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Neutral Citation Number [2019] EWHC 571 (QB)

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

No. HQ13D03735

HQ14D02898

Royal Courts of Justice
London, WC2A 2LL

Tuesday, 12 February 2019

Before:

MR JUSTICE WARBY

B E T W E E N :

FRANK KOFI OTUO

Claimant

- and -

WATCH TOWER BIBLE AND TRACT SOCIETY OF BRITAIN

Defendant

A N D B E T W E E N :

FRANK KOFI OTUO

Claimant

-and-

(1) JONATHAN DAVID MORLEY

(2) WATCH TOWER BIBLE AND TRACT SOCIETY OF BRITAIN

Defendants

THE CLAIMANT appeared in person.

MR S. BRADY (instructed by Legal Department, Watch Tower Bible and Tract Society of Britain)
appeared on behalf of the Defendant.

JUDGMENT

MR JUSTICE WARBY:

- 1 The claimant, Mr Otuo, began these two claims for damages for slander in 2013 and 2014. The first action ("Claim 1") arises from an announcement made on 12 July 2012 at a meeting of the London Wimbledon Congregation of Jehovah's Witnesses that Mr Otuo was no longer a Jehovah's Witness. The second action ("Claim 2") concerns words spoken at a meeting just over a year later on 22 June 2013, a meeting to consider his application for reinstatement. The case has a long and complex procedural history. Mercifully, only some of that history needs to be related in order to explain the decisions that I now have to make.
- 2 The matter was last before a judge in August 2018. That was His Honour Judge Parkes QC. On 30 August 2018 he gave judgment on various applications - [2018] EWHC 2304 and 2305 (QB) - which sets out much more of the detail than it is necessary to deal with today. On 17 September 2018, Judge Parkes made an order ("the Parkes order") consequent on his decisions of 30 August. The Parkes order struck out various parts of the statements of case and set directions for the case to progress towards trial. As a result, both actions are now, finally, fixed for trial concurrently over five to seven days commencing on 11 March 2019.
- 3 The Parkes order gave directions for disclosure and the service of amended statements of case, and provided that there should be a pre-trial review not less than a month before the trial date. I have been conducting that pre-trial review.
- 4 The Parkes Order has been complied with, in the sense that disclosure is complete and amended statements of case have been served. There is an outstanding dispute about the Reply in Claim 2, but it is not necessary to resolve that at this stage.
- 5 There is also a pending application or, failing that, a Defence which asserts that neither of the claims can be adjudicated on by the Court as they are non-justiciable, because the words

complained of related to membership of a religious organisation and were spoken in that context. The defendants' contention invokes the protection afforded by the Convention rights to freedom of religion, speech and assembly. That, as the defendants concede, raises some novel issues of law. For that and other, procedural reasons, I have deferred consideration of the issue. I have, however, heard enough of the argument on the non-justiciability issue to conclude that by giving this judgment I am not trespassing on any immunity enjoyed by these defendants.

- 6 This judgment deals with the defendants' application for an order that both claims should be dismissed as an abuse of process on more familiar, *Jameel* grounds.

The law

- 7 That shorthand is by now very familiar to defamation lawyers, as it is to others. It refers to the undoubted jurisdiction of the Court to dismiss as an abuse of process an action in which the claim represents an interference with the Convention right to freedom of expression which cannot be justified as necessary or proportionate in the pursuit of any of the legitimate aims specified in Article 10(2) of the Convention. On a proper analysis it would seem that, where that is the case, the Court is under a duty to dismiss the Claim pursuant to section 6 of the Human Rights Act 1998.

- 8 The test has been expressed in a variety of ways in the authorities. One often-cited passage comes from the decision of Eady J in *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296, where he said (at p.319) that the overriding objective's requirement for proportionality meant that he was bound to ask whether in that case "the game is worth the candle", and concluded:

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

- 9 In *Jameel* itself, the court adopted that form of expression with evident approval, and summarised the position in its own way in these words:

"Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged."

Jameel v Dow Jones & Co Inc [2005] EWCA Civ 75 [2005] QB 946 [55].

- 10 There are at least two important strands to any such assessment. There is the inherent gravity of the offending publication on the basis of which the court will evaluate what is, or may be, at stake for the claimant. On the other hand, there is the complexity and consequent costs in terms of resources of finding out whether the claimant's case is deserving of a remedy.
- 11 An important point for the court to bear in mind is that this is not, or not just, a numbers game. The point was expressed succinctly and clearly in *Haji-Ioannou v Dixon* [2009] EWHC 178 QB at [31], by Sharp J DBE:

"Publication of a libel, or indeed a slander, to one person may be trivial in one context, but more serious than publication to many more in another. Much depends on the nature of the allegation, and the identity of the person about whom and the person or persons to whom it is made. To that extent, the decision in each case is 'fact sensitive'. However, the court should not be drawn into making its decision on the basis of contested facts material to the issue of abuse which properly ought to be left to the tribunal of fact to decide."

- 12 It is recognised, moreover, that the dismissal of a claim on the grounds of triviality or disproportionate cost is a serious matter, and a step which the court should not take lightly. As the Court of Appeal pointed out in *Sullivan v Bristol Film Studios Ltd.* [2012] EWCA Civ 570, [2012] EMLR 27, the main function of the court is to decide cases, not to refuse to do so and to dismiss them because the process is too costly or burdensome.
- 13 So, before it can dismiss a claim as an abuse of this kind, the Court must be satisfied, first, that the costs and other resources that would be required to adjudicate on the claim are out of all proportion to any benefit that might legitimately be obtained by the claimant; secondly, that there is no alternative means by which the dispute could be resolved at proportionate cost, and with the devotion of only those resources which are truly necessary.

Previous decisions

- 14 This is not the first time that the defendants have made a *Jameel* application against Mr Otuo. Such an application was made in Claim 2 as long ago as 2014. It first came before

Master Leslie, who, by a judgment and order of 24 November 2014, dismissed it. The Master said:

"9. The matter is not so trivial as to be similar to that which was dealt with by the court in the case of *Jameel v Dow Jones & Co Inc.* [2005] EWCA Civ 75. One cannot say that somebody in Mr Otuo's position should not be permitted to sue simply because the case is not worth the candle or the wick. In my judgment, at least if he wins, it may very well be worth both the candle and the wick and the whole box of matches. "

15 There was an appeal, which came before Sir David Eady, sitting as a Deputy Judge of the High Court. It appears to have been argued over two days. On a third day, 26 June 2015, Sir David gave a reserved judgment dismissing the appeal, [2015] EWHC 1839 (QB). Sir David said, among other things:

"1. ... This is mainly because the Defendants are seeking to rid themselves of the claim on a summary basis at a stage when the statements of case are inchoate: they leave it unclear as to how much of a factual dispute there would be if the case is allowed to proceed to trial. ...

...

9. Although he does not plead a meaning as such, Mr Daniel has argued that one of the reasons why the action should be struck out is that the words are not defamatory in any sense. ...

...

10. Here, the actual meaning to be attributed may well depend on the evidence as to who was present, what exactly was their function and how

much background knowledge they had. I am not asked on the present appeal to determine the meaning(s) of the words, but I do not believe that I can at this preliminary stage rule that the words spoken were so obviously *not* defamatory that the Claimant is left without a cause of action. ...

...

14. *If* the words meant that the Claimant had been guilty of fraud (by whatever definition), and was thus dishonest, that is a defamatory allegation which is at least capable of causing serious reputational damage. The Court should thus be reluctant to shut out such a claim in a case where the facts have yet to be fully explored. I naturally recognise that this claim is not concerned with damage flowing from the original 'disfellowship' or from its announcement before the congregation, but only with the consequences of the limited publication sued upon, but even so it would be unduly "robust" in my view to hold that an allegation of fraud can have done no harm at all. ...

...

16. The Defendants intend to rely on qualified privilege and, although the evidence would need to be carefully considered in the context of the prescribed rules for the relevant internal procedures, there is quite a strong *prima facie* case to that effect. Nonetheless, the Claimant wishes to put forward a plea of malice against the First Defendant in particular. I understand that he wishes to assert, although no particulars of malice are yet pleaded, that the defendants must have known that there was no evidence of fraud on his part. The Claimant told me that he had been waiting to provide such particulars until at least he had seen the third-party letter and the specific accusations it had supposedly made against him. ...

...

19. ... I have come to the conclusion that the Master was correct in his conclusion that there is more to this than currently meets the eye. It is not the sort of case which can be terminated by the convenient means of summary disposal nowadays available to the court in the light of the CPR and their application in such cases as *Jameel (Yousef) v Dow Jones & Co Inc*, cited above. It seems to me that a significant number of the real issues between the parties fall within the description of 'fact sensitive' and do not lend themselves to a short cut.

20. I bear in mind Mr Daniel's warning that I may be allowing myself to be diverted by a 'smokescreen', but it simply illustrates why the facts need to be properly investigated after full pleadings have become available, disclosure of documents has taken place and witness statements have been exchanged. Only then will the smoke have cleared."

16 The present application was made by notice dated 1 February 2019. It seeks the dismissal of Claim 1 and Claim 2. It has been argued by Mr Shane Brady, Counsel for the defendants. Mr Otuo has ably represented himself with commendable skill and ability, making focused submissions with considerable clarity.

17 Mr Brady submits that both claims should be struck out because, adopting the words of the Court of Appeal in *Jameel*:

"It would be an abuse of process to continue to commit the resources of the English court ... to an action where so little is now seen to be at stake."

18 As to the previous decisions on this issue, Mr Brady acknowledges Master Leslie's decision, and that he did not then consider that the matter was "so trivial" as to be struck out. He points out, however, that that decision only dealt with Claim 2. He argues, further, that it dealt only with the case as it then stood. Now, however, much has developed and there are pleadings in both claims and, as he puts it:

"In view of the considerable judicial resources since expended on this matter, now is the time to strike the case before more resources are expended at a trial, estimated to last eight days, of religious enquiry."

19 Curiously, Mr Brady's submissions did not allude to the decision of Sir David Eady, of which I was only made aware by Mr Otuo, whose papers it was that contained the written judgment of Sir David. Mr Otuo has submitted that, so far as Claim 2 is concerned, the judgment of Sir David Eady is the last word.

20 The principles are well known. One consequence of the essential rule that judgments on particular issues are authoritative and must stand and be observed unless appealed, is that a party cannot invite the court to revisit an issue which it has previously decided on an interim application without demonstrating that there has been a material change of circumstances such as to justify further consideration of the particular issue.

21 I have borne in mind also that the present applications are made at a very late stage in both claims, just a month before trial. That is clearly a highly material factor. If the vast majority of the resources required have already been expended, there is less of a case for striking out than there would be at an early stage. One has to bear in mind, among other things, the

legitimate expectations of a litigant whose case has come so far without being dismissed on grounds such as this. Where the attempt had been made, and failed, that is all the more powerful a consideration.

22 However, here Claim 2 was in its relative infancy at the time of Sir David's decision. Over the intervening years it has undoubtedly matured considerably and the issues are clearer, to some extent at least. To adopt Sir David's metaphor, the smoke has cleared. Mr Brady has identified developments since the hearing before Master Leslie of some importance, including the existence of a transcript of the words complained of and, more significantly, the pleading by both parties of their cases on meaning and other issues.

23 I proceed on the basis that there **have** been developments in Claim 2 which are sufficiently material to entitle the defendants to ask the court to conduct a further review of the position in that Claim. No *Jameel* application has yet been made in Claim 1. I am thus persuaded that I should examine the merits of the *Jameel* application in relation to both claims. That does not mean that I should ignore the previous determinations and start afresh. In relation to Claim 2, I need to look carefully at what has changed or may have changed, and how the changes might affect the overall assessment.

24 In order to do this, and to address both aspects of the application, it will be necessary to explore in more detail the claims, defences and the issues to which they give rise. That is easier than it might have been because, happily, the Parkes order required the parties to prepare a Case Summary, and they have done so, albeit it is not wholly accurate. I rely heavily on that document for the account that follows, and that account will deal separately with the application of the *Jameel* principles to the two actions.

Claim 1

The facts

25 Starting with Claim 1, the facts that are not in dispute include these:

- (1) The claimant was baptised as one of Jehovah's Witnesses on 26 December 1992. By virtue of his baptism he voluntarily accepted certain Bible-based beliefs and practices of Jehovah's Witnesses.
- (2) On or around 30 March 2012, the claimant was disfellowshipped (excommunicated) as one of Jehovah's Witnesses, for the Biblical sin of fraud, by an Ecclesiastical Judicial Committee.
- (3) The disfellowshipping decision was upheld by an Ecclesiastical Appeal Committee in or around May 2012.
- (4) The Britain branch office of Jehovah's Witnesses, acting through the Christian Congregation of Jehovah's Witnesses, subsequently reviewed the decision and on 11 July 2012 confirmed that the decision should stand.
- (5) Thus it was that on 19 July 2012, as is said in the case summary in accordance with the religious beliefs and practices of Jehovah's Witnesses an announcement was made by Mr Mark Lewis to the London Wimbledon Congregation that I have already referred to in these words: "Frank Otuo is no longer one of Jehovah's Witnesses". That is the Announcement to which I have referred and those are the words complained of in the Claim.

The issues

26 A fundamental issue in Claim 1 is whether the defendant authorised or was otherwise responsible for the publication of the Announcement. Its case is that it bears no responsibility, vicarious or otherwise, for the conduct of Mark Lewis.

27 No natural and ordinary meaning is complained of at this stage. That is because His Honour Judge Moloney QC decided, by a judgment of 5 December 2013, that the words complained of are incapable of bearing the meaning then pleaded or any other defamatory natural and ordinary meaning about the claimant. Judge Moloney therefore struck out that aspect of the Claim.

28 Since then, Mr Otuo has pleaded a true innuendo meaning. His meaning is disputed by the defendant, which has pleaded its own innuendo meanings. I shall come back to those.

29 The following further issues arise, as stated in the case summary, and are reflected in part in the judgment of Sir David Eady:

- (1) whether any innuendo meaning that the Announcement bore was a defamatory meaning;
- (2) whether any defamatory innuendo meaning is actionable *per se*.

30 It will be immediately apparent that if the defendant was to succeed on any one of the issues that I have identified so far, the Claim would fail. Alternatively, there are affirmative defences of consent and qualified privilege. In reply, the claimant alleges malice.

31 Further, as I have indicated, the Defence also raises the question of whether the Claim in whole or in part is non-justiciable.

Submissions

32 Mr Brady's first submission is that the "game" involved in Claim 1 is not worth the candle, because the words complained of were not defamatory in their normal and ordinary meaning and cannot bear any defamatory innuendo meaning.

33 The claimant's pleaded meanings are as follows.

"5. The innuendo meaning of the words spoken is that, the Claimant has remorselessly engaged in one or more of the following act/s:

- i. Fraud
- ii. Paedophilia
- iii. Theft
- iv. Adultery
- v. Fornication
- vi. Drunkenness

6. The extrinsic facts relied upon to give rise to the innuendo meaning/s are derived from:

- a. The Defendant's own publications used regularly for teaching its members and people who are curious to know about the Defendant's teachings. The publications relied on are: "**Insight on the Scriptures**" (it-book) page 787-788 and the book "**Shepherd the Flock of God**" (KS book) pages 58-80, published by the Defendant.

The former states that:

"Some of the offenses that could merit disfellowshipping from the Christian congregation are fornication, adultery, homosexuality, greed, extortion, thievery, lying, drunkenness, reviling, spiritism, murder, idolatry, apostasy, and the causing of

divisions in the congregation. (1Co 5:9-13; 6:9, 10; Tit 3:10, 11; Re 21:8)

b. Furthermore, the following members who were present on the occasion of the announcement were aware (of the extrinsic facts) that the Claimant had been charged by the Defendant with fraud and was the subject of the Defendant's own 'judicial proceedings' and thus gave the imputation of guilt of fraud:

- Jonathan D Morley
- Mani Rahmani
- William Dallas
- Mark Lewis
- Ken Gracias
- Andrew Sutton
- Anna Newitt
- Richard Newitt
- Sonia Greenidge
- Olivier Da Silva”

34 A number of observations can be made about this pleaded case. One of them is to be found at para.21 of the judgment of Judge Parkes. He said this:

"According to Mr Otuo, that meaning arises because the announcement meant that he had been disfellowshipped by the church and, according to publications of the Jehovah's Witnesses, offences that merit disfellowship

include 'fornication, adultery, homosexuality, greed, extortion, thievery, lying, drunkenness, reviling, spiritism, murder, idolatry, apostasy and the causing of divisions in the congregation'. Not every activity or condition on that list, I observe, is nowadays likely to connote a defamatory meaning."

35 Secondly, the claimant's case, on analysis, suggests at least two separate and distinct groups of innuendo listeners and, consequently, two distinct innuendo meanings. There is a meaning that will have been conveyed to all those who are familiar with the general principles regarding disfellowship ("the Informed Audience"). There is another meaning of fraud which, on the claimant's case, will have been conveyed to the sub-group who knew not only that but, more than that, that there had been a fraud investigation involving the claimant ("the Insiders"). There could be a third group if, as alleged by the claimant, there were members of the general public present. But it is hard to see how any of them could have drawn any relevant meaning from the neutral wording adopted. Listeners in that group could not draw any defamatory meaning from the words used, as demonstrated by the judgment of Judge Moloney.

36 The Defence pleads as follows at para.7:

"Paragraph 5 is denied. The Announcement was made in neutral terms in accordance with the standard religious beliefs and practices of Jehovah's Witnesses. It is averred that the majority of those in attendance at the meeting (save for the elders, who were aware that the Claimant had been disfellowshipped for the sin of fraud – see further below), would have understood the Announcement to mean either:

- a. The Claimant had disassociated himself as one of Jehovah's Witnesses;
or
- b. The Claimant had been disfellowshipped (excommunicated) as one of Jehovah's Witnesses for unrepentantly engaging in, unspecified, serious "sin" or other gross violations of God's law as set out in the Holy Bible."

37 Mr Brady eventually submitted that the claimant's case on meaning is put impossibly high for two separate reasons.

- (1) First, the Announcement complained of was made in neutral terms, as it always is. The same words are used whether the individual is being disfellowshipped for sin or simply renouncing membership of the Jehovah's Witnesses. The neutral wording does not indicate, and cannot in this case have indicated, to any reasonable listener that the reason that Mr Otuo was ceasing to be a Jehovah's Witness was disfellowship. Nothing is pleaded, nor is there anything before the Court that would or even could lead a listener to prefer one of the two possible explanations for the Announcement over the other. Mr Brady refers, in support of his submission, to some of the evidence for trial of Timothy Eagles and Mr Morley, and in particular an exhibit to Mr Morley's statement. It is submitted that a trial would not change the facts in this respect.
- (2) Secondly, Mr Brady submits that no listener who, for whatever reason, did take the claimant to have been disfellowshipped could have drawn from the words used the imputation that the claimant complains of, namely that he was guilty of any one or more of the specified sins in the list pleaded by the claimant. The listener could only have concluded that he was guilty of some unspecified sin justifying disfellowship - a meaning, in other words, to the effect of that set out in para.7B(?) of the defence.

- 38 Mr Brady further submits that on neither view could the imputation derived by the listener be considered to be a defamatory one.
- 39 The first of these arguments involves an assertion that the Informed Audience (as I have called it) knew more than the claimant asserts. This was, it might be said, a “More Informed Audience” who knew not only the general principles regarding disfellowship but also that the same neutral announcement was used as a matter of custom and practice to announce a person's disassociation or voluntary departure from the community. Mr Brady's submissions invoked the principle that a statement which is in neutral terms and can be interpreted in a non-defamatory sense is not ordinarily a defamatory statement.
- 40 It seemed to me that in substance, as it developed, this argument was departing rather from the *Jameel* principles and moving into the territory of an application to determine meaning as a preliminary issue, or to rule that the words complained of were not capable of bearing the meaning(s) complained of, or any innuendo meaning defamatory of the claimant, with a consequent strike-out on the footing that the Particulars of Claim disclosed no reasonable basis for a claim. That was not the way the application had been framed at the outset. Applications for rulings on meaning are governed by CPR 53 and are vanishingly rare nowadays, for reasons explained in *Alsaifi v Amunwa* [2017] EWHC 1443 (QB), [39-40]. Before long, such applications may become extinct due to changes in the rules which are expected to be made within the year. Normally these days, the Court decides meaning as a fact, as it is free to do where jury trial has been ruled out.
- 41 There are some obvious difficulties with this when it comes to innuendo meanings. If the facts are in dispute, and cannot be assumed for the purpose of the meaning ruling, there may be unassailable obstacles. In this case, however, Judge Parkes' order contemplated a

determination of meaning. In para. 19(a), directing the pre-trial review, he described that as a hearing "at which the Court may of its own motion wish to determine the issue of meaning in Claim 1".

42 I therefore invited the parties to consider whether they wished me to determine meaning as a preliminary issue.

43 Mr Brady's response, after taking instructions, was to invite such a determination, and to submit that I should determine meaning on the basis of the submissions which I have sought to summarise, coupled with some admissions of fact on his client's behalf. He told me that the defendant would make some further admissions.

(1) The defendant would accept the facts pleaded by Mr Otuo at para.6(a) of his re-re-amended particulars of claim. He asserted, however, that the defendant's case was that listeners who knew those things would also know that an announcement could result from a person's voluntary disassociation from the Jehovah's Witnesses.

(2) The defendant was also prepared to admit, however, that the first six individuals in the list of 10 set out in Mr Otuo's para.6(b), being the elders in the congregation, were aware that the claimant had been charged with fraud, but, said Mr Brady, limited to the Biblical sin of fraud.

44 Mr Brady's second submission was that even if the words were defamatory, the action should be struck out in any event. The question for the Court was whether the interference with Convention rights that the Claim represents is proportionate to the legitimate aim of protecting Mr Otuo's reputation and possibly vindicating it. He asked rhetorically: "Where is it all going to take us in the end?" There was, he said, such a small group of hearers that the exercise is not worth the devotion of the resources that would be required. He relied on

Article 10 of the Convention but submitted that I should also have regard to Article 9, which is engaged on the facts. He referred me to para.165 of the case of *Sindicatul 'Pastorul cel Bun' v Romania*, Application number 2330/09, Judgment of 9 July 2013.

45 I agree that the particular context in which the statement was made must be taken into account, but I must be careful not to confuse or conflate the arguments about non-justiciability and abuse of process. I do not believe that in the present context the religious element adds materially to the weight of the Article 10 right. Put shortly, if the statement complained of is not in effect immune from suit, as the defendant contends, the balance should be struck in much the same way as it would be if the statement had been made in a non-religious context.

46 Mr Otuo argued, in summary, that it is not open to the defendants to invite me to dismiss this case at this stage on the basis that the meaning cannot have been more serious than that pleaded by the defendants. That is a matter for trial. Mr Otuo denied that the defendant's meaning 7(a) was one that would or could be drawn from the words complained of. He did not accept the factual premise for this meaning, and argued that it was not possible for me to rule on this meaning without hearing evidence. He pointed out that the burden lies on the defendants to establish this more innocent innuendo meaning. Mr Otuo pointed out that the defendants' pleaded case is that the statement complained of could have conveyed to listeners that he had been expelled for unrepentantly engaging in unspecified sin. He argued that on the defendant's own case there was a possible defamatory innuendo meaning conveyed to what he called an educated audience knowing the relevant facts.

47 Mr Otuo submitted that the defendants had conceded that at least six people in the audience had knowledge of the extrinsic fact of a fraud investigation, which is the basis for his

innuendo meaning of fraud, and that in itself is not an insignificant number. Mr Otuo finally suggested that there could be a Chase level 2 meaning arising from his innuendo facts to the effect that he was reasonably to be suspected of being involved in some or all of the sins listed in his meaning.

Decisions on meaning

48 I have concluded that I can, to a limited extent, decide the actual innuendo meaning of the words. That is because there is, to an important extent, common ground as to who heard the words complained of and when they knew. I refer to the Insiders. The claimant alleges that there were ten of these. The defendant now admits that there were six - the six elders who knew that there has been a fraud investigation involving Mr Otuo.

49 The principles to be applied when deciding meaning are well known. It is not necessary to set them out here. They have recently been helpfully collected in the judgment of Niklin J in *Koutsogiannis v Random House* [2018] EWHC 49 QB [11-13].

50 Those principles relate to the determination of natural and ordinary meanings, but in all cases the task of the Court is to identify the single meaning that the words would convey to the hypothetical ordinary reasonable publishee in the position of those who actually read, or in this case heard, the statement. The principles need little adaptation to serve as guidance when deciding what innuendo meaning would be conveyed to such a person.

51 Applying those principles to the factual scenario with which I am concerned here, I find that to an Insider, considered objectively, the words complained of will have conveyed the following meanings:

- (1) That the claimant had been disfellowshipped on the ground of fraud, and
- (2) That the claimant was guilty of fraud.

52 As to the argument that fraud in this context bears some special meaning, nothing is pleaded to justify any special interpretation of the term in this context, and I find myself in very much the same position as Sir David Eady when confronted with a similar argument some three and a half years ago. He said this:

"3. ... Mr Daniel was at pains, however, to emphasise that the notion of 'fraud' in this context was not such as to entail criminality, but rather bore a specific religious connotation, which he sought to define in his written submissions as follows:

'Fraud is defined as the intentional use of deception, trickery, or perversion of truth for the purpose of inducing another to part with some valuable thing belonging to him or to give up a legal right.'

4. I confess to some puzzlement, as it seems to be a distinction without a significant difference. Surely anyone accused by reference to that definition would be seriously defamed in the eyes of any reasonable listener: it would clearly be an allegation of dishonesty."

53 I reject the submission that the words are not and cannot be defamatory. For the purposes of this case, the test of what is defamatory is the common law test, namely whether the statement substantially affects in an adverse manner the attitudes of people towards the claimant, or has a tendency to do so: see *Thornton v Telegraph Media Group plc* [2011] EWHC 1414 (QB), [2011] 1 WLR 1985, [96]. The people with whom that definition is

concerned are what is known as "right-thinking people generally". That wording reflects what has been call "the consensus requirement", namely that the statement must impute some conduct which is contrary to values which are shared by society in general, and not just some part of society: see *Rufus v Elliot* [2015] EWHC 807 QB, at 38 onwards, especially 46. By these standards, the meanings that I have found are undoubtedly defamatory.

54 Otherwise, my decision is that I should not determine the actual innuendo meaning or meanings of the words complained of. There would be dangers in doing so when the innuendo facts relied on by the parties are to some extent in dispute. That said, this is one of those rare cases in which I believe it is possible and helpful to delimit the range of possible innuendo meanings, depending on the innuendo facts made out at trial.

55 My conclusion is, firstly, that the meaning presently pleaded by Mr Otuo is artificial and not one which a reasonable person, knowing the innuendo facts relied on by him, could take from the words complained of. For one thing, and of some importance in this context, Mr Otuo has selected for his meaning only some of the multiplicity of sins that the quoted scripture identifies as grounds for disfellowship. The list, which is non-exhaustive, includes additional matters of what are plainly of varying gravity. Some, such as murder, are graver than others. Some are less serious, at least by the standards of people outside the particular community. Moreover, the sins which can justify disfellowship include, for instance, idolatry and apostasy.

56 To a person who knew only the innuendo facts relied on by Mr Otuo, the words complained could - and, in my judgment, would convey the meaning that is set out in the defendants' para.7(b). I do not accept Mr Otuo's argument that the words would cast on him or might

cast on him a reasonable suspicion of guilt of each of the specified sins. No reasonable person would or could reach that conclusion.

57 I would go further, and determine that the words complained of are not capable of conveying any defamatory innuendo meaning to the Informed Audience relied on by Mr Otuo. Putting it another way, his innuendo facts, set out in para.6(a) of the Particulars of Claim, are not capable of supporting a defamatory innuendo meaning. That is because the range of sins which could justify disfellowship is so broad and inclusive that the defamatory meaning is not one that satisfies the consensus requirement. Of course a member of the Jehovah's Witnesses community would be liable to shun a person who had been disfellowshipped for infringing the religious principles to which the members subscribe; but not all of the values that bind together that community are shared by wider society. It cannot, in my judgment, be said that the meaning I have identified is one that would lower a person in the estimation of right-thinking people *generally*.

58 That conclusion makes it unnecessary to resolve the merits of Mr Brady's argument about his pleaded meaning 7(a). But I would not have upheld that argument at this stage for these short reasons. If the defendant can establish that members of the Informed Audience knew everything which Mr Brady has claimed that they knew, there would be obvious force in his argument that the words complained of would not have conveyed the defendants' meaning 7(b) or any defamatory meaning to that audience. On that footing, neither the words themselves nor the context in which they were spoken would seem to give the listener any good reason to conclude that Mr Otuo had been disfellowshipped, rather than having relinquished his status as a Jehovah's Witness. But this argument does not reflect the way the case is presently pleaded. The pleading of the defence case as to why meaning 7(a) would be an available meaning is far from crystal clear. That paragraph does not presently

aver expressly that all those present knew that the wording used for the announcement was common to disfellowship and voluntary departure. In any event, there is, it seems, a factual dispute about all of this which I could not determine at this stage.

59 I have not addressed the question of whether the defamatory meanings I have found are actionable *per se* without proof of special damage, which is not raised for decision on this application, but my provisional view would be that the imputation of fraud is actionable *per se* on the simple footing that it imputes a crime for which a person may be imprisoned.

Decision on abuse

60 I therefore turn to the question of whether this Claim is an abuse. I find that it is not. A claim for remedies in respect of an allegation of fraud is not inherently trivial, far from it. Context is of course all, but here it has become common ground that the allegation that the claimant was guilty of fraud was conveyed by innuendo to six elders of the claimant's church. I cannot resolve on this application whether that in fact caused serious or significant reputational harm, but I have to bear in minute the cautionary words of Sharp J in *Haji-Ioannou*. There is, as it seems to me, a real possibility that, if the defences fail, Mr Otuo would recover substantial damages to compensate for real and substantial reputational harm as well as distress. In addition, it is not obviously illegitimate for him to seek vindication in the eyes of the six individuals concerned.

61 I do not accept that the cost in terms of resources makes the claimant's conduct in litigating the remaining issues abusive. The litigation has indeed been complex, time-consuming, and costly, but that is not inherent in the nature of the claim, which is essentially quite straightforward. I would observe that, looking at this litigation overall, considerable costs

have been incurred as a result of applications to strike out, or for summary judgment, made by the defendants, without success so far. For instance, looking at the litigation overall, the defendants took what proved to be a bad point on limitation and, as a result, caused the parties to incur substantial costs over multiple hearings and indeed paper applications, before a number of judges. The costs in terms of court resources were very substantial. None of that can properly be laid at the door of Mr Otuo. I decline, in the circumstances, to dismiss Claim 1 before trial as an abuse of process.

Claim 2

62 I have reached essentially the same conclusion in relation to this Claim, with which I can deal a little more shortly.

63 The facts, drawn from the Case Summary, are these.

- (1) By letter dated 29 October 2012, addressed to the body of elders of the London Wimbledon Congregation of Jehovah's Witnesses, the claimant voluntarily sought reinstatement as one of Jehovah's Witnesses.
- (2) The ecclesiastical committee that had disfellowshipped the Claimant informed the Claimant that they would not meet with him to discuss his request as insufficient time had passed since the disfellowshipping decision for the Claimant to demonstrate genuine repentance.
- (3) The Claimant made a further request for reinstatement by a letter dated 17 June 2013. The ecclesiastical committee invited the Claimant to a meeting to discuss his request.
- (4) The Claimant voluntarily attended a meeting with the ecclesiastical committee to discuss his request for reinstatement on 22 June 2013.

64 During the course of that meeting, the claimant and Mr Jonathan Morley had an exchange which consists of the words complained of. It is unnecessary to set these out. A transcript is contained in the Case Summary, as it is in the Particulars of Claim. In this case too the second defendant denies responsibility for publication, but it is not suggested that I can strike out the Claim on that ground. The fact of publication is now admitted.

65 The issue of meaning has been determined by Sir David Eady by an order of 13 May 2016. The other issues are a limited defence of truth, consent, qualified privilege, malice and non-justiciability. The defendant also denies that the claimant suffered any damage.

66 Sir David Eady's determination of meaning was set out in paras.3 and 4 of his order of 13 May 2016, in the following terms:

"3. The words complained of by the Claimant at paragraph 7 of the Re-Amended Particulars of Claim actually bear the following meanings:

- a. The Claimant had been disfellowshipped a year before the reinstatement meeting on the ground of fraud.
- b. The Claimant was guilty of fraud.
- c. The Claimant was unrepentant.

4. The words complained of at paragraph 7 of the Re-Amended Particulars of Claim were defamatory of the Claimant."

67 The limited defence of truth to which I have referred relates only to the first of those three meanings. It is no part of the defendant's case in Claim 2, or indeed in Claim 1, that Mr Otuo was in fact guilty of fraud.

68 Mr Brady nonetheless invites me to determine, and to strike out on the basis, that there was no defamatory sting to the words complained of. That, as I said when he advanced the submission, is an untenable argument, contrary to the Court's unequivocal determination. He went on, however, to submit that the only hearers of the words were the four individuals who sat on the relevant committee, and that in reality the publication of the words complained of would not diminish their estimation of the claimant. If that was wrong, he argued, the Court would need at trial to decide whether the words were protected by privilege and, if so, whether the privilege was defeated by malice. That was an exercise which, in *Jameel*, the Court had regarded as disproportionate in view of the substantial resources that would have to be devoted to it, and I should reach the same conclusion here.

69 For his part, Mr Otuo refers to Sir David's Eady's judgment of 2015, and in particular the passages I have already cited, submitting that these are conclusive. Alternatively, he submits that the same reasoning should dispose of the present renewed application in what are not significantly changed circumstances. Indeed, his submission was that nothing of relevance has changed. The publishees are still the same four people as were alleged all those years ago. That was sufficient for Sir David Eady to conclude that the Claim was not an abuse, and it should remain sufficient for me.

70 I have already said that I work on the basis that I am entitled to review the position, now that the case has developed with the statements of case complete and witness statements exchanged. I have done so, and conclude that there have been no sufficient changes of relevance such as to justify the dismissal of this long-standing action. One thing has changed in Mr Otuo's favour. At the time the matter went before Sir David Eady, the defendants were denying that there had been any publication of the offending words. Sir

David gave short shrift to that contention: see para. [12] of his judgment. And when it came to the formal Defence, publication was admitted. It is now clearer what the issues are, but the prospect of a defence of privilege, and a Reply alleging malice, was there before Sir David Eady. I do not believe that the final form of those statements of case materially affects the overall assessment, subject always to the outstanding application to strike out the Reply.

71 Again, much of the complexity and expense that have characterised this action are due to the conduct of the defendants. I cannot wholly acquit Mr Otuo in that regard, but I can say that he is by no means the only offender. In all the circumstances, the application to dismiss Claim 2 is also refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**** This transcript has been approved by the Judge ****