Neutral Citation Number: [2020] EWHC 22 (Ch)

Case No's: BL-2018-002369 AND BL-2019-001483

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 15/01/2020

Before:

CHIEF MASTER MARSH

- -

Between in claim BL-2018-002369:

MUSST HOLDINGS LIMITED	**Claimant**
- and -	
(1) ASTRA ASSET MANAGEMENT UK LIMITED	
(2) ASTRA ASSET MANAGEMENT LLP	**Defendants**

Between in claim BL-2019-001483

(1) ASTRA ASSET MANAGEMENT UK LIMITED	
(2) ASTRA CAPITAL INTERNATIONAL LIMITED	**Claimants**
-and-	
(1) MUSST INVESTMENTS LLP	
(3) MR SALEEM ANWAR SIDDIQI	**Defendants**

Peter Knox QC and Richard Munden (instructed by **Collyer Bristow LLP**) for **Musst** and **Mr Siddiqi**
Jeffery Onions QC and Tom Blackburn (instructed by **Payne Hicks Beach**) for the **Astra**

Hearing dates: 13 December 2019

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Approved Judgment

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

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CHIEF MASTER MARSH

Chief Master Marsh:

1. At a hearing on 13 December 2019 I made the following principal orders:

    (1) That the application made by the claimants in claim BL-2019-001483 seeking permission to amend the particulars of claim be dismissed;

    (2) That the trial fixture for claim BL-2018-002369 in a window commencing on 22 June 2020, with a time estimate of 10 days, should be vacated;

    (3) That claim BL-2019-001483 should be tried, without a preliminary issue or issues being directed, with claim BL-2018-002369 in a new trial window to be fixed for a date in 2021.

2. This judgment provides my reasons for making those decisions.

3. I will refer to BL-2018-002369 as the "Contract claim" and BL-2019-001483 as the "Defamation claim". In the Contract claim, Musst Holdings Limited brings a claim against two entities. I will refer to them respectively as Astra UK and Astra LLP. In the Defamation claim, Astra UK and a related entity, Astra Capital, bring a claim against Musst Investments LLP and Mr Siddiqi. Musst Holdings was a defendant named in the Defamation claim but it was not served with the claim and the claim against it has lapsed. Save where it is necessary to distinguish between the corporate entities, I will refer to them generically as "Musst" and "Astra".

4. The circumstances in which a defamation claim has come to reside in the Business and Property Courts of England and Wales is a subject that will need to be explained in a little detail.

The claims and the parties

5. The Defamation claim was issued in the Queen's Bench Division on 1 June 2017. Particulars of claim dated 29 September 2017 were served with the claim form on the first and third defendants, Musst Investments LLP and Mr Siddiqi.

6. The words complained of by Astra are alleged to have been spoken by Mr Siddiqi at a meeting in Rome in late June 2016 in the presence of Mr Ralph Plotke and Mr Albertus Rigter[1] of Crown. It is alleged he said:

> "Astra is a sinking ship"
>
> "Astra does not have enough money to pay its staff"
>
> "Anish [Mr Mathur] is a one-trick pony"
>
> "All Astra's investors are pulling money out of funds managed by Astra and Crown should get out while it can. Don't be the last man standing."

7. The particulars of claim set out in paragraphs 7 and 8 what is said to be the natural and ordinary meaning of the words and the meaning by innuendo. Paragraphs 10 to 28

[1] It is no longer asserted that Mr Rigter was present.

set out the further claim in malicious falsehood with particulars of falsity provided in paragraphs 11 to 18 and particulars of malice in paragraphs 19 to 28. The claim goes on to allege that the serious nature of the allegations in the words used mean they are likely to cause serious financial loss and that they have caused actual loss amounting to US$ 300,000. Astra also seeks an injunction to restrain further publication of the words used by Mr Siddiqi.

8. On 24 November 2017, the defendants applied for an order with three elements:

(1) The issue of publication be tried as a preliminary issue;

(2) If the claimants were successful on that issue, they would answer the outstanding parts of the defendants' request for information; and

(3) Time for service of the defence would be extended until 14 days of the answers being provided.

9. The application was supported by a witness statement from Alexandra Galligan, who is a member of Musst Investments LLP. She suggested that there are substantial issues in the claim and pointed to the extensive particulars of falsity and malice. She went on to say:

> "Trying these issues would plainly require extensive disclosure, evidence and court time. This is even before we consider any defences to the slander claim. It is difficult to state what defences the defendants might wish to run before there has been a finding as to what, if any, defamatory statements have been made, but I understand that any statement to Crown about their investments with the claimants would be protected by qualified privilege given our relationship and history with them - it was [Mr Siddiqi] and I who introduced Crown to Mr Mathur of the Claimants and so facilitated their investment. We might potentially also want to rely on defences of truth or honest opinion."

10. As a result of issuing the application, a defence to the claim was not served. This was consistent with the approach to the case management of defamation claims discussed in Nicklin J's judgment in *Morgan v Associated Newspapers* [2018] EWHC 1725 (QB) [8] – [10]. However, more than two years later, no progress has been made in the Defamation claim. The application was not pursued at the hearing before me and is, in effect, defunct. The reasons why this has happened are largely irrelevant. It is common ground, however, that the application now serves no useful purpose and it was not pressed at the recent hearing before me.

11. On 9 October 2018, Astra applied for permission to amend the claim form and the particulars of claim and drafts of the proposed amendments were served.

12. The Contract claim was issued on 7 November 2018. It is made under the 'Introduction Agreement' dated 18 April 2013 which had an effective date of 21 November 2012. It is only necessary to note the following points:

(1) Mr Anish Mathur set up an investment fund managed by parties who can be referred to collectively as Octave. Initially Astra LLP acted as investment manager to the fund as Octave's appointed representative. The purpose of the

Octave contract was to provide for the introduction of prospective investors to the fund by Musst which would be entitled to a share of the fees earned in respect of the investments.

(2) Musst claims it introduced two investors that are referred to as 2B and Crown.

(3) Musst claims that Astra is liable under the Agreement on the basis that the Octave contract was novated first to Astra LLP, after it started to act directly as investment manager to the fund in July 2014, and then to Astra UK after it took over as investment manager in April 2016.

(4) Astra served a defence and counterclaim on 18 January 2019. In paragraphs 208 to 215, whilst denying that novation of the Octave contract occurred, Astra alleges that Musst acted in breach of clauses 5.1 and 5.7 of the Introduction Agreement. Under those provisions Musst was required to act in good faith towards Octave and not to "disparage, slander, comment maliciously or make any accusation of any nature whatsoever against or in relation to the business of Octave or its affiliates …".

(5) The breach of these provisions is said to arise from words spoken by Mr Siddiqi on two occasions and that they are attributable to Musst.

(6) The first occasion matches the allegation made in the Defamation claim concerning words spoken by Mr Siddiqi in late 2016 in Rome at a meeting where a Mr Plotke of Crown was present.

(7) In addition, Astra relies on an occasion in July 2017. Mr Siddiqi encountered Mr Sunil Chandler the CEO of Dawnbud Ltd on the London Underground and is alleged to have said:

> "There is a 'dark side' to Mr Mathur that you are probably unaware of"
>
> "Anish Mathur is unreliable"
>
> "Astra is a sinking ship"
>
> "Anish Mathur is a one-trick pony"
>
> "I have made similar statements [to those set out above] to Astra Management's investors and urged them not to be caught out as "the last man standing" on the sinking ship and to redeem their investments as soon as possible."

(8) Astra counterclaims for contractual damages in relation to the alleged breaches of clauses 5.1 and 5.7.

Transfer of the Defamation claim

13. A CCMC took place in the Contract claim before Deputy Master Bartlett in the Chancery Division on 18 April 2019 at which the subject of case managing the two claims was discussed. However, the subject was left for consideration at the hearing in the Defamation claim listed before a judge of the Media and Communications List

listed for hearing on 20 June 2019. That hearing was due to deal with the defendants' application for trial of preliminary issues and the claimant's application for permission to amend.

14. On 14 June 2019 a letter in an agreed form was sent to Warby J, as the judge in charge of the Media & Communications List. The letter invited the court to make an order transferring the claim to the Chancery Division. The terms of the letter are relied on by Astra and it is necessary to refer to the principal passages in it.

> "The intention of this letter is to notify the Court of the agreement reached between the parties as to case management and to propose a way forward:
>
> 1) The parties agree that the most efficient way to manage the Contract Claim and the Defamation Claim would be to case manage them and have them both heard as a single trial by the same judge on the basis that the structure of that trial reflects that which would otherwise have applied to the Contract Claim. The reason for this is, primarily, to achieve time and cost savings which are detailed further below as well as avoiding any risk of inconsistent judgements, and also to achieve a swifter resolution to both claims than might otherwise be possible.
>
> …
>
> 2. There is currently a risk that there could be conflicting findings of fact made in the two proceedings, leading to arguments as to the extent to which any findings are binding from one set of proceedings into the other. All parties agree that it would be beneficial for a single judge to hear the relevant factual evidence so as to avoid a situation where a trial takes place and judgement is handed down in the Contract Claim, in respect of which common issues might need to be revisited within the context of the Defamation Claim.
>
> 3. The parties would like to achieve certainty, as quickly as possible. By having the two claims heard together, judgement in both would be handed down simultaneously bringing an end to both sets of proceedings (subject to appeals, which would likely progress together). The alternative scenario, where the Contract Claim trial takes place first and results in a judgement that in part addresses the common issues might well necessitate a period of delay for the parties to the defamation claim. Given the overlap, it would otherwise be logical (and cost efficient) to stay the Defamation Claim until determination of the counterclaim. This would be undesirable, not least because the remedies sought in the Defamation Claim include an injunction.
>
> …
>
> 5. A trial window has been set down for the Contract Claim in June 2020. The trial window currently set comprises 10 days, to include 2 day(s) judges pre-reading time and an interval between close of evidence and final submissions of 7 day(s). The parties are of the view that further time for the hearing of the additional evidence pertaining to the Defamation Claim, as well as the

> additional legal argument, would be relatively limited and could be accommodated with only a modest increase."

15. On 18 June 2019 Warby J made the order for transfer of the Defamation claim to the Business and Property Courts "so that it may be case managed with claim no. BL-2018-002369." Some emphasis is placed on the fact that the order does not specify that the two claims are to be tried together. For my part, I consider that to be a point of no substance. In all probability, the order was made in these terms solely because the draft order that was supplied with the application seeking transfer did not ask for an order that the claims be tried together. In any event, it is always for the receiving court to decide how a claim transferred to it should be dealt with, although of course due consideration is given to the views of the sending court. It seems to me it is of far greater significance that the agreed request for transfer in the letter was made on the basis of case management and trial together. Musst now seeks to resile from that agreement.

The amendment application

16. Astra seeks permission to amend the claim form and the particulars of claim in the Defamation claim. The amended claim form adds a claim for slander and malicious falsehood in respect of the words spoken by Mr Siddiqi to Mr Chander on the London Underground in July 2017 ("the Chander claim"). The amendments to the particulars of claim seek to:

    (1) Add the Chander claim to mirror the claim set out in the amended claim form. This would have the effect of bringing the Defamation claim into line with the counterclaim in the Contract claim. The particulars of meaning that relate to the words spoken to Mr Chander are similar to those that relate to the words spoken to Mr Plotke in Rome in June 2016.

    (2) Provide additional particulars of malice in new paragraph 30.

    (3) Provide additional particulars of serious financial loss in paragraph 31.

17. Astra relies heavily on paragraph 38 (formerly 36) in the draft amended particulars of claim. It is the final paragraph of the statement of case and appears immediately before the prayers for relief seeking damages and an injunction.

> "38. Since the publication of the words complained of in paragraph 6 above, Mr Siddiqi has repeated the words complained of or words substantially similar to other individuals including Mr Chander (as set out in paragraph 7 above), and the Defendants have failed to provide satisfactory undertakings to the Claimants regarding republication of the words complained of when asked. Therefore, unless restrained by the Court, the Defendants will continue to publish the same or similar false statements concerning the Claimants' businesses. For that reason, the Claimants will seek an injunction to restrain any further publication at the trial of this action." [underlining in the original]

18. The primary period of limitation under section 4A of the Limitation Act 1980 ("the 1980 Act") expired in July 2018. Astra's case is that:

(1) The new pleading does not add a new claim – CPR 17.4(2).

(2) If it is a new claim, it arises out of the same or substantially the same facts in respect of which the original claim is advanced – CPR 17.4(2).

(3) It is just to allow the amendment to bring the two claims into line; the facts relating to the Chander claim are already in issue in the counterclaim.

(4) It is entitled to rely on section 32A of the 1980 Act.

19. Musst submits that:

(1) The Chander claim is untenable because no loss can be shown and in respect of the claim for malicious falsehood the claim relates to statements of opinion which are not actionable and there are no relevant particulars of malice or falsity for parts of the new claim.

(2) The claim is time-barred and Astra has not sought to rely in its statement of case on section 32A of the 1980 Act.

(3) The existing claim does not support an assertion that the Chander claim is already pleaded.

(4) The new claim is an abuse of the court's process.

20. Astra has to show either that the Chander claim is not a new claim or it arises out of the same or substantially the same facts that are already pleaded. As Mr Munden who appeared for Musst and Mr Siddiqi submitted, the facts that need to be identified in the existing claim are those that relate to the publication or communication of the words that are complained of: see *Komarek v Ramco* unreported 21 November 2002 per Eady J at [62] and *Economou v De Freitas* [2016] EWHC 1218 (QB) per Warby J at [49].

21. Mr Munden also relies on observations made by Christopher Clarke J (as he then was) in *Wallis v Meredith* [2011] EWHC 75 (QB) at [56]:

> "In English law each separate publication gives rise to a separate cause of action (*Jameel* para 32). It is, therefore, necessary for the Particulars of Claim to identify which is or are the publications relied upon. In a claim for slander the Claim Form must so far as possible contain the words complained of, and identify the person to whom they were spoken and when: *CPR PD 53, para 2.2(2)*. The precise words used and the names of the persons to whom they were spoken, and when, must, so far as possible, be set out in the Particulars of Claim if not already contained in the claim form."

22. It seems to me that a helpful starting point is to determine what relevant facts were, and what facts were not, included in the original claim. There is no direct mention of the Chander claim. Astra relies on paragraph 36 (38 of the amended particulars of claim) where it is said that Mr Siddiqi has repeated the words complained of or words substantially similar to other unnamed individuals. Mr Blackburn, who appeared for Astra, submitted that paragraph 36 can be seen as pleading a cause of action based on the same or similar words being spoken on different occasions. He also relied on the

approach adopted by the Court of Appeal in *Berezovsky v Abramovich* [2011] 1 WLR 2290. At paragraph [59] Longmore LJ observed:

> "If it happens to be the case that an element of one of those essential ingredients is misstated, misdescribed or omitted, it does not mean that a correct statement, description or inclusion is a new cause of action; even if the formal result of such a misstatement, misdescription or omission might technically be that an unaltered claim would have to be dismissed, that still does not mean that a corrective alteration involves or constitutes a new cause of action."

23. To my mind Astra's submissions concerning paragraph 36 are untenable for a number of reasons and it is clear that the Chander claim is a new claim that does not arise out of the same or substantially the same facts in respect of which the original claim is advanced:

(1) It is impossible to find any reference to the Chander claim in the claim form; and the claim in relation to which brief details of the claim are provided is limited to the publication of the words complained of in Rome in June 2016. Although it includes a prayer seeking an injunction to restrain Musst and Mr Siddiqi from further publishing those words, it does not assert that they have been repeated. To my mind this is fatal to Astra's case in light of the requirements of PD53 paragraph 2.2(2); and because limitation runs from the date of issue of the claim form – see CPR PD 7A paragraph 5.1. On any view, the Chander claim is a new claim.

(2) If there were any doubt on that point, it is notable that Astra has taken the view that it is necessary to add the Chander claim to the claim form. This strongly suggests that they did not consider it was a claim already made.

(3) The purpose and function of paragraph 36 of the particulars of claim is to provide a basis for the prayer seeking an injunction to restrain future publication. The facts pleaded in paragraph 36 do not form part of the cause of action that relates to the current claim. The reference to the words having been repeated is relied upon for the purpose of seeking an injunction which is a remedy that does not follow as of right as part of the cause of action. It is a discretionary additional remedy that is premised on a wrong having been committed and the need to restrain the commission of further similar wrongs.

(4) Paragraph 36 was not intended to provide, and did not provide, a catch-all basis for additional causes of action for slander and malicious falsehood arising from other unspecified occasions when the words, or similar words, may have been published.

(5) Paragraph 36 does not, in any event, plead a case with sufficient particularity about publication and loss.

(6) The situation here is quite unlike that considered by the Court of Appeal in *Berevovsky v Abramovich*. In that case, Mr Berezovsky had pleaded a claim that was recognisably intended to amount to a claim in the tort of intimidation. However, the reference to him having a "beneficial interest"

rendered the claim flawed and he wished to replead it. That is some distance from the oblique reference in paragraph 36 to the same or similar words having been uttered. In this case it cannot be said there has been a misstatement, misdescription or omission in respect of a cause of action. It was plainly not the purpose of paragraph 36 to make out a cause of action and there was a failure to achieve that objective.

24. It follows that unless the limitation period can be extended by virtue of section 32A of the 1980 Act, it is not possible for Astra to rely on CPR 17.4(2) because Astra is seeking to put forward a new claim that does not arise out of the same or substantially the same facts that are advanced in the current particulars.

25. Section 32A provides:

> "(1) If it appears to the court that it would be inequitable to allow an action to proceed having regard to the degree to which –
>
> (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,
>
> the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.
>
> (2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to –
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A –
>
> (i) the date on which any such facts did become known to him, and
>
> (ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
>
> (c) the extent to which having regard to the delay, relevant evidence is likely –
>
> (i) to be unavailable, or
>
> (ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.

[sub-sections (3) and (4) omitted]

26. In *Bewry v Reed Elsevier UK Ltd and another* [2015] 1WLR 2565 at [5] Sharp LJ (as she then was) remarked that the discretion to disapply section 4A is a wide one and is largely unfettered. She went on the explain, however, that special considerations apply to libel actions:

> "In particular, the purpose of a libel action is vindication of a claimant's reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications. These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why the disapplication of the limitation period in libel claims is often described as exceptional."

27. Although use of the jurisdiction under section 32A is exceptional, it is right to have in mind that Astra is able to take advantage of a six year limitation period under the Introduction Agreement upon which it bases its claims under clauses 5.1 and 5.6. Those causes of action are related to the causes of action in the Defamation claim but are different, as is the measure of loss. On the one hand it might be thought odd that Astra is unable to pursue a very similar claim in tort by virtue of the very restrictive limitation under section 4A. On the other hand, the fact that Astra already has in effect a remedy for the wrong it relies on may be a factor that leans against disapplication of that period.

28. A number of witness statements have been provided in relation to the application for permission to amend. Much of the content is of limited relevance. There are, however, two points that are worthy of mention:

(1) The strength of Mr Chander's connections to Astra, Mr Mathur and associated entities is disputed. Mr Siddiqi points to Mr Chander's links with Apeiron Securities and Investments LLP ("Apeiron"). He says the two members of Apeiron are Mr Vikas Chauhan and Astra Financials UK Ltd. The latter is owned by Mr Mathur and his wife, Ms Shipra Nagpal. Ms Nagpal was formerly a member of Apeiron. She and Mr Chauhan are the directors of Apeiron. Mr Chander denies that he is a senior member of the advisory team at Apeiron. However, he has been shown until recently as one of Apeiron's "Leaders" on its website. This strongly suggests that his links to Mr Mathur and Astra are rather stronger than he cares to admit.

(2) Mr Mathur and Mr Chander explain in witness statements dated 6 November 2018 what they say happened after the encounter between Mr Siddiqi and Mr Chander on the London Underground on 23 June 2017. Mr Chander felt it was necessary to see Mr Mathur immediately after the encounter. Mr Mathur says that Mr Chander was shocked by the severity of the statements that had been made and it is clear that Mr Chander was aware of the pre-existing dispute. However, he says he did not relay exactly what Mr Siddiqi said to him as he did not wish to become involved. Mr Mathur says he respected that wish and as a result Mr Chander was not named in the particulars of claim. The catalyst for a change of heart by Mr Chander was being informed by Mr

Siddiqi on 27 September 2018 that Astra was seeking to have the issue of publication dealt with as a preliminary issue. Despite the careful wording of Mr Mathur's statement, it is clear that he became aware of the publication of what both he and Mr Chander regarded as seriously defamatory words on the same day they are said to have been uttered.

29. Section 32A(2) requires the court to have regard to all the circumstances of the case but to have particular regard to matters relating to the delay and the reasons for it. Clearly it is permissible for the court to have some regard to the strength of the claim, although I have in mind Lord Neuberger's observations about considering the ultimate merits of the claim for the purposes of case management decisions in *Global Torch Ltd v Apex Global Management Ltd and others (No2)* [2014] 1 WLR 4495 at [29] to [31]. His remarks were made in a different context but it seems to me the court should be slow to embark on an evaluation of the merits on any case management decision unless (a) it can be undertaken without difficulty and (b) it is obvious that the claim is strong, or weak. If the evaluation will be time-consuming, it should not be pursued.

30. It seems to me that the right course is to decline to adopt the course Mr Munden invited the court to adopt and to proceed on the basis that both limbs of Astra's case have a real prospect of success.

31. Taking the factors that adumbrated in section 32A in turn:

(1) The delay lasted from 23 June 2017 until 9 October 2018, a period of 16½ months.

(2) The reasons for the delay are unimpressive. It is plain that, as a minimum, Mr Mathur knew of nature of the words that are complained of. Indeed, it seems implausible that he could have had a discussion with Mr Chander on the same day the encounter took place without the substance of words complained of being passed to him. And if it is right that Mr Chander was only willing to become involved in a limited way, that is not a good reason for the delay.

(3) If Mr Mathur's evidence is taken at face value, he did not know the precise words that were spoken until about 27 September 2018 and steps were taken to produce the draft amendment within days. However, it seems to me that Mr Mathur must have known the substance of words complained about in June 2017.

(4) It is unlikely that relevant evidence will not be available but inevitably it will be less cogent than if the claim had been commenced within the one year limitation period. There is no indication that a record of the discussion between Mr Mathur and Mr Chander in June 2017 was made. It must be said, however, that the courts regularly deal with evidence that relates to oral discussions of some antiquity.

32. I have already observed that the circumstances to be taken into account include the overlap between the draft amended claim and the Contract claim. A remedy for the wrong complained of is already available in the Contract claim. It seems to me that this factor weighs against Astra's application.

33. Although a review of the merits overall is not normally appropriate when considering a case management decision of this type, it is possible in this case to have regard to the likely value of the claim arising from the words said to have been spoken to Mr Chander. In the Contract claim, Musst made a request for information under CPR 18 and asked at paragraph 33:

> "(3) What actions did Mr Chander (or any entity associated with Mr Chander) take as a result of the alleged disparaging statements, or not take which otherwise they would have taken but for the alleged disparaging statements; and
>
> (4) What loss resulted to the Defendants from the said actions (or inactions) or Mr Chander or any associated entity?"

34. The answers provided by Astra are:

> "(3) Mr Chander contacted Mr Mathur.
>
> (4) The Defendants do not currently claim to have suffered any loss and damage as a result of the statement to Mr Chander."

35. Mr Munden submitted that not only is the Chander claim worthless but also by virtue of section 1 of the Defamation Act 2013 there can be no claim in defamation. He also submits that the claim in malicious falsehood is not pleaded adequately such as to enable Astra to rely on section 3(1)(b) of the Defamation Act 1952. Astra would need to show that the words were more likely than not to cause pecuniary damage – see *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152 at [27].

36. It suffices when considering all the circumstances and the general discretion concerning whether to grant permission to amend to say that the claim arising from the Chander words is likely to have a very limited value.

37. In my judgment, Astra is unable to avail itself of section 32A and there is no basis upon which it can rely on CPR 17.4(2). It is unnecessary for me to consider the remaining submissions put forward by Mr Munden.

Trial of preliminary issue and directions for trial

38. The only other application that was before the court was that issued on 24 November 2017 for the issue of publication to be tried as a preliminary issue and if the words were of a defamatory tendency whether they were statements of fact or opinion. It might reasonably have been thought by Astra, in light of the agreed terms of the letter written to Warby J on 14 June 2019, that neither the application nor any similar order would be sought.

39. At the hearing Musst applied for an order that was not defined in an application or a draft order, the form of which was difficult to pin down. It was common ground, however, that if the Defamation claim is tried as a whole with the Contract claim, it will add 3 days to the length of the trial. Enquiries made by the court before the hearing disclosed that adding 3 days to the existing listing was likely to mean that the trial date would have to be vacated and re-fixed. In any event, I came to the view that the trial date relating to the Contract claim had to be vacated.

40. It is not in doubt that when the application for transfer of the Defamation claim was made, both parties agreed that the two claims would be tried together without a trial of preliminary issues. As I have indicated, nothing turns on the fact that the order made by Warby J did not make any direction about a combined trial. Of course, an agreement of that type is not binding on the court and it is open to the court to make whatever order it considers best complies with the overriding objective. However, the court will always have regard to an agreement of this type and all the more so when the agreement is the premise, or one of the premises, upon which an order for the joint management of claims has been made because it may reasonably be assumed that the parties have an intimate understanding of their claims. Although it is open to Musst to resile from the agreement it made with Astra, the court as a minimum will wish to understand what caused Musst to do so. The only answer that has been provided is that Musst has changed its legal advisers and a different view has been taken. To my mind, that does not provide an adequate reason to pursue a different approach.

41. A list of issues for trial in the Contract claim has been agreed. It runs to 32 issues, two of which relate to the counterclaim:

> "31. The disparaging statements allegedly made by Mr Siddiqi, and in particular: (i) what statements were made, (ii) whether they were disparaging, malicious, true, justified and/or reasonable statements for Mr Siddiqi to make, (iii) whether they comprised breaches entitling the Defendants to terminate the Octave Contract; and, (iv) whether they caused the Defendants any damage as a result.
>
> 32. Relief to which the Defendants are entitled (if any) in respect of their Counterclaim."

42. In the course of submissions, Mr Munden who dealt with the Defamation claim, proposed that an order should be made in both claims to the effect that:

> (1) The trial of issues 31 and 32 in the Contract claim (and issues 7 and 16 that relate to the context in which the LGT and Crown contracts were entered into and whether there was a common assumption that Musst was to be treated as having introduced 2B and Crown) should be the trial of those issues in the Defamation claim.
>
> (2) The balance of the Defamation claim should be stayed pending the determination of the Contract claim. This would have the effect that Musst would not serve a defence at this stage.
>
> (3) The facts found on issues 7, 16, 31 and 32 in the Contract claim would be binding on the parties in the Defamation claim.

43. In support of the approach put forward by Musst, Mr Munden cited passages from the judgment of Warby J in *Decker v Hopcraft* [2015] EWHC 1170 (QB) at [77], [80] to [81] and [84] and passages from the judgment of Nicklin J in *Morgan v Associated Newspapers* [2018] EWHC 1725 (QB) at [9] to [10] that explain the undoubted benefits of the trial of preliminary issues in defamation claims. On the other hand, Mr Blackburn points to an observation by Nicol J in *Reay v Beaumont* [2018] EWHC 2172 at [4]. After having said that it is common in defamation claims for there to be an order for a preliminary trial, and that such order can lead to a saving of time and

money and the narrowing of issues between the parties, he went on the say that "… in each case it is necessary to consider whether such benefits will flow from an order of this kind."

44. I accept that had the Defamation claim remained in the Queen's Bench Division it is likely, but not certain, that an order in the terms sought in Musst's application would have been made. That, however, is not to the point because the Defamation claim is now being case managed for disposal alongside the Contract claim and counterclaim at the joint request of the parties. The court must consider how the provisions of the overriding objective are best applied with both claims in mind.

45. The risks that are involved in ordering a trial of preliminary issues are well understood. In *Tilling v Whiteman* [1980] AC 1 at 25 Lord Scarman described orders for the hearing of separate points as "too often treacherous short cuts." In *Rosetti Marketing Ltd v Diamond Sofa Co Ltd* [2013] Bus LR 543 at [1] Lord Neuberger observed that "… the siren song of agreeing or ordering preliminary issues should normally be resisted …".

46. The principal benefits of the approach proposed by Musst are said to be:

    (1) A determination of issues 31 and 32 in the Contract claim are highly likely to substantially dispose of the Defamation claim. If Musst is able to establish liability, only general damages and the claim for an injunction will be left over. As to the latter, an undertaking has been offered that renders the making of an injunction unnecessary.

    (2) It will save the cost of Musst serving a defence.

    (3) It will save the additional 3 days of trial time that the defamation claim may add to the trial.

47. Against those considerations, the order proposed by Mr Munden may not achieve a determination of the main issues in the Defamation claim. The focus of the Contract claim is on different issues and there is no certainty that the trial judge will make all the relevant findings of fact. I am not attracted to the idea that the court should at this stage direct the trial judge to decide certain issues, regardless of whether it is necessary to do so, so that the unusual order that is proposed can be made to work.

48. Musst has been far from consistent about what the issues may be in the Defamation claim. I have already referred to the observations made by Ms Galligan in her witness statement and at the same time as agreeing the list of issues in the Contract claim on 17 April 2019, Mr Knox QC indicated in his skeleton argument that working out common issues between the two claims could take time and be expensive. Furthermore, and self-evidently, in the absence of a defence it is impossible to know what the issues are in the Defamation claim.

49. It seems to me that the order sought by Musst is only superficially attractive. The trial of both claims together is the better course of action because, for amongst other reasons:

(1) The proposed order sought by Musst has not been properly formulated. It was only when asked during oral submissions what Musst had in mind that Mr Munden provided suggested wording whilst 'on his feet'.

(2) It was clear to me that the trial in June 2020 had to be vacated for reasons unrelated to the trial of the Defamation claim.

(3) There is no certainty whatever that the trial of the Contract claim might have the effect of determining most of the issues in the Defamation claim. If anything, the contrary appears likely. The proposed order is fraught with risk.

(4) There is reasonable expectation that there may be a saving of costs if all issues in both claims are resolved together.

(5) The parties agreed to a joint trial and no good reason has been given that warrants deviating from that agreed course of action.

50. I have ordered that a defence to the Defamation claim should be served. I will consider what further directions are required, beyond those already ordered, and deal with costs at the hearing on 23 January 2020 if a judgment hand down hearing cannot be fixed before then or the parties so agree.