.

142. The Court did not even specifically exclude distress relating to reputational harm, notwithstanding its obvious relevance to the present case and the Court's recognition at [73] that "everyone agrees" that compensation for reputational harm

[56] 348E-348G.
[57] The defendant had circulated within the Iranian community a mock photograph which suggested that the plaintiff was a pornographic model. This had caused her to be *"deprived of employment in the Iranian community or by any member of that community, and deprived of employment which she greatly enjoyed"*.
[58] See [42], part of which was cited by the Court of Appeal at [76].

is outside the scope of malicious falsehood. It must follow that distress relating to actual or presumed reputational harm is excluded from any malicious falsehood distress damages.

Application of the relevant principles to the facts

143. The two publications complained of did not cause any loss and there is therefore no basis for any award of distress. The points made below are without prejudice to this fundamental objection.

144. It is evident from the judgment at trial that the primary claim was in defamation and that the Respondent's distress evidence was directed to perceived reputational impact. There was no evidence of any distress about the impact on the Respondent of losing commission (the loss relied on in the malicious falsehood claim).

145. Further, the Respondent's reputational concerns were due to the erroneous belief that the First Appellant had published the falsehoods complained to all the Second Appellant's clients. This arose from the First Appellant's email to the Respondent of 21 January 2019 ("the George Email") which included: "I will…be contacting our clients to advise them of your actions and your violation of the terms of your post-employment obligations". The George Email was not the subject of any claim. The Judge noted at [181]: "*C's case did not always distinguish between losses flowing from falsehoods* [those complained of] *and those flowing from that Email* [the George email]. It is unnecessary to consider what remedy, if any, could be available in respect of any loss caused by the George Email. It could not be in malicious falsehood, as the tortious act is publication to third parties, not the claimant.

146. The only proved publication to a Second Appellant client was to Butler and any potential client-related distress of the Respondent must, in principle, relate to him alone.

147. The Respondent's evidence was that she was angry when she found about the publication to Butler and regarded the falsehood complained of to be damaging. Butler was one of a large number of potential clients. There was no evidence that any loss of instructions from him would have had any material impact on the

Respondent's financial position, let alone that she was distressed by this prospect. In any event, any distress in relation to such loss would have been based on the misconception that he might otherwise have instructed her.

148. As regards Lingenfelder, the Respondent knew immediately following publication that (a) he knew that there were no post-employment restrictions and (b) he was *"100% behind* [her]*"*.[59] The suggestion in the Court of Appeal's judgment at [79] that the Respondent did not become aware of some relevant fact as regards Lingenfelder until a later date does not accord with the Judge's findings.

"79…Neither the claimant nor the defendants knew that, as the Judge later found, what was inherently likely would not in fact come to pass. The fact that this later emerged, and the claimant came to know it, would limit but not extinguish her claim."

149. In consequence of all of the above, even if an inherent likelihood of financial loss could lead to distress damages, the distress would need to be directed to that loss and there is no basis for such an award in favour of the Respondent.

G. Conclusion

150. The appeal should be allowed because:

150.1. In order to succeed in a claim for malicious falsehood, the claimant must establish that it is more likely than not that financial loss has been caused by the publication of the words complained of; alternatively, as at the date of publication, that it will be caused. There is no restriction on the admissibility of facts relevant to either determination (save as would generally apply in civil litigation). No financial loss was caused to the Respondent by the two publications found to have taken place; and taking into account the facts set out in the Respondent's Notice, as at the date of publication, no loss was likely to be caused. Accordingly, the claim fails.

[59] Judgment [80], [81], [94]-[100] [134(iii)-(iv)], [135], [181] & [196].

150.2. Alternatively, there is no basis in principle and/or on the evidence to award distress damages to the Respondent and, in consequence, the only possible award is nominal damages.

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11 July 2023
For the Appellants/Defendants