Neutral Citation Number: [2022] EWCA Civ 1067

Case No: CA-2021-003377

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Mr Justice Saini
[2021] EWHC 2988 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2022

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE WARBY
and
LORD JUSTICE SNOWDEN

- -

Between:

FIONA GEORGE	**Claimant/ Appellant**
- and -	
(1) LINDA CANNELL **(2) LCA JOBS LIMITED**	**Defendants/ Respondents**

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- -

William Bennett QC and Godwin Busuttil (instructed by **Thomson Heath & Associates**) for the **Appellant**
David Price QC (instructed by **Brabners LLP**) for the **Respondents**

Hearing date: 14 June 2022

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Approved Judgment

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 27th July 2022

LORD JUSTICE WARBY:

Introduction

1. Fiona George ("the claimant") worked as a recruitment consultant for an agency owned and operated by Linda 'Lynn' Cannell ("the first defendant"), called LCA Jobs Limited ("LCA"). After the claimant left LCA and took a new job with another agency, the first defendant spoke to one of the claimant's clients and sent an email to her new employer, alleging that the claimant had been acting in breach of restrictive covenants in her contract with LCA by approaching LCA's clients and soliciting business from them. The claimant sued the first defendant and LCA for libel, slander, and malicious falsehood.

2. The claimant established that these words were published, that they were defamatory of her, that the allegation that she had acted in breach of contract was false, and that the defendants had published that allegation maliciously. But Saini J ("the Judge") dismissed all the claims for want of proof of harm. He held that the defamation claims failed because the claimant had not established that either publication caused serious harm to her reputation as required by s 1(1) of the Defamation Act 2013. The malicious falsehood claims were dismissed on the grounds that the claimant had not proved special damage as required by the common law, nor had she shown that her case fell within the exception to that requirement contained in s 3(1) of the Defamation Act 1952.

3. The claimant now appeals with the leave of the Judge against the dismissal of her claims in malicious falsehood. She accepts that she failed to establish special damage but argues that she proved enough to justify findings in her favour on liability based on s 3(1) with damages to be assessed. That is the order we are asked to substitute for the order made by the Judge.

4. Section 3(1) provides:-

> "In an action for slander of goods, slander of title 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."

The issues

5. The main issue is: what does a claimant need to prove to take advantage of s 3(1) of the 1952 Act? Two main options have been identified. Does the claimant need to show that with hindsight it can be seen that the false and malicious statement of which she complains probably caused her some financial loss ("the historic approach")? That, in summary, was the conclusion of the Judge. Or is it enough to show something less: that the statements were such that it was inherently probable that in the ordinary course of

events they would cause the claimant some financial loss? ("the forward-looking approach"). That, broadly, is the case for the claimant.

6. If the claimant is right on the main issue, a further question arises: can she recover anything more than nominal damages? More specifically, in the absence of actual financial loss is there any tenable claim for damages to compensate for injury to feelings?

Background to the appeal

7. To put these issues in context, I need to say a little more about the key facts and the course of the proceedings. But as the facts are recited in some detail in the judgment below, and I only need to deal with points of relevance to the issues on the appeal, I can be relatively brief.

8. The claimant's employment with LCA came to an end on 19 November 2018. On 3 January 2019, she started work with Fawkes and Reece ("F&W"). Her manager there was Graeme Lingenfelder. One client with whom the claimant dealt in her new role at F&R was Matthew Butler of Balgores Property Services ("Balgores"). Balgores was also a long-standing client of LCA. But after the claimant moved to F&W Mr Butler commissioned her to conduct a search for staff. That came to an end on 21 January 2019.

9. At 4.30pm that day, the first defendant sent the claimant an email ("the George Email") accusing her of being in breach of the "post-employment obligations under the terms of your employment, not to solicit business from LCA clients and candidates". The first defendant announced that she would write to F&R as well as to LCA's clients "to advise them of your actions and your violation of the terms of your post-employment data protection policy", and threatened to take "severe legal action" against the claimant "without hesitation" if she did not confirm within 7 days that she would not contact those clients.

10. At 4.32pm on 21 January 2019, Mr Butler sent the claimant an email in these terms:-

> "Please can you put our search for staff from you on hold. I have spoken again to Lyn Cannell today she advises that as part of your terms you should not be approaching her clients. As you know, I have dealt with Lyn for 10 yrs and until you have come to a resolution with her, I think its best we put on hold for now. I wish you all the best in future".

11. The claimant's inferential case based on this email was that the first defendant had said to Mr Butler the following or words to substantially the same effect ("the Butler Words"):-

> "The Claimant signed a contract with the Defendants by which she agreed not to contact companies for whom the Defendants had worked. By searching for new staff for Balgores she had breached that contract. Therefore, Balgores should stop using the Claimant to find candidates."

12. The defendants admitted that there was a conversation between the first defendant and Mr Butler but denied that any such statement had been made. At the trial Saini J found that the claimant had proved her case on this issue.

13. At 4.37pm on 21 January 2019, the first defendant sent Mr Lingenfelder an email ("the Lingenfelder Email") in the following terms:-

> "Hi Graham. I hope you are well, and that business is good. You may recall we had a conversation in November regarding the suitability of recruiting Fiona for a potential Recruitment Consultants role with you. Whilst I explained that I felt Fiona possessed some great potential, I also advised that there were reservations, ultimately resulting her departure. Whilst not all of my reservations were revealed during our conversation, I recall mentioning her lack of attention to detail and failure to respect LCA rules and processes. It is therefore with great sadness and disappointment, that I write to inform you that despite making clear to Fiona, both verbally and in writing, of her legal obligations under the terms of her employment with LCA, not to solicit business from our clients and candidates (and Fiona's absolute assurances that this is something she would never do), that she has been proactively approaching our clients for new business as well as contacting candidates of LCA. I am writing to you firstly to ask if this is something you are aware of and secondly to ask from one business owner to another to ensure the post-employment restrictions preventing her from contacting our clients and candidates is respected by you and ask for your assurances that this will stop immediately. I have worked hard to build a business based on honesty, trust, and loyalty and as I am sure you will appreciate, will do all I can to protect it. I have emailed Fiona today explaining her breach of post-employment obligations and asked her to confirm in writing within the next seven days, that she will desist from contacting our Clients and candidates. Failure to receive confirmation will result if (*sic*) me taking legal action which I know will have an impact on her performance (I allowed Fiona over two months off work during her employment with LCA as she was unable to fulfil her duties to a satisfactory level whilst dealing with a personal court case)".

14. The defendants admitted publication of the Lingenfelder Email but disputed the claimant's case on its meaning and the meaning of the Butler Words (assuming those were spoken).

15. At a trial of preliminary issues before Richard Spearman QC, sitting as a Deputy Judge of the High Court, the court determined the natural and ordinary meaning of the Butler Words (assuming proof of publication) and the Lingenfelder Email: [2020] EWHC 3386 (QB). The judge found that each publication bore the following meaning, and that this meaning was defamatory at common law:-

> "The Claimant, in breach of the restrictions contained in her contract of employment with the Second Defendant, and

> contrary to her express assurances that she would never do this and thus disloyally and contrary to her word, had been approaching the Second Defendant's clients to solicit business from them as well as contacting the Second Defendant's job applicants".

16. At trial, the Judge held that this was the only reasonable meaning of the words complained of. He therefore did not have to address the complexities that sometimes arise from the principle that the "single meaning rule" that prevails in defamation does not apply in malicious falsehood.

17. The defendants never sought to prove that the claimant had breached an actual non-solicitation clause. But they did advance a defence of truth. They asserted, among other things, (1) that there was a *de facto* non-solicitation obligation to be read into the Confidentiality Clause in the claimant's Employee Handbook; (2) that the claimant had given assurances that she would not solicit business; and (3) that she had acted in breach of the *de facto* obligation and her assurances. Other allegations were made, but the Judge struck these out at the start of the trial as an attempt at "character assassination".

18. The defendants eventually withdrew the first of the three points I have mentioned, which the Judge described as "based on a strained/imaginative interpretation of the Confidentiality Clause". The defendants however maintained the second and third limbs of their case of truth, and argued that proof that the claimant had breached assurances was enough to show that the gist and substance of the words complained of was true. The Judge found that the assurances had indeed been given, and broken, but held that the meaning contained two stings which were "distinct and severable as a matter of substance". So proof of one was not enough to establish the substantial truth of the other. The Judge rejected other allegations that the claimant had been in breach of contract during her employment. He therefore held that the statements complained of were false.

19. The Judge examined in detail how these falsehoods came to be published. He upheld the claimant's case that the allegation of breach of covenant had been made without any honest belief in its truth. He rejected the first defendant's case that the allegation had been made honestly on the basis of legal advice from LCA's employment law consultant, Mr Tagg. On the contrary, the Judge's overall conclusion was that the defendant and Mr Tagg "knew that what was being put forward was untrue". They had "worked out a way of making assertions as to [the claimant's] legal obligations which had, to their knowledge, no proper basis … The threat to sue [the claimant] for breach of a non-existent non-solicitation clause had been hatched and discussed on 11 January 2019 during the exchanges with Mr Jacobs." Those exchanges, in which privilege had been waived, showed among other things that the first defendant had told Mr Tagg in terms that "we didn't have the relevant restrictive covenants in our contract". She had nonetheless proposed that "sort of sending it to, making her employer aware". Mr Tagg had expressed "100% agreement" with that proposal, observing that "<u>obviously we haven't got the restrictions in place</u> but hopefully you know, <u>they're not going to know that</u> are they?" (the emphasis is that of the Judge).

20. What remained for the claimant, if she was to make out a cause of action for malicious falsehood in respect of the Butler Words or the Lingenfelder Email, was to show that they had caused her special damage or that the requirements of s 3(1) were satisfied.

21. The claimant's pleaded case was that (a) the Lingenfelder Email was "calculated to cause pecuniary damage" by preventing her from obtaining business from the publishees and thereby preventing her from earning commission (paragraph 20 of the Particulars of Claim); and (b) the Butler Words and the Lingenfelder Email were calculated to cause her pecuniary damage "in respect of the business/employment carried on by her at the time of publication" because the publishees would not want to assist or be party to a breach of contract (paragraph 21). In support of both points the claimant relied on "the fact that Balgores withdrew from dealing with her as a result of such publications." The claimant further alleged that she had suffered special damage because the publications complained of, and the threat of other publications to the same effect, had intimidated her into seeking employment in a recruitment sector in which the defendants did not operate. So, she resigned from F&R. She got a job in the education sector but was unemployed for three weeks meanwhile, losing net earnings of £1,143.

22. The Judge rejected the claim for special damage. He was "not satisfied on the evidence that there was any financial impact of the publications at all". He found that the Butler Words did not cause loss because he accepted Mr Butler's evidence that he had already decided not to deal with the claimant for other reasons. No loss had flowed from the Lingenfelder Email because F&R had wanted the claimant to stay in their employment. Moreover, they knew that the LCA Handbook did not contain the alleged restrictive covenants. That was because the claimant had shown the Handbook to Mr Lingenfelder and made this point to him on 21 January 2019, shortly after the George Email. So, any limits Mr Lingenfelder might have imposed on the claimant's freedom of action "were his own decision". The Judge held that the cause of the claimant's resignation was her belief, wrong as it turned out, that the first defendant had carried out the threat in the George Email. That was "not a loss flowing in a legally recoverable way from the falsehoods which are the subject of the claim."

23. As for s 3(1), the claimant's leading counsel, Mr Bennett QC and junior counsel (Ms McNeil-Walsh) dealt with the law at some length in their written argument, supplemented by oral closing argument from Mr Bennett. The claimant's case, as summarised by the Judge, was that "the application of section 3(1) is to be undertaken by reference only to the words spoken/published themselves and an assessment (without reference to actual historic facts) of whether they themselves were 'calculated to cause pecuniary damage'. That is, without reference to any form of causation-focussed factual inquiry as to what actually took place (such as is required for example under section 1(1) of the [2013] Act when considering the different issue of proof of serious harm to reputation)." Those submissions were not contradicted in the written or oral submissions for the defendants. As the Judge put it, they were "not responded to … in any manner." Basing himself on these undisputed submissions the Judge prepared and circulated a draft judgment finding that the claimant was entitled to general damages, including an injury to feelings award, to be assessed (he had stated at the end of trial submissions that he would consider quantum issues following judgment).

24. The purposes of circulating a judgment in draft are to enable the parties to identify typographical and other obvious errors and to prepare an agreed order or submissions on consequential matters. The authorities make clear that this is not to be treated as an opportunity to advance further argument. The Judge was persuaded by the defendants, however, that this was one of those exceptional cases in which it was appropriate to do

so. The upshot was that the parties exchanged further written submissions in which "for the first time, the Ds explained their position on the law on section 3(1) in some detail". This was, in summary, that malicious falsehood is an economic tort; s 3(1) does not relieve a claimant of the need to prove on the balance of probabilities that she has suffered some economic loss; it does relieve her of the need to plead and prove special damage, "but the likelihood of some pecuniary damage is nonetheless central to the statutory provision." Rejecting the claimant's complaint of procedural impropriety and unfairness, the Judge proceeded to reconsider the issue on the basis of the further written submissions. Having done so, he prepared and handed down a judgment dismissing the claims.

25. Explaining this decision, the Judge said that "the preponderance of modern authority favours the [defendants'] position". Malicious falsehood, he said, "is a tort that compensates only for pecuniary loss… Recovery turns on matters of fact as to pecuniary damage." The claimant's case on (1) nature and mechanism of loss and (2) causation failed because for both purposes it was necessary to undertake "an inquiry into the circumstances of the publication, including into historical facts". On that basis, the pleaded case on the nature and mechanism of loss failed for essentially the same reasons as the special damage claim: the publications complained of did not dissuade Mr Butler or F&R from dealing with the claimant, because Balgores would not have dealt with her anyway, and F&R's attitude to the claimant was unaffected by the Lingenfelder Email. The case on causation fell victim to the same line of reasoning. Proof of causation required proof that the pleaded loss was a "direct and natural result" of the publication complained of. That could not be established because "an examination of the facts as they were before, at and after publication" was "fatal to the claim based on s 3(1)." The Judge identified a third route to the same conclusion, namely that even if a claimant could prevail on proof that the words were "in the abstract" more likely than not to cause pecuniary loss, a defendant could not be prevented from establishing, as these defendants had done, that no such loss occurred in fact.

The main issue: the interpretation of section 3(1)

26. The Judge's decision was based on an analysis of authorities decided after 1952, the earliest of these being *Fielding v Variety Inc* [1967] 2 QB 841 (CA) and the most recent being the first instance decision in *BHX v GRX* [2021] EWHC 770 (QB). The Judge did not refer to any pre-1952 authority, none having been cited by either party. Nor was he taken to other interpretative aids which the claimant has cited on this appeal and which I consider significant, including the 1948 report of the Committee on the Law of Defamation ("the Porter Committee") Cmd. 7536 which led to the introduction of s 3(1); s 2 of the 1952 Act, a comparison with which has been undertaken in the course of this appeal; or the legislative history. On the other side of the coin, the Judge was not pressed with the argument that is now at the forefront of the defendants' case, that the issue is conclusively determined in their favour by three binding decisions of this Court. Nor did the defendants then argue, as they do now, that the interpretation they advocated was one compelled by the Human Rights Act 1998 ("HRA"). In short, the hearing before us has involved review of a range of additional materials and a considerable further expansion of the arguments.

27. Having considered these arguments I have concluded, for the reasons that follow, that the Judge was led into error. In summary, the aim, purpose, and effect of s 3(1) was to

relieve a claimant of the need to plead or prove any actual loss on the balance of probabilities as a matter of historical fact. The statutory test is forward-looking. It is enough for a claimant to prove the publication by the defendant of a false and malicious statement of such a nature that, viewed objectively in context at the time of publication, financial loss is an inherently probable consequence or, putting it another way, financial loss is something that would probably follow naturally in the ordinary course of events. This interpretation of s 3(1) respects the intention of Parliament, is consistent with authority, and Convention-compliant. The Judge's initial finding on this issue was correct and should be restored with judgment for the claimant accordingly. I would allow the appeal on the main issue.

The interpretative approach

28. Statutory interpretation is the process of identifying the meaning of the words used by Parliament in the legislation under examination, applying established rules of interpretation. In this context, as in others, we are bound by the essential reasoning (*ratio decidendi*) of previous decisions of this court and above. But it has not been suggested that there is any decision of the House of Lords or Supreme Court that touches on the issue now before us. Although a number of decisions of this court contain guidance and indications, they are by no means clear and consistent. I do not consider that the issue has previously been raised directly for decision in this court. At this level, it is a new point. There are several decisions at first instance that bear on the issue, some of them perhaps more directly relevant and helpful than the appellate decisions. But I do not regard any of these as a direct decision on the issue after a contest either. I think we must start with the words of the statute.

29. The primary interpretative rule is to give those words their ordinary and natural meaning. To do this the court must bear in mind the date on which the legislation was enacted and how language was used at the time. We must also look at the purpose of the Act and the relevant context. As the stated purpose of the 1952 Act was "to amend the law relating to libel and slander and other malicious falsehoods" the context includes the common law of the time. It also includes the report of the Porter Committee which proposed the legislation. If the legislation is ambiguous then subject to the limits identified in *Pepper v Hart* [1993] AC 593 the relevant context may include statements by the promoter of the Bill that became the 1952 Act.

30. Another interpretative rule is contained in s 3 of the HRA, which obliges a court to read legislation in a way that is compatible with the Convention Rights, where it is possible to do so. But this is a duty to avoid incompatibility, where possible. Earlier authorities have held that HRA s 3 affects the meaning to be given to s 3 of the 1952 Act but, as will become apparent, I do not consider that the HRA has any further role to play in this case. Whether the law as enacted in 1952 should be amended is a matter for Parliament.

The common law context

31. In its narrow definition, the law of "defamation" consists of two torts: libel and slander. Both torts afford a remedy for statements that are defamatory. Libel is concerned with defamatory statements in permanent form. Slander is concerned with those that are spoken or otherwise transitory. It has always been understood that the common law test of what is defamatory is concerned with the inherent tendency of the words

complained of to injure a person's reputation. At the time of the 1952 Act the most authoritative definitions of what is defamatory were expressed in terms of the effects on reputation which the words complained of were "calculated to" produce, a term that was treated in the cases as synonymous with "tend to": see the classic analysis of Neill LJ in *Berkoff v Burchill* [1996] 4 All ER 1008, 1011-1013, reviewed by Tugendhat J in *Thornton v Telegraph Media Group Ltd* [2010] EWHC (QB), [2011] 1 WLR 1985 [29].

32. At common law, libel is actionable *per se*; that is, without proof of actual damage. Slander is not, except in certain instances. The most important category of slander actionable *per se* at common law is "words spoken of the plaintiff in the way of his office, profession or trade and naturally tending to injure or prejudice his reputation therein". So in this context also we see the natural harmful tendency of a statement as a touchstone of liability. It was common ground that this rule applied to the Butler Words so that, if proved, they were actionable *per se* at common law.

33. Malicious falsehood is a long-established common law tort which is related to defamation. Some varieties of the tort are called slander of goods and slander of title. The tort has also been referred to on occasion as "injurious falsehood". The ingredients of the common law tort were identified in *Ratcliffe v Evans* [1892] 2 QB 524 where Bowen LJ, giving the judgment of the Court of Appeal, began by observing that it was established law that an action will lie for

> "written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they *are calculated in the ordinary course of things to produce, and* where they do produce, *actual* damage."

34. The emphasis here and later is mine, unless otherwise stated. In this quotation it serves to highlight three related points. The first is that, for the Court of Appeal, the quality of being "calculated to" produce actual damage is something different from producing such damage. The second is that in this context the term "calculated to" has nothing to do with the defendant's state of mind but all to do with the statement; that is clear from the words "in the ordinary course of things". The quality referred to here is the inherent tendency of the statement to cause actual harm. The third point is that Bowen LJ spoke of "actual" not "special" damage.

35. The facts of *Ratcliffe v Evans* were that a jury held that a newspaper report that the claimant's engineering business had closed was false and malicious, and awarded damages of £120 for consequent loss of profit. The claimant had relied on evidence of a general falling off of business and had not proved any direct causal link between the publication and the loss of any specific item of business. An appeal against the damages award on that ground was dismissed. The court observed that malicious falsehood was "an action on the case" where the law required that "actual damage must be shewn" because it was "the damage done that is the wrong". The court pointed out however that the meaning of the term "special damage" varies according to context and warned against an unduly rigid approach. It held that this ingredient of the tort could be established by showing "that a general loss of business has been the direct and natural result" of the statement. The underlying principle identified by the court was that

> "As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to

> the circumstances and to the nature of the acts themselves by which the damage is done. To insist on less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

36. The effect of the decision was, therefore, to establish that it is not always essential for a claimant to prove the loss of specific customers or contracts. In appropriate circumstances the necessary "special damage" can be established by proof of actual financial loss consequent on a general falling-off of business that is a direct and natural result of the statement complained of.

The Porter Committee

37. The Porter Committee was appointed by Viscount Maugham LC on 8 March 1939 "To consider the Law of Defamation and to report on the changes in the existing law, practice and procedure relating to the matter which are desirable". Its work was inevitably interrupted by the outbreak of war, but by the time it delivered its report in October 1948 it had deliberated for over four years. The report makes clear that the Committee had drawn on a range of legal and practical expertise, including evidence from legal practitioners and academics as well as authors, editors, and publishers.

38. At paragraph 20(3) of its report the Committee explained that for its purposes it had treated the law of defamation as including "actions on the case" for slander of title, slander of goods and "other false statements made maliciously *and calculated to cause* and actually causing pecuniary damage". This appears to be an echo of the language of *Ratcliffe v Evans.* When the Committee came to discuss these "actions on the case" it began by defining this term, quoting the passage that I have set out at [33] above: see Chapter C, Section (1)(B).

39. The Committee went on to explain that "the necessity of furnishing proof of special damage has rendered this type of action rare in the extreme", although statements of these kinds could cause "very serious damage which, owing to technical rules of evidence, it is impossible to prove strictly as special damage." Evidently, the more flexible approach identified in *Ratcliffe v Evans* had not had any great impact on the practical utility of the tort over the intervening 56 years. The Committee observed that the result was that injured parties were left without any remedy for the loss they had suffered. It identified this as "an injustice which should be righted by an amendment of the existing law."

40. The remedy proposed was twofold. First, it was suggested that false statements which are "*calculated to cause damage* to the plaintiff in his office, profession, or trade … should be *actionable without proof of special damage*, irrespective of whether they are written or spoken." This was reflected in a draft clause that was the precursor of s 3(1)(b) of the 1952 Act. Secondly, it was proposed that "false statements which, although *calculated to cause damage* to the plaintiff, are not calculated to do so in his office, profession, or trade … should be *actionable without proof of special damage* only where they are written." This was reflected in a draft sub-clause that was the precursor of s 3(1)(a) of the 1952 Act. The Committee went on to make clear that proof of express malice would remain a necessary ingredient of the cause of action and "no action would lie except in respect of *words having a natural tendency to cause* actual pecuniary damage." These recommendations were summarised on the final page of the

Report, adopting word-for-word some of the language used by Bowen LJ in *Ratcliffe v Evans*:

> "(3) Actions on the Case
>
> We recommend that the existing law with respect to written or oral falsehoods which are made maliciously and *calculated in the ordinary course of things to produce actual damage* should be amended so as to make them actionable *without proof of special damage*."

41. In my judgment the words I have emphasised throughout the previous paragraph show clearly that what the Committee meant by "are … calculated to" was "have a natural tendency to". The Committee took the language of *Ratcliffe v Evans* as a reference point but adapted it to address the mischief it had identified. It did so by eliminating the need for proof of special damage. It was not proposing a modest alteration to the flexible approach identified in *Ratcliffe v Evans*. It was going further. The intention was that a claimant who could establish the relevant tendency would have a cause of action without more. In short, the Committee was recommending that a false and malicious statement should be actionable *per se*, if it had a natural tendency to cause financial loss and was written, or had a natural tendency to cause financial loss in an office, profession or trade, however it was made.

42. This interpretation is supported by the context in which these passages appear. They are contained in a Part of the Report headed "The assimilation of libel, slander and actions on the case". In the previous section of that Part the Committee had addressed the need for a "re-definition of certain of the common law categories of words actionable *per se*." It had noted the chief common law category of slanders actionable *per se* ([32] above); it had observed that the restriction to statements spoken of the plaintiff "in the way of" an office, profession, or trade had given rise to "anomalies and injustices"; and it had recommended that the common law should be amended so that "*any words naturally tending to injure* or prejudice the reputation of the plaintiff in his office, profession or trade should be actionable without proof of special damage". This became s 2 of the 1952 Act. When the Committee came to deal with "actions on the case" it described its first recommendation on that topic as "analogous" to this proposed amendment to the law of slander. The Committee was advocating a coherent approach to these categories of slander and malicious falsehood, based on the naturally harmful tendency of the words complained of.

The 1952 Act – Parliamentary history

43. Sections 2 and 3 as enacted are similar in form to the draft clauses contained in the Porter Committee report. It seems likely that the small differences that exist were probably introduced by the Parliamentary draftsman; the Act resulted from a Private Members' Bill. One of the differences is that where the Committee's draft referred to "any false statement of fact", s 3 focuses attention on "the words on which the action is founded". It is these which must be "calculated to" cause pecuniary damage if the section is to avail a claimant. That tends to underline the point that s 3 is concerned with the nature and quality of the words complained of rather than the outcome of their publication. Another difference is that s 3(1)(b) refers to an office, etc. "held or carried

on by the plaintiff *at the time of the publication"* which indicates that the focus of attention should be on that point in time.

44. Mr Bennett has invited us to have regard to what the Bill's sponsor, Harold Lever MP, had to say about the purpose of the relevant clause when promoting it in the second reading debate in Standing Committee B of the House of Commons on 13 March 1952 (Hansard, Session 1951-52, cols 934-936). For my part, I do not think there is any such ambiguity as would justify reliance on this material. But as Mr Price on behalf of the defendants maintains that the statutory language should be interpreted quite differently from the way I read it, I set out the key passages.

45. Moving the second reading Mr Lever said, among other things:

> "… by this Clause we are seeking to … establish a certain amount of ethical and moral principles.
>
> The effect of this Clause will be that, *wherever* a false or malicious statement is made about a man, his property or his business, which *naturally would be calculated to cause damage*, is published in permanent form … he would have *an automatic remedy*. If some words are said verbally in such a manner as to be *calculated to cause him financial loss* in his calling, then without proof of special damage he would be able to maintain his action on the case."

46. In my opinion, if admissible, these words fortify what I have said so far. They are not consistent with an intention to require a claimant to prove some actual financial loss. It is true that Mr Lever also said that the Bill would "provide protection and benefit to aggrieved persons who suffer damage as a result of malicious falsehoods". The point is fairly made that this indicates an intention to protect those who have suffered damage that cannot be proved, rather than persons such as the claimant in this case, who has been proved not to have suffered any financial damage. But I think there are several answers to this point.

47. First, liability in cases of that kind is an inescapable consequence of the chosen method of dealing with the mischief; it is no more than a side-effect of the remedy. Secondly, it will be a rare one: a publication that is inherently likely to cause financial loss will not often fail to produce any. Thirdly, in all these exceptional cases the defendant will have told lies about the claimant from which financial loss would ordinarily flow. So the imposition of liability can be seen as consistent with the other aim stated in the Hansard extract, that of establishing "a certain amount of ethical and moral principles".

Authority

48. Three points have become established in the jurisprudence: (1) in this context "calculated" does not mean intended but objectively likely; (2) the degree of likelihood required is that of probability; and (3) it is incumbent on a claimant who relies on s 3 to plead the nature of the damage which they are claiming to be more probable than not, and the causal mechanism: see, among other cases, *Ferguson v Associated Newspapers Ltd* (unreported, 3 December 2001) (Gray J), and *Tesla Motors Ltd v BBC (No 1)* [2011] EWHC 2760 (QB) [7], [66], [73] (Tugendhat J). None of these points is or was controversial in this case, nor would I cast doubt on any of them.

49. But nor do I think that individually or collectively these points help with the issue under consideration. It is important in particular to be clear just what the second point amounts to, and to distinguish it from the quite different proposition that a claimant relying on s 3 must establish on the balance of probabilities that she sustained some actual financial loss as a result of the publication. Here, it is helpful to set out the reasoning of Gray J in *Ferguson,* which was the first decision on this point. He said this:

> "In my opinion, the word 'calculated', where it appears in the Defamation Act, should be given the meaning of 'likely' or 'probable' rather than such as might well happen, or something which is a possibility. I say that for the reasons advanced by Mr Caldecott [Counsel for the defendant]. Namely, firstly, that the purpose of s 3(1) Defamation Act is *to relieve a claimant of having to shoulder the evidential difficulties of proving actual damage.* Secondly, that Article 10 requires that any restriction on freedom of expression must be strictly justified as necessary in a democratic society. And a wider interpretation of 'calculated' in s 3(1) would constitute an additional restriction on freedom of expression. Thirdly, that the word 'calculated' which one finds in the statute, of itself suggests a higher rather than lower degree of likelihood."

50. Gray J was saying here that a claimant must show that the nature of the words complained of is such that financial loss is a probable consequence of their publication, not just one that is possible or may well occur. That is the forward-looking approach. And the passage I have emphasised makes clear the distinction between this and the interpretation advocated by the defendants and accepted by the Judge: Gray J was saying that a claimant relying on s 3 does *not* have to prove *any* actual damage. The same is true of Tugendhat J's decision in *Tesla No 1* (above). He described the claim in that case as one in which the claimant "as he is entitled to do, … relies *not on any actual damage*, but on probable damage such as is referred to in the 1952 Act, section 3": [66]. And at [73] Tugendhat J identified the test under s 3 as "whether it *was* more probable than not that those words *would* cause some pecuniary damage to the claimants", indicating a test that looks forward from a point in the past which must, in context, be the time of publication.

51. This distinction is I think less clear in some of the other authorities, which occasionally use language that appears to treat the test of probability identified in these cases on a par with the general rule that damage must be proved as an historic fact to the civil standard. In my judgment to treat the statutory words "calculated to cause" as meaning "probably did cause" is a fallacy to which the defendants and the Judge have both fallen prey. The fact that the language of probability features in both contexts may account for the mistake, but such an approach represents an unwarranted leap away from the intentions manifested by the statutory language, by the Porter Committee Report, and – if relevant – by the words of Mr Lever MP. Indeed, there is scant difference between "pecuniary damage" and "special damage"; the latter term generally extends only to damage that is financial in nature or would take effect in that way: see Gatley on Libel and Slander 13th ed para 6-002. So this interpretation would make s 3 essentially self-defeating, meaning that Parliament had failed in its stated aim of amending the law.

52. A wealth of further case law has been cited to us; the agreed bundle of authorities contains 35 decisions, as well as the relevant statutes, five textbook extracts and a learned article. I do not propose to analyse this body of authority in detail. For reasons I have already indicated I do not think it necessary or helpful to do so. I shall confine myself to six main points.

53. First, I note that a number of other decisions at first instance and in this court have proceeded on the same footing as *Ferguson* and *Tesla*, namely that a claimant can establish liability for malicious falsehood by reliance on s 3 without proof that any actual damage resulted from the offending statement. In *Calvet v Tomkies* [1963] 1 WLR 1397 (CA) (cited to but not by the Judge) where the claimant's case was exclusively based on s 3, this court held that she was not bound to disclose documents showing whether or not she had sustained actual loss as this was irrelevant. In *Fielding v Variety* (CA, 1967, above), the defendants had admitted liability for falsely alleging that the claimants' show "Charlie Girl" had been "a disastrous flop". This court was untroubled by the concession that this statement was "calculated to cause pecuniary damage" even though there was "no evidence" of pecuniary damage in this country nor any to show that the chances of production in the USA had been harmed. In *Joyce v Sengupta* [1993] 1 WLR 337 (CA), Sir Donald Nicholls VC summarised the position thus: "… if a plaintiff establishes that the defendant maliciously made a false statement … in respect of which he is *relieved from proving damage* by the Defamation Act 1952, the law gives him a remedy". In *Quinton v Peirce* [2009] EWHC 912 (QB), [2009] FSR 17, Eady J rejected the claimant's case of actual loss but upheld his case under s 3.

54. Secondly, there are also cases that have stated the test under s 3 in a way that is clear and consistent with the *Ferguson* and *Tesla* decisions I have mentioned and with the interpretation I have identified. In *Stewart-Brady v Express Newspapers plc* [1997] EMLR 192 the claimant, detained at Ashworth Hospital, alleged that a newspaper report that he had assaulted a female visitor was likely to cause the withdrawal or reduction of his privileges and allowances. Morland J held that the issue under s 3 was to be answered "notionally at the date of publication", without regard to what the hospital management had in fact done since that date, the question being whether the loss of the allowance was "likely to be a natural and probable consequence of the publication". In *Quinton v Peirce* Eady J held (*obiter*) that the claimant's case under s 3 would have succeeded on the basis that "(judged at the time of publication) the words published were likely to put in jeopardy his council allowances". I also note a passage in *Fage UK Ltd v Chobani UK Ltd* [2013] EWHC 630 (Ch), [2013] FSR 32 [151] where Briggs J held that the statutory wording means that "damage is, *in the ordinary course of events*, viewed objectively, *likely to be caused* by the conduct of which complaint is made."

55. Thirdly, an elision of or confusion between the two separate questions which I have identified at [48]-[50] above appears to have emerged in some of the cases following *Ferguson.* Gray J decided that words "are calculated to" cause pecuniary loss within the meaning of s 3 only if they are such that, viewed objectively, they probably would do so. On occasion the court may appear to have fallen into the trap of treating s 3 as if it required proof that the words complained of "probably did" cause pecuniary loss. I think this is true of a passage from *IBM Ltd v Web-Sphere Ltd* [2004] EWHC 529 (Ch), [2004] FSR 39 [74] (Lewison J) on which the defendants rely. At [74] he cited what Gray J had said in *Ferguson* about s 3 relieving a claimant from "the evidential

difficulties of proving *actual* damage" and said that he proposed to follow that guidance. But at [84] he said that "it does not seem to me to be likely (as opposed to possible) that any of IBM's customers *were actually diverted* by the leaflet". Another instance may be provided by the *obiter* observations of Tugendhat J in *Tesla Motors Ltd v BBC (No 3)* [2012] EWHC 310 (QB) [48], where he equated what Gray J had said in *Ferguson* and what Lewison J said in *Web-Sphere* with "the standard of proof ... generally applicable in civil litigation".

56. Fourthly, I accept 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. Clearly, the answer must take account of the identity and characteristics of the claimant. That much is inherent in the statutory wording, which requires that the words be calculated to cause pecuniary damage "to the plaintiff". So, an allegation that "he knows no law" might be calculated to cause financial loss to a solicitor, but not to a surgeon. I think the context and circumstances of the statement must also be relevant, as they are when determining whether a statement bears a meaning with a defamatory tendency (see Gatley para 3-030). It is a long-standing principle that relevant context for that purpose may include the identities and essential characteristics of the publisher and the publishees: see, for instance, *Bukovsky v CPS* [2017] EWCA Civ 1529, [2018] 4 WLR 13 [13]-[16]. I think we must take Parliament to have intended that the same approach would be adopted when deciding an issue under s 3 of the 1952 Act. Tugendhat J did so in *Andre v Price* [2010] EWHC 2572 (QB) [97]-[103], when deciding whether the words complained of in that case met the threshold imposed by s 2 of the 1952 Act. The defendants rely on a passage in that case, but this was no more than a passing reference in an *extempore* pre-trial ruling at first instance to the unknown content of the witness statements for trial. I cannot regard it as authority for the proposition that the context relevant to a s 3 assessment includes evidence of what if any harm resulted in the event.

57. Fifthly, and more to the point, as already noted I do not consider (any more than the Judge appears to have done) that any of the three decisions of this court that are relied on by the defendants amounts to binding authority in favour of the approach for which they contend.

58. In the first case, *Sallows v Griffiths* [2001] FSR 15, a company director complained of allegations of dishonesty made to the claimant himself and two other individuals: the company's solicitor and the personal assistant to one of the defendants. The claimant complained that this also amounted to publication to the company. An appeal against judgment for the claimant was allowed on the basis that the plaintiff had to show "that the statements *in the circumstances in which they were made were calculated to* cause damage to him" but apart from damage caused by his wrongful dismissal, which had been compensated in a separate claim, "… 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 on": [17]. The words I have emphasised do not support the defendants' case. They reflect the interpretation I favour. 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 time that the offending publication would cause him pecuniary loss that had not already been compensated for.

59. The second decision of this court that is relied on is *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152. In his second first instance judgment, Tugendhat J had decided that

unless they could be saved by amendment Tesla's malicious falsehood claims should be struck out on the ground that "the claim for damages under s 3 of the 1952 Act was so lacking in particularity that it could not be allowed to proceed". He had left over for later consideration the BBC's alternative application to strike out those claims on the grounds identified in *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946. Tesla applied for permission to amend and in *Tesla (No 3)* Tugendhat J refused that application and granted the BBC's *Jameel* application. This court dismissed an appeal. The defendants do not suggest that this case supports the "historic" approach to s 3 and rightly so: the claim was advanced and dealt with in both courts on the basis that the test was a forward-looking one. This is illustrated, for instance, by a passage in paragraph [37] of the judgment of Moore-Bick LJ (with whom Maurice Kay and Rimer LJJ agreed): "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 …" What the defendants do say is that Tugendhat J tested the case under s 3 by reference to factors extraneous to the words complained of, and this court approved that approach. I disagree.

60. The case had some unusual features. One was that there had been multiple broadcasts of the Top Gear programme which was the subject of the claim, but only some of these could be complained of due to limitation. Another was that the programme, the whole of which was complained of, contained a range of potentially damaging statements about the company and its electric car, only some of which were alleged to be malicious falsehoods. Tesla pleaded that the statements selected for complaint had the potential to deter buyers of its cars and thereby cause it financial loss. Tugendhat J accepted that the company had pleaded a tenable case that this was so; but he held that it had failed to provide any clear or coherent explanation of how those statements could cause any loss additional to that which, adopting the claimant's own analysis, would probably flow from the other damaging statements that were not complained of. In the circumstances, the claim had no real prospect of success. This court disagreed, for the reasons given by Moore-Bick LJ, who concluded that the relevant paragraphs of the draft pleading "sufficiently set out the nature of the case Tesla seeks to make" and that "a court might find it likely that some customers would be deterred from buying a Roadster by the actionable statements even though they had not been deterred by any of the non-actionable statements": [37]. Thus, the Court agreed with Tugendhat J that the intrinsically damaging potential of the statements complained of fell to be assessed in the context of the broadcast as a whole, but did not agree that this process led to the conclusion that the claim could not succeed. This is nothing to do with extrinsic factors.

61. Moore-Bick LJ went on to observe that "it might be said, however, that the prospects of satisfying the court that the loss likely to be caused by the actionable falsehoods was significant was so small that in reality no substantial tort has been committed", thus engaging the principles identified in *Jameel*. He came back to that topic, having first considered Tesla's claim for special damages and concluded there was "[no] real prospect of Tesla's being able to demonstrate at trial that it has suffered any quantifiable loss by reason of the actionable statements". Returning to the claim for general damages Moore-Bick LJ referred to *Jameel* and held that Tesla did not have "sufficient prospect of recovering a substantial sum by way of damages to justify continuing the proceedings to trial" nor any realistic basis for seeking an injunction in respect of matters that had become historic. It followed, he said, that he was not persuaded that Tesla's case "has any real prospect of success or, if successful, is likely to yield any benefit to Tesla that

can justify the devotion of the substantial resources in terms of cost and the use of court time that its determination would require": [49].

62. The defendants point to the fact that the earlier broadcasts and consequent damage featured in the reasoning that led to this conclusion. But I do not read *Tesla* as deciding that the earlier broadcasts were an extrinsic fact that served to defeat the claim under s 3. Tugendhat J did not say so. He referred to the earlier broadcasts (at [5] and [35]) but they formed no part of the reasons he gave for his decision (at [81]-[83]). And it is implicit in the overall reasoning of Moore-Bick LJ that Tesla's case under s 3 was adequately pleaded and could have succeeded on liability. The essential problem was the improbability of any significant or worthwhile remedy, coupled with the cost of the proceedings. I would accept the submission for the claimant that the earlier broadcasts were "an idiosyncratic problem on the facts" when it came to a *Jameel* analysis of the claim under s 3. The defendants also point to the fact that Tesla had admitted that the damaging statements of which it did not complain were true, saying this is an extrinsic fact. So it is. But truth is logically irrelevant to an analysis of potential causation. I see nothing in the judgments of Tugendhat J or the Court of Appeal to suggest they adopted any different view.

63. The third case that is said to be binding authority in favour of the historic approach is *Tinkler v Ferguson* [2021] EWCA Civ 18, [2021] 4 WLR 27. The claimant sued in respect of a Stock Exchange announcement ("the Announcement") by a company of which he had been a director and employee ("Stobart"). Nicklin J struck out the claim as an abusive collateral attack on a decision of the Commercial Court that the claimant had acted in serious breach of his duties to Stobart and had been lawfully dismissed and removed from his office ("the Stobart Judgment"): [2020] EWHC 1467 (QB), [2020] 4 WLR 89. Nicklin J also held that the pleadings, drafted by the claimant as a litigant in person, disclosed no reasonable basis for a case on damage. This court dismissed an appeal. The defendants argue that Nicklin J adopted the historic approach to s 3 and that this was endorsed by this court as part of the essential reasoning for its decision. I do not think that is right.

(1) Nicklin J expressly stated that his observations about the adequacy of the pleaded case were not necessary to his decision: see [90].

(2) Paragraph [94(iii)] of Nicklin J's judgment, on which reliance is placed, does identify a number of problems with the claimant's case on causation, including his "very public sacking" some days before the Announcement and publicity for the Stobart Judgment thereafter. Reading these passages in the context of the judgment as a whole I am not persuaded that they adopt the historic approach. In this section of his judgment Nicklin J was considering compendiously and simultaneously whether there was a tenable case of special damage or under s 3. This is clear, in particular, from [96] where he concluded that the claimant "cannot demonstrate that the publication of the announcement either caused him special damage or that it was likely to cause him pecuniary damage".

(3) In this context it is relevant to note some of what Nicklin J said about the law at [44]: "(i) A claimant can recover general damages under section 3(1) Defamation Act 1952 if s/he can show that the alleged false statements *were* more likely than not to cause him pecuniary damage … (iii) If the claimant's claim falls within section 3(1) Defamation Act 1952, the fact that s/he cannot demonstrate actual

financial loss does not mean that the court must award only nominal damages…". At [93] he recognised that in setting the requirements for a plea under s 3 "the court must not … effectively compel a claimant to provide evidence of special damage." These passages clearly suggest that he was not adopting the historic approach to s 3.

(4) As this court upheld Nicklin J's conclusion that the claim should be struck out as an abuse, what it said on the pleading issue was not an essential element of its decision either. I agree that the section of the judgment headed "Section 3 of the Defamation Act 1952" includes analysis of the claimant's prospects of establishing causation of the heads of damage he alleged as a matter of fact. There are however some strong indications in this section of the judgment that, like Nicklin J, the court was looking at actual damage and s 3 together. In any event, I do not consider the court was deciding whether or not the extraneous causal factors mentioned were legally relevant to a claim based on s 3. At most it was assuming that they could be, as appears to have been common ground (see [55]-[57], [59]-[61]). A court is not bound by a proposition of law which, although part of the *ratio decidendi* of an earlier decision, was assumed to be correct by the earlier court and had not been the subject of argument before or consideration by that court: *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955, 965-966 (CA).

64. My sixth and final point on the authorities is to make clear that I do not accept the defendants' submission that there is or has been a settled practice of treating s 3 as directed to the actual impact of publication, taking account of all relevant circumstances. The limited review I have conducted shows otherwise. The jurisprudence seems to me somewhat diffuse.

The reasoning of the Judge

65. I have already given most of my reasons for concluding that the Judge was wrong to adopt the historic approach. In summary his decision, that a claimant relying on s 3 must plead and prove a specific mechanism by which the offending statement did on the balance of probabilities cause actual financial loss, flowed from a fallacy that fails to give the statutory language its natural meaning and effect. The authorities, properly understood, do not support this. I add that I think it is also a fallacy to reason from the proposition that malicious falsehood is an economic tort to the conclusion that only proof of actual financial loss will do. "Economic tort" is a label to indicate the nature of the interest protected by the cause of action. On its natural interpretation s 3 is aimed at the protection of financial or economic interests. Parliament provided for a claimant to establish liability on proof that the acts complained of had a natural tendency to cause loss of the type protected by the tort. I can see nothing heterodox in that. Nor do I see force in the supposed paradox that the claimant might establish liability on the basis of an inherent probability of financial loss, even though the defendant has proved as a fact that there was none in the event. This is not an "absurdity" as the defendants have submitted. In my view it is consistent with Parliament's intention and simply an extreme illustration of the occasional side-effect I have described at [47] above.

Other points raised by the defendants

66. The defendants have taken a number of additional points which they did not advance to the Judge at or after the trial. Some were taken in the respondent's notice. Still more were taken in the skeleton argument. I have not found any of them persuasive.

67. Three points were made in the respondent's notice. The first is that the claim would fail even if the relevant facts were confined to those in existence at the time of publication, because (a) Mr Butler's adverse view of the claimant pre-dated the Butler Words and (b) it was inevitable at the time of publication that, if Mr Lingenfelder did not already know that the Handbook did not contain the alleged restriction, he would discover that fact. This is a refinement of the historic approach, based on after-acquired knowledge; it provides no answer to the forward-looking approach I have described, which asks whether financial loss is an inherently probable consequence of publishing these allegations about this claimant to her new employer and one of the customers she was dealing with in the new role. Secondly, it is said that even if the test is forward-looking, findings about what actually happened can and should be relied upon in assessing what was likely at the time of publication. This is essentially the same point, and the same answer applies. The fact that the claimant pleaded reliance on post-publication events is a purely forensic point that does not assist the argument.

68. I would also reject the third point in the respondent's notice, that there was no sufficient pleading of a mechanism of likely loss in relation to the Lingenfelder Email. The argument is based on paragraph 20 of the Particulars of Claim and overlooks paragraph 21 (see [21] above). It was not pressed in argument before us. It was common ground that the claimant's remuneration by F&R was substantially based on commission. Viewed at the time of the Lingenfelder Email, a loss of commission was an inherently probable consequence of alleging to the claimant's manager that she had been acting in breach of her restrictive covenants with LCA.

69. The defendants' written and oral arguments include two further points that I have not yet dealt with sufficiently. First, they submit that the HRA compels the Judge's interpretation of the 1952 Act. I do not believe the HRA imposes any further duty on the court. Section 3 of the 1952 Act, however interpreted, is an interference with freedom of speech. But it is an interference with false and malicious speech of a kind that is inherently likely to cause financial loss to another. In many if not most cases it will be, as it was here, commercial speech uttered with a view to financial gain. These are not kinds of speech that attract a high level of protection under Article 10. The objectives identified by the Porter Committee and, if relevant, by Mr Lever MP pursue the legitimate aim of protecting the rights of others, which are likely in many cases to be "possessions" within Article 1 of the First Protocol. (I would add that Article 10(2) allows restrictions in the interest of the protection of morals so the secondary "ethical" aims of s 3 are also legitimate in principle). The chosen method of achieving those aims is a rational one that can properly be seen as necessary and proportionate. The inevitable incidental effects in the occasional case of the present kind are justified on the same grounds. No lesser measure of achieving the stated objectives has been suggested; what the defendants have argued for is lesser objectives.

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. I am not persuaded that giving s 3 its natural meaning is likely to have a significant chilling effect on truthful and honest speech. Experience suggests that claims for malicious falsehood are relatively rare and that the main brakes upon them are the need to prove falsity and, in particular, malice. This is notoriously hard to plead (allegations of malice are frequently struck out at the interim stage) and to prove. There are safeguards against abuse, including the *Jameel* jurisdiction.

71. The second new argument is that we should draw conclusions about the meaning to be ascribed to s 3 from the fact that Parliament said nothing about this issue when it passed the Defamation Acts 1996 and 2013. The argument is that Parliament could have legislated on the matter but saw no need because it knew of the "settled practice" of treating s 3 as calling for proof of actual damage. Particular reliance is placed on Parliament's decision to raise the threshold of seriousness for defamation but not malicious falsehood when enacting s 1 of the 2013 Act. In the absence of the alleged settled practice, the premise is false. Moreover, the 1996 Act contained a range of technical measures stemming largely from the 1991 Report of the Supreme Court Procedure Committee on "Practice and Procedure in Defamation", which were almost exclusively concerned with libel and slander, touching on malicious falsehood only when it came to limitation. The 2013 Act was entirely concerned with defamation, properly so-called. We have been shown nothing to suggest that in 2013 Parliament directed its mind to malicious falsehood at all, nor am I aware of any such material. I do not think we could properly rely on Parliament's later silence as a basis for interpreting the Act of 1952. The materials I have referred to are the much better guide.

Application to the facts

72. Applying the natural meaning of s 3, with the *Ferguson* gloss, to the facts of the case, I conclude that the publication of the Butler words and the Lingenfelder Email satisfied the requirements of the section. The defendants alleged to the claimant's new employer and one of her customers that she had broken her contractual commitments to the defendants. Such an allegation has a natural tendency to cause financial loss to someone whose income is commission-based. The mechanisms of probable loss were adequately pleaded and, having regard to the relevant context, the necessary harmful tendency was established.

The second issue: is the case worth more than nominal damages?

73. At [216] the Judge said that even if he had been satisfied that the claimant had established a claim for general damages under s 3 he would have awarded a purely nominal sum on that account. The defendants contend that this conclusion cannot be challenged, because permission to do so has not been sought or granted and in any event it was a conclusion the Judge was entitled to reach. Subject to the next point, I agree. I do not think it is open to the claimant to argue, as Mr Bennett has sought to do, that the successful claimant under s 3 can recover compensation for "the malicious publication itself, including (a) the seriousness of the allegation (b) the quality of the publishees and (c) the degree of malice." In any event, I am wholly unpersuaded by these arguments. Damages in this context can only be compensatory. The claimant must identify some recognised type of injury. As the argument proceeded the nature of the injury for which compensation was being sought remained elusive, unless it was reputational harm, which everyone agrees is outside the scope of this tort.

74. What then of distress? The claimant pleaded that she had suffered non-pecuniary damage in the form of "huge emotional distress" as a result of the publications "exacerbated and/or aggravated by the fact that the defendants acted maliciously". Those averments were supported by evidence in her witness statement. As I have mentioned, the Judge's initial draft judgment concluded that damages for this class of injury should be assessed. When granting permission to appeal he made clear that what he said about nominal damages had been directed at pecuniary loss; he would have awarded "some sum for injury to feelings where [the claimant] had made an evidential case (subject to resolution of entitlement in law, which [the defendants] contested)." The defendants maintain their contention that damages for injury to feelings are not recoverable in the absence of actual loss, so the claimant could only recover nominal damages. They say, further, that the evidence does not support an award of anything substantial and that in these circumstances a retrial or assessment of damages would be so disproportionate as to be a *Jameel* abuse.

75. I think the Judge's initial approach was right, and supported by authority, and I would restore his initial conclusion. I do not consider it open to the defendants to argue the facts before us. I would reject the *Jameel* point, which does not appear to have been argued below, did not figure in the respondent's notice, and is unpersuasive. I would expect any award to be modest but am not convinced it would be trivial, and if a sum cannot be agreed the costs of the assessment can be controlled by proportionate case management.

76. The question of whether damages for distress are recoverable at all in a malicious falsehood claim was raised in this court in *Joyce v Sengupta*. The court did not decide the point but Sir Donald Nicholls V-C (with whom Butler-Sloss LJ agreed) and Sir Michael Kerr both explored it in some detail and expressed the view that such damages should in principle be available in all such claims, whether based on the common law or s 3 of the 1952 Act: [1993] 1 WLR 337, 347-348, 349, 351H. The issue came up again seven years later in *Khodaparast v Shad* [2000] 1 WLR 618. The claim was based on s 3. The trial judge was satisfied that pecuniary damage was a likely consequence of the offending publication and that the claimant had been deprived of congenial employment. He made an award of £20,000 including aggravated damages for injury to feelings. On appeal it was argued, among other things, that aggravated damages were not recoverable in law. That was rejected. Stuart-Smith LJ (with whom Otton and Potter LJJ agreed) considered what had been said in *Joyce.* At [41] he noted that there are areas of law where special damage is an ingredient of the cause of action but, once that is established, damages are "at large" and aggravated damages can be awarded. He went on to say this at [42]:

> "… once the plaintiff is entitled to sue for malicious falsehood, whether on proof of special damage or by reason of section 3 of the Defamation act 1952, I can see no reason why, in an appropriate case, he or she should not recover aggravated damages for injury to feelings. As Sir Donald Nicholls V-C pointed out in *Joyce v Sengupta* … justice requires that it should be so."

77. The defendants submit that the observations in *Joyce v Sengupta* assumed a case in which it was proved that the publication complained of had caused some recoverable loss and that in *Khodaparast v Shad* the claimant had actually suffered significant

material losses, on which the award of aggravated damages was dependent. There is no principled basis, say the defendants, for an award of damages for injury to feelings in a case where it is demonstrated, as it was here, that no actual loss or harm was caused.

78. Clearly, we are not bound, nor was the Judge, by the observations in *Joyce*. *Khodaparast* is a decision that damages for hurt feelings can, as a matter of law, be recovered by a claimant who establishes a claim under s 3. But it was a case in which the claimant established substantial harm and was awarded substantial general damages. And Stuart-Smith LJ did not say that aggravated damages could always be recovered but only that there was no reason not to award them "in an appropriate case". I would therefore accept that we are not bound by *Khodaparast* to decide this issue in favour of the claimant. But I would endorse what was said at [42] of *Khodaparast* and I would decline to rule out, as a matter of law, an award in a case where the publication caused no actual pecuniary loss in the event. I think it would be wrong to do so when the tort is complete on proof of a publication that has a natural tendency to cause financial loss and that is false and malicious. It cannot be said that such publications are inherently incapable of causing distress. In principle, such an award may be made. The question of whether any and if so it should be made should be left to trial judges to decide, in the light of the infinitely variable factual circumstances of the cases that come before them.

79. I do not think that we should rule out an award of substantial, as opposed to nominal, damages for distress on the facts of this case. On 21 January 2019, the claimant learned that the defendants had wronged her tortiously by maliciously publishing a falsehood in circumstances that made it probable that she would suffer consequential financial loss. According to the claimant's evidence, she found this very hurtful. The prospect of loss and the prospect of distress were both foreseeable by the defendants. 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.

Conclusion

80. I would allow the appeal, restore the Judge's initial decision to enter judgment for the claimant for damages, including compensation for injured feelings, to be assessed, and remit the case for that assessment to be carried out.

LORD JUSTICE SNOWDEN:-

81. I agree.

LORD JUSTICE UNDERHILL:-

82. I also agree.