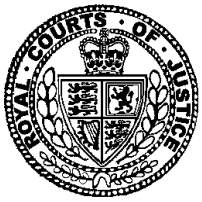

Neutral Citation Number: [2021] EWHC 873 (QB)

Case No: QB-2020-002450

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 April 2021

Before :

MR JUSTICE JOHNSON

- -

Between :

WALTER TZVI SORIANO

Claimant

- and -

(1) FORENSIC NEWS LLC
(2) SCOTT STEDMAN
(3) ERIC LEVAI
(4) JESS COLEMAN
(5) ROBERT DENAULT
(6) RICHARD SILVERSTEIN

Defendants

- -
- -

Greg Callus and Ben Hamer (instructed by Rechtschaffen Law Offices) for the Claimant
Alexandra Marzec (instructed by Eversheds Sutherland (International) LLP) for the Sixth Defendant

Hearing date: 29 March 2021

- -

Approved Judgment

Mr Justice Johnson:

1. The Claimant lives in London. He brings a claim against the Sixth Defendant in defamation and misuse of private information. The Sixth Defendant is a resident of the state of Washington in the United States of America ("the US"). The Claimant seeks permission to serve the claim form (and other documentation) on the Sixth Defendant out of the jurisdiction. The application was initially heard by Jay J on 14-15 December 2021: [2021] EWHC 56 (QB). It was granted (in part) in respect of the First to Fifth Defendants. Jay J was not satisfied that the Sixth Defendant had been properly served with notice of the hearing (see at [168]). He adjourned the application so far as it concerned the Sixth Defendant. He observed that the case against the Sixth Defendant fell into a slightly different category from that against the First to Fifth Defendants, thereby recognising that the outcome might be different.

2. There is a preliminary procedural issue as to whether the Sixth Defendant should be given relief from sanctions so as to be permitted to rely on late served evidence. The agreed substantive issues are whether the Claimant has established:

   (1) a good arguable case for a "jurisdictional gateway" under CPR PD 6B for service out of the jurisdiction,

   (2) a serious issue to be tried on the merits in respect of each of his claims,

   (3) (a) England and Wales is, on the balance of probabilities, clearly the most appropriate place in which to bring the defamation claim against the Sixth Defendant, and

   (b) there is a good arguable case that England and Wales is clearly or distinctly the appropriate forum for the trial of the dispute and,

   (c) in all the circumstances, the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

3. Issues (1), (2) and (3)(b) and (c) derive from *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 [2012] 1 WLR 1804 *per* Lord Collins JSC at [71]. Issue (3)(a) derives from section 9 Defamation Act 2013.

Summary of claim

Claim against the Sixth Defendant in defamation

4. The claim against the Sixth Defendant concerns two articles (referred to in the claim as "Publication 9" and "Publication 10") posted by him on his open access internet blog. His blog "focusses on the perceived excesses of the Israeli national security state". The evidence suggests that the majority of the readership of his blog is split between the US and Israel, and that a small proportion (around 5%) is in the United Kingdom ("UK") (cf paragraph 40 below).

5. Publication 9 was posted on 30 January 2020. The headline is "Poor Walter Soriano Beset by 'Dark, Hidden Forces'". It addresses a newspaper article, described as "a puff piece", in which the Claimant had accused "dark forces" of a conspiracy "to take him down." It says that the Claimant "is not a good guy", that he works "for corrupt

oligarchs and prime ministers", that he "sells weapons at steep profit to failed states" and that he "hires Israeli former military hackers to spy on his clients' enemies." The blog was tagged with the words "bibi netanyahu, corruption, oligarchs, press freedom, russia, spying, water soriano." Mr Terry's evidence (see paragraph 40 below) is that there have been 5,811 global unique pageviews of Publication 9, of which 2,741 were in the US and 792 were in the UK.

6. Publication 10 was posted on 14 February 2020. The headline is "Walter Soriano: Bibi's Bully and Fixer for Putin's Favourite Oligarch." The latter was said to be Oleg Deripaska who had been placed under sanctions by the US. The blog post says that the Claimant was a "fixer" for Oleg Deripaska who was charged with serving "as Putin's money launderer", that the arrangements included the transfer of billions of pounds to finance the Sochi Olympics, that the Claimant secured the security contract for Sochi Airport during the Olympics, that "there was a massive payoff to those close to Putin surrounding the Sochi Olympics" and that it had been suggested that the Claimant "may have had the Kremlin's blessing." It also said that the Sixth Defendant's interest in the Claimant arose when the Claimant filed a lawsuit against him after he reported a "news segment which said that [the Claimant] had been hired to spy on Israeli police investigating Netanyahu for corruption… It appears that he's not only Deripaska's fixer, but Bibi's as well." It said that the Claimant routinely lied. The blog post was tagged with the words "corruption, oligarchs, russia, walter soriano." Mr Terry's evidence is that there have been 774 unique pageviews of Publication 10, of which 276 were in the US and 149 were in the UK.

7. The Claimant alleges that the natural and ordinary meanings of the words complained of in these publications are:

   Publication 9: The Claimant is an individual who makes illegal arrangements for corrupt oligarchs; the Claimant hires hackers to illegally spy on his clients' enemies.

   Publication 10: The Claimant makes illegal arrangements for Oleg Deripaska and Israeli Prime Minister Benjamin Netanyahu.

8. The Claimant alleges that these publications have caused or are likely to cause serious harm to his reputation. He contends that they are "self-evidently serious, including grave criminality and attack his personal and professional integrity [and attack him] as a corrupt businessman", thereby directly impacting on his reputation which is crucial to his business. He contends that it can be inferred that "the allegations complained of have inevitably spread amongst others." As well as causing serious harm to his reputation, he says they have caused him distress and embarrassment. The Claimant's claim is limited to damage sustained in England and Wales.

Claim against Sixth Defendant for misuse of private information

9. The claim in misuse of private information concerns the publication by the Sixth Defendant of two photographs which were included in both Publication 9 and Publication 10. In one photograph the Claimant is shown with three other people at a table in what appears to be a restaurant. The faces of the other three people have been pixelated so as to be unrecognisable. The second photograph shows the Claimant with two other people. Again, the faces of the other two people have been pixelated. The setting is not immediately apparent, save that it is clearly indoors.

10. Both of these photographs were placed on the social media account of one of the Claimant's children. That social media account was publicly accessible. Any person could therefore access the photographs. The two photographs were copied from the social media account (or, as pleaded by the Claimant, "ripped from the social media accounts of a child in his family") and published by the First Defendant on 14 July 2019. The copies that were published by the First Defendant were then published by the Sixth Defendant as part of Publication 9 and then Publication 10.

11. No evidence has been provided as to the circumstances in which either photograph was taken, other than what can be inferred from the photographs themselves and their subsequent appearance on a social media account maintained by one of the Claimant's children. It does not appear that either photograph was taken at long range without the Claimant's knowledge or consent. It appears that the pictures are posed. In the first photograph neither the Claimant nor the other three are eating (it appears that they have paused eating for the purpose of having the photograph taken), the Claimant's head is turned towards the camera, and it appears that the other three people are also turned towards the camera. In the second photograph the Claimant and the other two people are facing towards the camera in what appears to be a group pose.

12. The Claimant says that the publication of the photographs amounts to a misuse of private information which has caused him "considerable distress and alarm."

13. The pleaded case also advances a claim in respect of a third photograph which had previously appeared in The Telegraph newspaper. In the course of his submissions, however, I understood Mr Callus to clarify that the claim against the Sixth Defendant for misuse of private information is limited to the two photographs described in paragraph 9 above.

Claim against First to Fifth Defendants

14. It is not suggested that there is any connection between the Sixth Defendant and the First to Fifth Defendants, save that they have all published material that is said to be defamatory of the Claimant.

15. The claim against the First to Fifth Defendants concerns 8 publications. Publication 1 was made on 5 June 2019. The claim in respect of that publication has been withdrawn by amendment. Publications 2-7 were made in July and August 2019. Publication 8 was made in June 2020. The Claimant alleges that the wording of each publication is defamatory of him in its natural and ordinary meaning. He says that Publication 2 bore the following (amongst other) defamatory meanings:

> "The Claimant is guilty of receiving illegal kickbacks and other corrupt payments from the Russian state under the façade of security consultancy work for Sochi Airport during the Olympic Games held in 2014. The Claimant entered into a corrupt and secret business partnership, in the Universe Security Group, with the Prime Minister of Israel, Benjamin Netanyahu."

16. Jay J summarised his preliminary assessment of the publications thus, at [20]:

> "the Publications appear to make extremely serious allegations against the Claimant at various Chase levels (including level one) asserting, for example, that he is the "thug" of the current Prime Minister of Israel, has close and corrupt links to the Russian State and various individuals of note, is guilty of multiple homicide, has received illegal "kickbacks", has been convicted of corruption in Monaco, is part of a money laundering operation and makes illegal arrangements for corrupt oligarchs and public figures. …on any view they amount to a sustained assault on the Claimant and his reputation."

17. Publication 2 contains the same photographs that were subsequently included within Publications 9 and 10. Publication 2 claims that these are "the first images ever published" of the Claimant. The Claimant contends that the inclusion of the photographs within Publication 2 amounts to unlawful misuse of his private information.

The procedural background

18. The procedural background has become unnecessarily complicated, but it is relevant to the application for relief from sanctions. It is necessary to set it out in some detail.

19. The Claimant did not comply with the Pre-action Protocol for Media and Communications Claims. No pre-action correspondence at all was sent to the Sixth Defendant.

20. The Claim Form was issued on 14 July 2020. The application for permission to serve the Claim Form out of the jurisdiction was filed on 24 August 2020 without notice to any of the respondents. The application would, ordinarily, have been determined without notice to the respondents, but with the prospect of a subsequent (on notice) application to set aside a grant of permission. That would involve two court determinations, with consequential additional time and cost.

21. On 30 September 2020 Nicklin J made an order requiring the Claimant to serve the application on the respondents (including the Sixth Defendant). He directed that any evidence in answer to the application should be filed 14 days before the hearing. The purpose (which was spelt out in the written reasons) was to enable the application to be determined on notice to the respondents, obviating the prospect of a subsequent application to set aside a without notice grant of permission, and thereby (it was to be anticipated, assuming compliance by the parties with their duties under CPR 1.3) saving time and costs. No party has sought to set aside this order or has suggested it was in any way inappropriate.

22. The Sixth Defendant was served with the papers at his home address on 2 October 2020. The Claimant instructed Dentons solicitors. At that point, no hearing date had been set. A hearing date was subsequently set for 28 October 2020. That hearing date was not communicated to the Sixth Defendant (but was communicated to the First to Fifth Defendants). The Claimant and the First to Fifth Defendants agreed that it was too short notice for a hearing. Their solicitors wrote a joint letter to the court asking for the hearing to be adjourned. On 26 October 2020 Nicklin J adjourned the hearing

and provided that the directions that had previously been set (including for the service of evidence 14 days before the hearing) would apply to the new hearing date.

23. The new hearing date was set for 14-15 December 2020. The Claimant and the First to Fifth Defendants were informed of the new hearing date. It appears that the Sixth Defendant was not informed of the new hearing date by either the Court or the Claimant. On 5 November 2020 the Sixth Defendant received a message from the Second Defendant: "Looks like December 14-15 is the date." On 20 November 2020 Dentons emailed the Claimant's solicitor asking whether the Claimant intended to pursue the application against the Sixth Defendant:

> "Should your client intend to do so, then we would be grateful for an update as to the current status of the matter, including in relation to the hearing of the Application. Our client has not received a Notice of Hearing in relation to the Application."

24. The Claimant's solicitor did not respond in writing (I was told that there was a conversation between solicitors, but there is no evidence as to what was said). On 23 November 2020 Dentons informed the Claimant that they could not act for him because of a conflict of interest.

25. On Friday, 11 December 2020 the Sixth Defendant instructed his current solicitors. On Monday, 14 December 2020 his solicitor wrote to the Court and explained that the Claimant had not been provided with proper notice of the hearing, and that there had been insufficient time to arrange representation or obtain full instructions. The hearing before Jay J took place on 14-15 December 2020. At the outset of the hearing Jay J indicated that if the first five defendants succeeded in opposing the application then it would follow that the application against the Sixth Defendant should be dismissed, but that otherwise an issue would arise as to how best to deal with the application against the Sixth Defendant.

26. On 7 January 2021 the Claimant made a without notice application to extend the validity of the Claim Form in respect of the Sixth Defendant to 14 April 2021 (the First to Fifth Defendants having agreed to an order extending the validity of the Claim Form in their cases). On 13 January 2021 Jay J made an order that the validity of the Claim Form against the Sixth Defendant was extended until 14 April 2021. He directed the Claimant to serve a copy of the order by no later than the date of service of the Claim Form (if permission were granted for service of the Claim Form) or by 14 April 2021 otherwise. The Sixth Defendant was granted permission to apply to set-aside the order within 7 days of it being served. This order has not yet been served.

27. On 15 January 2021 Jay J handed down judgment. He allowed the application in part (excluding a number of causes of action) against the First to Fifth Defendants. He made an order adjourning the application against the Sixth Defendant and directing that it be re-listed. On 16 February 2021 the Claimant's solicitor provided the Sixth Defendant's solicitor with a copy of the order of Jay J dated 15 January 2021 and indicated that arrangements were being made to secure a further listing of the application. On 23 February 2021 the Sixth Defendant's solicitor pointed out that in the light of the order of Jay J the claim would need to be substantially amended against the First to Firth Defendants, and that the Claimant might wish also to amend the claim against the Sixth Defendant. Notice was sought of the precise nature and

extent of the claim before any future hearing. A request was also made for documentation (including the material that had been put before Jay J). The Claimant's solicitors responded that they did not have permission to serve such documentation on the Sixth Defendant outside the jurisdiction, and asked whether the Sixth Defendant's solicitor would accept service. There does not appear to have been a response to that question.

28. On 9 March 2021 Murray J made an order on the Claimant's application notice which had been filed on 7 January 2021 (presumably unaware that Jay J had, by his order of 13 January 2021, disposed of that application). He ordered that the Claimant must file evidence in support of the application by 4.30pm on 15 March, that any evidence in response must be filed and served no later than 7 days before the hearing, and that the Claimant must serve the order by 4.30pm on 15 March 2021. The Claimant did not serve the order. The Claimant's solicitor's explanation is that when the order was received by the court it was automatically filed in the firm's "spam" email folder and was not noticed.

29. On the same day, 9 March 2021, the Sixth Defendant wrote to the court (without issuing an application notice) and asked for the hearing of the application that had been made on 24 August 2020 to be adjourned pending the determination of an appeal that had been brought by the First to Fifth Defendants. On 11 March 2021 Nicklin J refused that request. He noted that the application was listed to be heard on 29 March 2021.

30. On 12 March 2021 the Sixth Defendant applied for directions, including an extension of time until 22 March 2021 to serve evidence in opposition to the application. On 15 March 2021 Nicklin J directed that the application be considered at the hearing on 29 March 2021. He observed that the application was, arguably, an application for relief from sanctions and that the prospects of the Sixth Defendant being granted such relief (if that were required) would be improved if he served any evidence on which he sought to rely in good time before the hearing on 29 March 2021.

31. On 17 March 2021 the Claimant provided the Sixth Defendant with a draft Amended Claim Form and draft Amended Particulars of Claim. On that day the Sixth Defendant's solicitor accessed the court's electronic file and noticed the order made by Murray J on 9 March 2021.

32. On Monday, 22 March 2021 the Sixth Defendant's solicitor emailed the evidence on which the Sixth Defendant relies to the Claimant's solicitor. The evidence comprises a statement from his solicitor together with four exhibits. The statement, and three of the exhibits, were emailed at 4.13pm. The fourth exhibit was emailed at 4.43pm.

The evidence adduced by the parties

33. Neither the Claimant nor the Sixth Defendant have made a witness statement. The Claimant relies on his Claim Form and Particulars of Claim (and the draft Amended Claim Form and draft Amended Particulars of Claim), and two statements filed by his solicitor, Shlomo Rechtschaffen. The Sixth Defendant, subject to securing relief from sanctions, relies on two statements from his solicitor, Andrew Terry.

Particulars of Claim

34. The Particulars of Claim are supported by a statement of truth signed by Mr Rechtschaffen. The statement of truth is defective because it asserts that Mr Rechtschaffen understands (but not that the Claimant understands) the consequences of making a false statement in a document verified by a statement of truth. This was not a point taken by the Sixth Defendant. I am content to treat the Particulars of Claim as if they had been correctly verified by a statement of truth so that the Claimant may rely upon their content as evidence.

35. The Particulars of Claim state that the Claimant has dual Israeli/British citizenship, that he moved to the UK in 2003, that he is both domiciled and habitually resident in London, that he is the director of seven English companies, and that all of his professional life is centred in London. Eight of his nine children, and all of his seven grandchildren, are based in the UK. He claims that the UK is the "centre of his interests". Little or nothing is said about the reputation of the Claimant (a) in England and Wales or (b) worldwide.

36. The Particulars of Claim assert that each of the publications caused, or was likely to cause, serious harm to the Claimant's reputation, made self-evidently serious allegations which attacked his personal and professional integrity, and impacted on his professional reputation and business activities. They say that a compilation of Publications 1-8 is the first result on the first page when a search is made for "walter soriano" on the site "google.co.uk", whereas Publications 9 and 10 feature as the first two entries on the second page of search results.

37. The Particulars of Claim say the following about misuse of private information:

> "the photographs of the Claimant are self-evidently private, and the Claimant had a reasonable expectation that they would remain private. The Defendants were aware that the Claimant avoided publicity and protected his private life, and that there were no photographs of him online (prior, that is, to the invasion of privacy by the Defendants and each of them)… The Claimant's private photographs were flagrantly and unjustifiably published, with Publication 2, amongst others, noting the photographs of the Claimant were "the first images ever published" of the Claimant. The photographs include those of the Claimant with his children. The publication of each such photograph by the Defendants strikes at the heart of the Claimant's private and family life, and which magnifies the invasion of the Claimant's privacy, directly targeting as they do his children and family…"

Evidence on behalf of the Claimant

38. In his witness statements Mr Rechtschaffen states that the Claimant is a private individual and that (prior to Publications 1-10) there was minimal information about him available online. He says that he has a "relatively small property investment portfolio in the US" and that he owns properties in Israel, but that apart from these "passive investments" the Claimant's businesses are all in England, that he conducts

his business in England, and that save for family vacations and business trips he spends his time in the UK. He explains that in May 2018 the Claimant brought a libel claim against the Sixth Defendant in Israel. A challenge to the jurisdiction was upheld – the Israeli Supreme Court decided that Israel was not the right forum to deal with the claim, in part because neither the Claimant nor the Sixth Defendant are resident in Israel. As to the harm caused by the publications, Mr Rechtschaffen says:

> "the publications and each of them are defamatory and have caused or are likely to cause serious harm to… Mr Soriano's reputation, not least because due to the gravity of the imputations and the substantial publication within this jurisdiction."

39. He says that the Claimant has suffered detriment within the jurisdiction as a result of the misuse of private information by the Defendants. He does not, however, clearly identify any discrete damage that has been occasioned as a result of the photographs published by the Sixth Defendant, beyond asserting "[t]hey are private and their use as a weapon against him by the Sixth Defendant is deeply disturbing to him."

Evidence on behalf of the Sixth Defendant

40. Mr Terry explains that the Sixth Defendant is a US citizen who lives in Seattle, Washington. He considers himself to be a journalist and a human rights activist. He has no links to England and Wales and has not visited the UK since 1983. He founded his blog "Tikun Olam" (Hebrew meaning "repair the world") in 2003. He describes it as a liberal Jewish blog which deals with the Israeli-Arab conflict. Research from Google Analytics suggests that the proportion of readers who visit the blog from Israel, the US and the UK are in the region of 30%, 30% and 7% respectively. Mr Terry gives the figures for the number of unique accesses to each of Publications 9 and 10 (see paragraphs 5-6 above) that have been gleaned from Google Analytics.

41. Mr Terry draws attention to a widely read news publication in the US which reported in 2016 that the Senate Intelligence Committee was interested in speaking with the Claimant about his alleged connections to Oleg Deripaska (a Russian oligarch) and Israeli intelligence firms.

42. Mr Terry says that, in contrast to the position stated in the Particulars of Claim (see paragraph 36 above), at the time of preparing his statement Publication 9 was the 67th entry (appearing on the seventh page of results) when undertaking a search for "walter soriano" on google.co.uk, and Publication 10 did not appear at all. He exhibits the search results to make good that point.

43. Mr Terry exhibits to his statement "an independent legal view from a practicing defamation attorney in the State of Washington USA, Ms Jessica Goldman of Summit Law Group PLLC."

44. Ms Goldman says that a defamation action could be brought in either the federal court or the state court in Washington. The federal court would only have jurisdiction if "the amount in controversy is alleged to be at least $75,000" but no such limit applies in the state court. The Claimant would have to prove that the Sixth Defendant was negligent and that the published statements were false. Damages are an available

remedy. They would include damages for loss incurred outside the US, including in England and Wales. Damages are usually (but not always) assessed by a jury. Quantum is unpredictable. The court would have power to order that defamatory material be removed from the internet. It is unlikely that a defendant would be ordered to publish a summary of any judgment, because that would likely violate the First Amendment to the US Constitution. A defamation claimant is not entitled to recover attorney's fees or costs. There would be a high hurdle to obtain enforcement by a US court of a judgment given in favour of a claimant for a defamation claim brought in England. This is a result of the 2010 SPEECH Act. That Act provides that foreign defamation judgments are presumptively invalid, and it is unlikely that the presumption would be rebutted. Ms Goldman cited "Comparative Defamation Law: England and the United States" 24 U Miami Int'l & Comp L Rev 1 8-9 (2017):

> "In light of the SPEECH Act, it is widely assumed that American courts will normally refuse to recognize or enforce English libel and slander judgments against commercial publishers. This is so because United States tribunals have held that American federal and state law reflects a public policy in favor of a much broader and more protective freedom of the press than ever provided for under English law."

Relief from sanctions

45. On any view the Sixth Defendant has not filed his evidence in accordance with the Civil Procedure Rules or the orders of the Court. So far as the former are concerned, CPR PD 23 para 9.4 states:

> "Where a respondent to an application wishes to rely on evidence which has not yet been served he should serve it as soon as possible and in any event in accordance with any directions the court may have given…"

46. The Sixth Defendant has been aware of the application since 2 October 2020. Evidence was not served until 22 March 2021. It would have been possible for the evidence to have been secured, and served, much earlier than that.

47. So far as the orders of the Court are concerned, the order of 30 September 2020, read with that of 26 October 2020, required the evidence to be served by 14 days before the hearing. This was not done. Even if the order of Murray J could be treated as extending the deadline until 7 days before this hearing, the Sixth Defendant did not comply with that extended deadline. That would have required service by Friday 19 March 2021 (see CPR 2.8(2): "A period of time expressed as a number of days shall be computed as clear days" and CPR 2.8(3)(b): "In this rule 'clear days' means that in computing the number of days - …(b) if the end of the period is defined by reference to an event, the day on which that evidence occurs [is] not included" and CPR 6.26 which effectively precludes service on a weekend).

48. The parties agree that the question of whether the Sixth Defendant should be permitted to rely on the evidence turns on the application of the tripartite test for relief from sanctions set out by the Court of Appeal in *Denton v TH White Limited* [2014] EWCA Civ 906 [2014] 1 WLR 3926: (1) is the breach serious or significant? (2) if so,

is there a good reason? (3) if not, considering all the circumstances, should relief from sanctions be granted?

49. (1) Is the breach serious or significant? The requirement to serve evidence 14 days before the hearing was not contingent on the Sixth Defendant being given formal notice of the hearing (albeit the absence of such notice is relevant to the question of whether there is "good reason" - (2) below). Accordingly, the Sixth Defendant was in breach of the order to provide evidence 14 days in advance of the hearing before Jay J. The evidence was not provided until 4 months later. By that stage, the Sixth Defendant was also in breach of the deadline set by Murray J (assuming, in favour of the Sixth Defendant, that order extended the time for evidence to be served). The effect has been significantly to disrupt the preparation for the hearing. The Claimant responded to the evidence with a detailed statement from his solicitor on 24 March 2021 (and a further statement was then filed from the Sixth Defendant's solicitor on 25 March 2021). The time for skeleton arguments had to be extended, so that they were received one working day before the hearing. The time for the hearing had to be extended so as to accommodate (a) argument over relief from sanctions, and (b) the additional evidence. The breach was therefore both serious and significant.

50. (2) Is there a good reason for the breach? The fact that the Court did not notify the Sixth Defendant of the hearing that was listed for 14 December 2020 is likely to have been a factor in the Sixth Defendant's failure to comply with the direction to file its evidence in advance of that hearing (and his failure to attend the hearing). The Claimant's conduct (most notably in failing to provide details of the hearing in response to the email of 5 November 2020) is also likely to have been a significant contributory factor. I do not, however, consider that either of these factors provides a good reason for the breach. The Sixth Defendant had been told (albeit in what appears to have been an informal exchange) of the date by a co-defendant. It appears that this was sufficient (no other triggering factor is identified) to cause him to instruct his present solicitors on the working day before that hearing, and to cause them (no doubt after checking the cause list) to write to Jay J. There is no reason (certainly none has been given) why these steps could not have been taken weeks earlier so as to enable the evidence to be served in time. Nor has any good reason been given as to why evidence could not have been served before 22 March 2021. The Sixth Defendant candidly accepts that a mistake was made as to the deadline set by Murray J (because account was not taken of the effect of CPR 2.8 – see paragraph 47 above), and that explained why the documents were sent on 22 March 2021 rather than (as required) 19 March 2021. That mistake does not amount to a good reason. It does not, in any event, explain why the material had not been served well before 22 March 2021 and why, instead, it had been left so late. For the same reason, the fact that the Sixth Defendant only became aware of the order of Murray J on 17 March 2021 does not provide a good reason for failing to serve the evidence by 22 March 2021 or having failed to do so before 17 March 2021. Moreover, even on 22 March 2021 some of the evidence was served beyond the deadline to which the Claimant was (erroneously) working (because an exhibit was sent after 4.30pm). In isolation that would not have been a significant breach. Mr Callus accepts that this would not have resulted in a contested application for relief from sanctions. The reason given for why an exhibit was emailed after 4.30pm is that there had been an email outage at the Sixth Defendant's solicitor's offices. In isolation, that might have been capable of amounting to a good reason. The context, however, was that the Sixth Defendant had

left compliance with the order to what was (wrongly) thought to be the last possible moment. By doing so, he was courting disaster (cf *Barton v Wright Hassall LLP* [2018] UKSC 12 [2018] 1 WLR 1119 *per* Lord Sumption JSC at [23]).

51. Accordingly, I do not consider that the Sixth Defendant has shown a good reason for any part of the 4-month delay in serving his evidence.

52. (3) Considering all the circumstances, should relief from sanctions be granted? The failure to serve the evidence before the hearing in December 2020 has caused considerable procedural disruption and additional cost. The need for litigation to be conducted efficiently and at proportionate cost (see CPR 3.9(1)(a)), and the need to enforce compliance with the rules and the court's orders (see CPR 3.9(1)(b)) both militate against the grant of relief from sanctions. I give particular weight to these factors, but it is necessary to place the Sixth Defendant's breaches of the Court's orders in the wider litigation context, including, in particular, the conduct of the Claimant.

53. Aside from the Claimant's failure to respond to the Sixth Defendant's solicitor's request for details of the listing of the application of 24 August 2020, the Claimant did not (a) comply with the pre-action protocol, (b) provide any advance notification of the claim, (c) notify the Sixth Defendant's solicitor (until 16 February 2021) of the outcome of the hearing before Jay J in which judgment had been given on 15 January 2021, (d) serve the order of Murray J (which he had been ordered to serve), or (e) provide details of the amended claim (until 17 March 2021).

54. When matters are considered in the round, the Claimant shares a considerable allocation of the responsibility for the procedural confusion and disruption that has occurred. Moreover, the Claimant is in a position to address the evidence that has been belatedly served and has done so. In the event that relief from sanctions is granted, the Claimant does not seek an adjournment of the hearing. Further, there is some force in Ms Marzec's observation that the Claimant positively seeks to rely on aspects of the Sixth Defendant's evidence (for example as to publication of the blog having taken place in England and Wales) so as to plug (some of the) evidential gaps in the Claimant's case. In all the circumstances, it would, as between the Claimant and the Sixth Defendant, be disproportionate and unfair to refuse to entertain the Sixth Defendant's evidence.

55. It has been possible, with the considerable assistance of counsel (who, in addition to excellent and comprehensive skeleton arguments, helpfully focussed their oral submissions) to hear all of the oral argument within the period of time that was ultimately allocated. There has not been tangible disruption to other litigants. It would be undesirable to determine this application without the Sixth Defendant's evidence which is, in part, highly relevant and which addresses some evidential gaps that were identified by Jay J.

56. In all the circumstances, therefore, notwithstanding the serious breaches of the Court's orders for which no good reason has been given, I consider that the Sixth Defendant should be granted relief from sanctions, and the evidence on which he relies should be taken into account.

57. Expert evidence: A discrete issue arises in respect of the evidence of Jessica Goldman. That is expert evidence as to the law in Washington. It does not cease to be expert evidence simply by being exhibited to the factual statement of Mr Terry – see *New Media Distribution Company v Kagolovsky* [2018] EWHC 2742 (Ch) *per* Marcus Smith J at [10]. Permission to adduce expert evidence has not been granted. CPR 35.4(1) provides that an expert's report may not be put in evidence without the court's permission. There is nothing in CPR 35 to restrict its ambit to trials (so that permission would not be required to adduce expert evidence for an interlocutory application), although the possibility of such a limitation appears to have been contemplated in *Deutsche Bank AG v Comune di Savone* [2018] EWCA Civ 1740 [2018] 4 WLR 151 *per* Longmore LJ at [16]. Since *Deutsche,* it has been held at first instance that permission is required to adduce expert evidence on an interlocutory jurisdiction challenge – see *BB Energy (Gulf) DMCC v Al Moudi* [2018] EWHC 2595 (Comm) *per* Andrew Baker J at [49]-[50] and *Gulf International Bank BSC v Aldwood* [2019] EWHC 1666 (QB) *per* John Kimbell QC at [9]. I consider that CPR 35.4(1) prevents the Sixth Defendant from relying on the evidence of Jessica Goldman without the permission of the court.

58. I give that permission. Jay J did not have the benefit of any expert evidence. In the absence of such evidence, he determined a critical issue on the basis of where he considered an evidential burden lay (see at [154] and [157]). The evidence of Ms Goldman fills that (and other) evidential gaps. Expert evidence is reasonably required to resolve this application. Ms Goldman clearly has the requisite expertise to opine on the questions she has been asked (she has gained Bar admission to the Washington State Supreme Court and has acted in many First Amendment/Free Speech/Media Litigation cases, including defamation claims, and has acted for both claimants and defendants). Her evidence is clear and concise and apparently objective. The Claimant has not sought to adduce responsive evidence (or an adjournment so as to seek such responsive evidence). Mr Callus has not sought to challenge the evidence that Ms Goldman gives about US law (although he does make some forensic observations about what she says about the application of that law to this case). To the extent that Ms Goldman's evidence does not comply with the procedural requirements of a written expert report (CPR PD 35 paragraph 3.2) it would be disproportionate, unnecessary and contrary to the overriding objective to require that it be re-served in a form that complies with those requirements. I therefore direct, in accordance with CPR 35.5(1), that the evidence may be given in the form in which it has been presented, rather than in a written report that complies with CPR PD 35 paragraph 3.2.

Claims in defamation

(1) Is there a jurisdictional gateway under CPR PD 6B?

59. Paragraph 3.1 of CPR PD 6B, read with CPR 6.36, sets out the circumstances in which a Claimant may serve a claim form out of the jurisdiction with the permission of the court. The Claimant must show that his claims fall within one of these prescribed jurisdictional gateways. The standard of proof required is a good arguable case. In this context, that means "a plausible evidential basis", being one that shows that the Claimant has the better argument (albeit not, necessarily, "much the better argument") – see *Goldman Sachs International v Novo Banco* [2018] UKSC 34 [2018] 1 WLR 3683 *per* Lord Sumption JSC at [9] and *Kaefer Aislamientos SA de CV*

v AMS Drilling Mexico SA de CV [2019] EWCA Civ 10 [2019] 1 WLR 3614 *per* Green LJ at [71]-[80].

60. In respect of the claims in defamation the Claimant relies on CPR PD 6B paragraph 3.1(9)(a):

> "A claim is made in tort where – (a) damage was sustained… within the jurisdiction."

61. Ms Marzec helpfully concedes that this gateway applies: the Claimant has made a claim in tort and Ms Marzec accepts that he has established a good arguable case that damage was sustained within the jurisdiction. In doing so, Ms Marzec expressly reserves her position as to whether serious damage had been caused (which is relevant to the application of section 1 Defamation Act 2013 – see (2) below).

(2) Is there a serious issue to be tried?

62. The Claimant must establish that he has a real (as opposed to fanciful) prospect of success, such that he would succeed in resisting an application by the Sixth Defendant for summary judgment – *Altimo* at [71].

63. The Sixth Defendant's evidence is that Publications 9 and 10 were viewed 792 and 142 times respectively in the UK. For the purposes of this hearing, it can be inferred that a significant proportion of those views took place in England or Wales. The Claimant has therefore established a serious issue to be tried in relation to the question of publication.

64. In order to succeed in a claim in defamation, it is not sufficient for the Claimant to establish that he sustained damage – he must show that he suffered serious harm or that the publications were likely to cause serious harm. Otherwise, the content of the publications is not defamatory – see section 1 Defamation Act 2013. The Claimant must establish serious harm not merely by reference to the meaning of the words, but "by reference to the actual facts about [their] impact" – see *Lachaux v Independent Print Ltd* [2019] UKSC 27 [2020] AC 612 *per* Lord Sumption JSC at [12]. Ms Marzec's submission is that he has failed to do this because:

(a) The focus must be on the alleged defamatory meanings of Publication 9 and Publication 10, rather than the content of the publications as a whole – *Sube v News Group Newspapers* [2018] EWHC 1961 (QB) [2018] 1 WLR 5767 *per* Warby J at [34].

(b) The alleged defamatory meanings (see paragraph 7 above) are framed at a high level of generality, cover a range of activity of varying degrees of seriousness, and are contingent on the reader's opinions of Mr Deripaska and Mr Netanyahu.

(c) The impact on the Claimant is irrelevant – it is the impact on his reputation in the minds of others that matters.

(d) Serious harm cannot be inferred, having regard to the limited readership of the publications and the obscurity of the Sixth Defendant as a source.

65. I accept points (a) and (c). As to (b), it is not necessary or permissible (on this hearing) to reach a concluded view as to the natural meaning of the words. There is scope for argument as to their precise meaning. The Sixth Defendant may be able to argue that the meaning is more benign than that pleaded by the Claimant, or that the meaning pleaded by the Claimant carries a less serious imputation than alleged by the Claimant. On the other hand, the Claimant only has to show that he has a real prospect of establishing serious harm. Considering the Claimant's pleaded meanings as against the actual content of the publications, I am satisfied that the Claimant has a real prospect of establishing that the words complained of amount to a serious imputation as to the Claimant's character.

66. That does not mean that the words necessarily caused, or were likely to cause, serious harm. As to that issue, the Claimant has not himself given any evidence as to the harm that was caused. Nor has he produced any evidence from any person whose opinion of the Claimant was changed by reading Publication 9 or Publication 10. The only evidence is from his solicitor (see paragraph 38 above) which simply rehearses the pleaded case without identifying any harm caused by the alleged defamatory imputations in Publications 9 and/or 10.

67. The words of Publication 10 are arguably not as hard-hitting as those of Publication 9. It had only 149 views in the UK (and so no more than that number in England and Wales). In determining whether Publication 10 caused serious harm it will be necessary to leave out of account the damage that is attributable to Publication 9 (and indeed Publications 1-8). Similarly, in determining whether Publication 9 caused serious harm it will be necessary to leave out of account the damage that is attributable to Publications 1-8.

68. For all these reasons I agree with Ms Marzec to the extent that it is not a foregone conclusion that an inference will be available at trial that serious harm was caused. If there is no direct evidence of harm, and if an inference is not available, then the Claimant will fail at trial.

69. I do not, however, rule out the possibility that an inference may be available, depending on the primary evidence that is adduced at trial. Notwithstanding the lack of evidence that has been adduced in support of the application, I am satisfied that the Claimant has a real prospect of establishing that he has suffered significant harm. The action is at an early stage and there is scope for further disclosure. The alleged imputations (or something akin to them) are capable of being established, and they arguably amount to a serious attack on the Claimant's integrity capable of causing significant harm to business interests. On the basis of the assertions made in the Particulars of Claim, both Publications featured on the second page of a Google search against the Claimant's name (and, on the basis of Mr Terry's statement, Publication 9 continues to feature – albeit lower down the rankings – 8 months later). The "serious issue to be tried" burden sets a relatively low burden. I am satisfied it has been surmounted on the totality of the material that has been adduced.

(3)(a) Is England and Wales, on the balance of probabilities, clearly the most appropriate place in which to bring the defamation claim against the Sixth Defendant, (b) Is there is a good arguable case that England and Wales is clearly or distinctly the appropriate forum for the trial of the dispute and, (c) in all the circumstances, should the court exercise its discretion to permit service of the proceedings out of the jurisdiction.

70. Section 9 Defamation Act 2013 states:

> "**9 Action against a person not domiciled in the UK or a Member State etc**
>
> (1) This section applies to an action for defamation against a person who is not domiciled—
> (a) in the United Kingdom;
> (b) in another Member State; or
> (c) in a state which is for the time being a contracting party to the Lugano Convention.
>
> (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.
>
> (3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.
>
> …"

71. It is therefore necessary to establish whether it is clearly more appropriate to bring an action in respect of the statement in England and Wales, than any other place. Mr Callus realistically accepts (for the purpose of this hearing) that the burden is on the Claimant to establish the section 9 test on the balance of probabilities (cf Jay J at [117]-[120]), although he reserves his position for argument in the Court of Appeal.

72. Mr Callus advances an elaborate argument that the approach to the "most appropriate place" test should be informed by principles of European Union law, and that the key to identifying the "most appropriate place" is the assessment of where the Claimant's "centre of interests" lies. His argument is that claims with an international element are ultimately governed by the Brussels Recast Regulation ("BRR"). The European Union (Withdrawal Agreement) Act 2020 provides that EU Regulations (like the BRR) which had direct effect under the European Communities Act 1971 continue to do so under the UK-EU withdrawal agreement. The BRR therefore applies until the end of the implementation period for that agreement at 11pm on 31 December 2020. For that reason it applied at the time this claim was issued on 14 July 2020. It continues to apply to these proceedings under the savings provision in regulation 92 Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2009. Article 6 BRR provides that (subject to qualifications) the court's jurisdiction over defendants

domiciled in the US is governed by the domestic law of England and Wales. That domestic law includes Part 1 of the Civil Jurisdiction and Judgments Act 1982 which implements the Brussels, Lugano and Hague Conventions into domestic law. Article 5(3) of the Brussels Convention provides that a person domiciled in a Contracting State may be sued in another Contracting State "in matters relating to tort… in the courts of the place where the harmful event occurred." By section 3(2) of the 1982 Act judicial notice shall be taken of any decision of, or expression of opinion by, the Court of Justice of the European Union ("CJEU") on any question as to the meaning or effect of any provision of those Conventions. In *eDate Advertising v X* [2012] QB 654 the CJEU recognised that there were particular difficulties in applying the "place where the harmful event occurred" test in article 5(3) of the Brussels Convention in cases of defamatory publications on the internet (see at [46]) because "the distribution of content placed online is in principle universal." At [48]-[49] the CJEU said:

> "…a person who has suffered an infringement of a personality right by means of the Internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice.
>
> The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a member state in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that state.
>
> The jurisdiction of the court of the place where the alleged victim has the centre of his interests is in accordance with the aim of predictability of the rules governing jurisdiction… also with regard to the defendant, given that the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the persons who are the subject of that content. The view must therefore be taken that the centre of interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued."

73. Mr Callus argues that this jurisprudence informs the approach to be taken to the assessment of the "most appropriate place" within section 9 of the 2013 Act: Parliament is to be taken to have been aware of the general law (including the decision in *eDate*) when it passed the 2013 Act, and the whole regime governing the bringing of a claim against a defendant domiciled outside the jurisdiction stems from the BRR, such that principles derived by the CJEU have an important role to play.

74. I accept that identification of the place where a claimant has suffered most reputational damage in a defamation claim is potentially highly relevant to the assessment of the most appropriate place in which to bring a claim (see paragraph 81(b) below). The place where a claimant has suffered most reputational damage will, in many cases, be the place which is "the centre of his interests" in the sense explained in *eDate*. So, in many cases, there may be no difference between the application of the *eDate* test and the application of section 9. I do not, however, consider that "the centre of interests" test is that which should be directly applied to the assessment of the most appropriate place in which to bring a claim within the meaning of section 9. There is no principled reason why the decision of the CJEU in *eDate* should directly influence the interpretation of section 9 of the 2013 Act. There is no indication that Parliament intended simply to adopt the *eDate* test. Neither the Act nor the Explanatory Notes refer to the *eDate* test. The language of section 9 is much more open ended. It allows for the consideration of all the circumstances of the case, not just the centre of interests of the claimant (if that can even be ascertained). Section 9 was implemented to address a mischief (so called "libel-tourism") which is distinct from the focus of *eDate* and the provisions with which that case is concerned. Although *eDate* pre-dates the 2013 Act, the more direct jurisprudential context for the enactment of section 9 is the decision in *King v Lewis* [2004] EWCA Civ 1329 where the Court of Appeal (Lord Woolf CJ, Mummery and Laws LJJ) explained that the court's discretion when assessing the most appropriate forum "will tend to be more open-textured" in an internet case than otherwise – see at [31]. There is nothing in the language or statutory context of section 9 to suggest a Parliamentary intention to narrow the "open-textured" nature of the assessment.

75. Mr Callus argues that the court must construe section 9 of the 2013 Act in a way that is compatible with the right of access to a court that is guaranteed under Article 6 of the European Convention on Human Rights (see eg *Golder v United Kingdom* (1979-80) 1 EHRR 524 at [36]). In principle, I agree. However, I was shown no authority which suggests that the well-established domestic principles to establish the most appropriate forum for a trial (see *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460), to which section 9 closely corresponds, raise any serious issue as to the right of access to a court. In particular, I was not shown any authority to suggest that refusing permission to serve outside the jurisdiction is incompatible with Article 6 in a case where there is a more appropriate place in which to bring proceedings. Such a decision does not deny access to a court. It facilitates access to a domestic court for the purpose of determining the place where it is most appropriate to bring a claim.

76. The Court of Appeal has held that section 9 raises a "multifactorial question" which is "fact specific" and is likely to require an assessment on the evidence as to "whether any competing jurisdiction is an appropriate place to bring this claim" (see *Wright v Ver* [2020] EWCA Civ 672 [2020] 1 WLR 3913 *per* Dingemans LJ at [65]).

77. The possible competing jurisdictions for this claim are Israel, the US (by way of a federal claim), and the state of Washington (the Sixth Defendant's place of domicile).

78. So far as Israel is concerned, the Sixth Defendant's evidence is that 75% of the readership of the blog generally was split between the US and Israel. For these two publications, the proportion of the readership in the US was 47% and 36%. That suggests that the proportion in Israel may have been in excess of 25%. That is

substantially more than the proportion in the UK. In isolation this might suggest that Israel would be a more appropriate jurisdiction in which to pursue a claim. The evidence, however, is that the Claimant has previously brought a defamation claim (in respect of a different publication) against the Sixth Defendant in Israel. The Sixth Defendant's jurisdictional challenge was upheld. Part of the court's reasoning was that neither the Claimant nor the Sixth Defendant were resident in Israel. The position remains that neither the Claimant nor the Sixth Defendant are resident in Israel. It therefore seems unlikely, on the evidence, that a claim in Israel would be entertained. Accordingly, I am satisfied that the Claimant has established that Israel is not an appropriate place in which to bring a claim.

79. So far as a federal claim in the US is concerned, Ms Goldman's evidence is that a federal claim for defamation may only be brought where the value of the claim exceeds $75,000. The claim brought against all defendants is limited to £50,000 (which is less than $75,000). A claim in the US may be brought in respect of worldwide loss of reputation. Given the unpredictability of jury awards it might be open to the Claimant to advance a more expansive claim (possibly one exceeding $75,000). That, however, involves a degree of speculation. I accept Mr Callus' submission that, on the evidence, a federal claim may face a jurisdictional bar. That being the case I am satisfied that the Claimant has established that a federal claim in the US would not be an appropriate place to bring a claim.

80. It is therefore not surprising that Ms Marzec focusses on the state of Washington as a place which, she argues, is more appropriate for a claim to be brought than England and Wales (or, strictly, that it has not been shown to be a less appropriate place for a claim to be brought than England and Wales).

81. The factors that are relevant to assessing whether England and Wales is clearly the most appropriate place in which to bring an action include:

(a) the number of times the statement was published in England and Wales, compared to the number of times it was published in other jurisdictions,

(b) the amount of damage to the Claimant's reputation in this jurisdiction compared to elsewhere,

(c) the extent to which the publication was targeted at a readership in this jurisdiction compared to elsewhere,

(d) the available remedies from the Courts of the other jurisdictions,

(e) the costs of pursuing proceedings in each possible jurisdiction,

(f) whether there is reason to think that the Claimant would not receive a fair hearing elsewhere,

(g) language barriers,

(h) the location of likely witnesses.

(See the Explanatory Notes to the 2013 Act at paragraph 66, and *Wright per* Dingemans LJ at [61]-[65]). I will address each of these factors before turning to an additional point which did not arise in *Wright*.

82. (a) Number of publications: In some cases, publication figures may give a clear steer to the correct answer to the statutory question. The Explanatory Notes give an example of a statement that is published 100,000 times in Australia but only 5,000 times in England and Wales. Such figures provide a "good basis on which to conclude" that Australia is the most appropriate jurisdiction to bring an action. In this case, the publication figures (see paragraphs 5-6 above) show that each of the two blog posts was viewed many more times in the US than in the UK (a ratio of 3.5:1 and 1.9:1 for Publication 9 and Publication 10 respectively). The discrepancy is not nearly as stark as that given in the Explanatory Notes (20:1). Mr Callus points out that the number of views in each individual state in the US (and in Washington in particular) is likely to be far less than the number of views in England and Wales. I am prepared to draw that inference (particularly as that information is accessible to the Sixth Defendant, but not the Claimant, and the Sixth Defendant has not provided it despite a request). I do not, however, think it appropriate simply to compare the publication figures of an individual state in the US with those for England and Wales, without taking any account of the fact that the level of publication across the whole of the US is far greater than that across the UK. I note that the example given in the Explanatory Notes is Australia, rather than an individual state within Australia. The expert evidence is that a claim in Washington could be brought in respect of all damage caused in the US (and internationally). As Jay J observed at [146]: "the appropriate comparison should be between publication in England and Wales on the one hand and publication throughout the US on the other." The volume of publication is significantly greater in the US than it is in England and Wales. That factor suggests that a state in the US is a more appropriate place to bring a claim than England and Wales. I do not, however, consider that the figures alone are so clear as to provide the answer. Other factors need to be taken into account.

83. (b) Extent of damage to reputation: The evidence as to the Claimant's reputation in different locations, and the extent of damage to his reputation, is scant. Mr Rechtschaffen's statement suggests that the Claimant's domestic and family life is firmly rooted in England and Wales where he and his family live. The evidence as to his business life is far less clear. The Claimant has not been forthcoming about the nature of his businesses, his customer base or his business associates. The fact that his businesses are incorporated in the UK does not mean that they have a solely domestic outlook. Nor does the fact that the Claimant spends his time in the UK apart from business trips and vacations. The fact that he undertakes business trips outside the UK shows that there is an international element to his businesses, but the Claimant gives no details whatsoever about this. The evidence filed on behalf of the First to Fifth Defendants does give a little more detail – see Jay J at [135]:

> "In 2010 the Claimant founded USG Security Ltd with offices in Central London. According to the Claimant's LinkedIn page, this is a business with worldwide interests, having provided its services in Russia, Mexico and Switzerland and for several "world airlines"… [T]he Claimant owns or controls a network of companies across multiple jurisdictions including BVI and

> Florida. Playland Investments LLC is a property company based in Florida, and is presumably where the Claimant's "passive investments" are located. The US Senate Intelligence Committee reported on the Claimant's business relationships with Russian oligarchs and Psy Group, a private Israeli intelligence company."

84. By contrast the Claimant has given no evidence as to the activities of his businesses either directly or through his solicitor. Jay J commented (at [138]):

> "the Claimant has been far from forthcoming about his business interests both here and overseas. Para 57 of the Particulars of Claim is couched in very general if not emollient terms… what little that has been said emerges vicariously through his solicitor, and in my view he could have afforded me much greater assistance. In particular, it would have been useful to know whether USG Security Ltd is his sole business in the UK, barring investments in property, as well as the number and/or percentage of its clients who are based here rather than in Russia, Israel and elsewhere. The impression given is of excessive reticence bordering on secrecy."

The Claimant has filed no further evidence on this issue for the purpose of this hearing.

85. Ms Marzec points to evidence that articles have been written about the Claimant in a number of different jurisdictions. I do not consider that this is of real assistance in determining where the most reputational damage has been occasioned to the Claimant. Many of the articles date back some years, I am in no position to make a judgment as to the truth of the content of the articles, and the fact that the Claimant has excited the attention of commentators in other countries is not a reliable indicator of the location where his reputation is most vulnerable to damage.

86. Notwithstanding what he described as "evidential *lacunae*" Jay J was prepared to accept that the Claimant's reputation was "most obviously centred" in the UK. That fact sensitive conclusion (reached in the context of a claim against different defendants and in respect of different publications) is not binding on the Sixth Defendant. Ms Marzec challenges the correctness of the conclusion. In any event, however, it does not follow from that finding that the Claimant has suffered greater reputational damage in this jurisdiction than elsewhere as a result of Publications 9 and 10. That is partly because the location where a person's reputation is centred is not necessarily the same as the location where their reputation has sustained most damage, and partly because the publications concerned are different.

87. In my judgment, the Claimant has not discharged the burden of showing that Publications 9 and/or 10 damaged his reputation more extensively in England and Wales than in any other jurisdiction. I reach that view having regard in particular to (a) the Claimant's international business interests, (b) the lack of any evidence from the Claimant on which to enable the court to make anything other than a very broad brush assessment, (c) the much more extensive readership of Publications 9 and 10 in the US than in England and Wales, and (d) the small number of people (in absolute

terms) who read Publications 9 and 10 in England and Wales (compared to the numbers who read, for example, Publication 2). Conversely, I do not consider that a positive conclusion can be reached that the Claimant's reputation was damaged more extensively in any other identified jurisdiction – the evidence is simply not available to make that sort of comparison.

88. Ms Marzec suggests that the conclusion in *Wright* that Dr Wright had not discharged the section 9 burden reads across to this case. She says that Dr Wright had extensive links to the UK, no links to the US and the breakdown of the publication between the US and UK in that case was 23% as against 5% (and the absolute number of publications in the UK – 96,915 was much higher than in the present case). I do not agree that the result in *Wright* mandates any particular result in the present case. The issues are exquisitely fact sensitive. The comparisons that Ms Marzec seeks to draw are too superficial. There was a much firmer evidential foundation in *Wright* as to the nature of Dr Wright's business (and the whole case arose in the context of bitcoin – a currency that is intended to operate seamlessly across international boundaries and which Dr Wright claimed to have invented). In the present case I do not consider that either the publication figures, or the location of the primary damage to the Claimant's reputation, provide a clear answer to the section 9 question either on their own terms or by comparison with *Wright*.

89. (c) Target audience: The blog appears to have been targeted primarily to an Israeli/US audience. It concerns the Israeli-Arab conflict, including US Middle East policy. According to Mr Terry, the Sixth Defendant does not write about UK affairs except as they relate to "Israel and related issues." The evidence is that a significant majority of the readership was split between the US and Israel. That is a factor in favour of Washington being the most appropriate place to bring an action (taking the same approach of not artificially distinguishing between publication in an individual state in the US as opposed to publication across the US).

90. (d) Remedies: Ms Goldman's evidence shows that an action in Washington could encompass a claim for damage sustained in England and Wales, but that an action in England is unlikely to be enforceable in the US. That seems to me to be a weighty factor in favour of Washington being the most appropriate place in which to bring an action. It also markedly distinguishes the case against the Sixth Defendant from that against the First to Fifth Defendants (where Jay J considered that the Defendants had not discharged an evidential burden to show that a claim in California – being the alternative candidate state – could encompass damages sustained in England and Wales – see at [153]-[154] and [157]). Mr Callus argues that even if enforcement of an English judgment is not possible in the US, the Claimant would still benefit from what he says is the primary objective of this litigation, namely the vindication of his reputation from a public judgment and "the unique injunctive and other relief that the English High Court can offer." This does not provide an answer to the effect of Ms Goldman's evidence. Insofar as the Claimant seeks vindication, he is able to secure that from a Washington court. Insofar as the Claimant is able to secure injunctive relief in England that is of limited utility if it is not enforceable. A comparison of the practical utility of the available remedies therefore militates in favour of Washington being the more appropriate place to bring a claim.

91. (e)-(h) Costs/fair hearing/language/witnesses: The other factors identified in *Wright* do not seem to me to be of great moment in this case. There is no suggestion that the

Claimant would not receive a fair hearing in Washington. The remedies available are different, but damages are available and the evidence is that the Claimant would, in any event, face a high hurdle to obtain enforcement in the US of a judgment in his favour in England (so the availability of additional remedies is unlikely to have a practical impact). The expert evidence suggests that the Claimant would not be able to recover his attorney's fees or costs in a successful lawsuit filed in Washington State. That might have made Washington a less appropriate choice, but an order for costs in this jurisdiction is unlikely to be enforceable in the US. Those two factors therefore largely cancel each other out. There is no language issue. The disadvantages to the Claimant and the Sixth Defendant of having to travel to Washington or England respectively are largely equal and opposite. Although assertions are made as to the likely location of witnesses they are without any sound evidential basis.

92. The Claimant says that a claim in Washington would be "perilous", in part because there are "incredibly onerous thresholds for a claimant" including the need to prove "falsity". I do not consider this is a relevant factor. The appropriate forum test (whether at common law or under the 2013 Act) is blind to the relative prospects of success of either party in different jurisdictions (so long as there is a fair procedure) – see *Spiliada per* Lord Goff at 482E:

> "We have to consider where the case may be tried 'suitably for the interests of all the parties and for the ends of justice.' Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave… simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum."

93. For all these reasons, considering the claim against the Sixth Defendant in isolation, the Claimant has failed to demonstrate that England and Wales is a more appropriate place to bring the action than Washington.

94. The claim against the Sixth Defendant does not, however, stand in isolation. Aside from the claim against the Sixth Defendant, there are claims against a further five defendants in respect of an additional eight publications. Those claims are proceeding in England and Wales. They are distinct claims based on separate causes of action, but there is considerable overlap. It will, for example, be necessary to take account of damage to the Claimant's reputation occasioned by Publications 1-8 when assessing whether serious harm was caused (and, if so quantifying that harm) by Publications 9-10. It may be that there will be overlap between any defences that are advanced. It would be more convenient if the claims proceeded in the same jurisdiction than if there were parallel proceedings in separate jurisdictions. This is a factor which was not identified in *Wright* (because it had no application in that case, being a claim against a single defendant) but which has considerable significance here.

95. In *Spiliada* Staughton J refused an application to set aside an order for service of proceedings out of the jurisdiction in circumstances where he had started to hear the trial of a similar action for damages which involved the same defendant (but a different claimant). This decision was overturned by the Court of Appeal but restored by the House of Lords. Lord Goff found that the judge had been entitled to weigh in the balance the "efficiency, expedition and economy" of the two cases being tried in the same jurisdiction – see at 486A. In the present case, the fact that the claims against the First to Fifth Defendants are proceeding in this jurisdiction is a significant factor in favour of the claim against the Sixth Defendant also being brought in this jurisdiction. It does not, for these purposes, make a significant difference that the focus of the test in *Spiliada* was the location of the trial, whereas the focus of the test under section 9 is the location where the action is brought. So far as the trial is concerned, there are likely to be common and linked issues, including as to the Claimant's pre-publication reputation, the harm caused by each of the publications and any defences of public interest or truth. However, even at the point of bringing the claim, this application shows the desirability of the claim against the Sixth Defendant, and that against the First to Fifth Defendants, being brought in the same place.

96. Accordingly, in my judgment it is more appropriate for the case against the Sixth Defendant to be brought, to proceed and to be tried in the same jurisdiction as that against the First to Fifth Defendants. This outweighs those factors that weigh in favour of Washington as a more appropriate place to bring a claim.

97. I also consider that the residual discretion should be exercised in favour of allowing the application in respect of the defamation claim. Having found that the jurisdictional tests are satisfied there is no other residual factor which would justify refusing the application for service out of the jurisdiction (in contrast to the claim for misuse of private information – see paragraph 112 below).

Claims for misuse of private information

(1) Is there a jurisdictional gateway under CPR PD 6B?

98. The Claimant relies on CPR PD 6B paragraph 3.1(21)(a):

> "A claim is made for breach of confidence or misuse of private information where – (a) detriment was suffered, or will be suffered, within the jurisdiction;"

99. The Claimant has made a claim for misuse of private information. The pleaded detriment is "considerable distress and alarm." The Claimant is resident in England. To the extent that he has suffered distress or alarm then that detriment was suffered within the jurisdiction. The issue, therefore, is whether the Claimant has established a good arguable case that he has sustained distress and/or alarm as a result of the publication, by the Sixth Defendant, of the two photographs.

100. The evidence strongly suggests that the Claimant jealously guards his privacy, does not seek a public profile, and is protective of his image. It appears that there was no image of the Claimant in the public domain (aside from on the social media accounts

of his family) until 14 July 2019 when photographs of him were included within Publication 2. The evidence is that there have been 15,670 views of Publication 2.

101. In the light of the evidence as to the importance that the Claimant attaches to his privacy, including the privacy of his image, I readily accept that the Claimant has a good arguable case that the mass publication of images of him has caused him distress and/or alarm. That mass publication took place from 14 July 2019. On 25 January 2020 The Sunday Telegraph published (both in the paper edition and The Telegraph online edition) a very clear photograph of the Claimant. Publication 9 was 5 days later. It did not include any new photograph of the Claimant: the 2 photographs about which complaint is made had previously been published 6 months earlier.

102. The Claimant has not, himself, provided any evidence that he suffered distress or alarm as a result of the inclusion of photographs of him within Publication 9, beyond the distress and alarm that he had already sustained as a result of the mass public dissemination of his image that flowed from Publication 2 (and, perhaps, the no doubt much wider dissemination of his image within England and Wales by The Sunday Telegraph).

103. His pleaded case is that the publication of the photographs has caused him considerable distress and alarm, without distinguishing between different publications. The photographs were first published by the First Defendant, six months before Publication 9. The First Defendant's publication was far more extensively viewed than publication 9 (15,670 in total including 1,507 in the UK, so approximately twice as many views in the UK as publication 9). There is no positive pleaded case that Publication 9 caused any additional distress or alarm. The Claimant has not, himself, given any evidence that the re-publication of the photographs in Publications 9 and/or 10 caused him additional distress or alarm. His solicitor does not quite give such evidence in terms, albeit he does say (without attributing a source, basis or explanation) that the Claimant was "disturbed" by the Sixth Defendant's use of the photographs "as a weapon".

104. In the absence of direct or clear evidence, and in the light of the previous mass publication of the Claimant's image, including these precise photographs, and in the absence of anything that is obviously inherently private about the photographs, I do not consider that the Claimant has discharged the burden of showing that he has a good arguable case that he has sustained distress or alarm as a result of the publication by the Sixth Defendant of photographs of him. It follows that he has not established that there is a jurisdictional gateway under CPR PD 6B for his claim for misuse of private information.

(2) Is there a serious issue to be tried?

105. In the claim against the First to Fifth Defendants (in respect of Publication 2 which includes the same photographs) Jay J was "not entirely persuaded" by the argument that the Claimant's case did not give rise "to an actionable misuse" - see at [120]:

> "In particular, the circumstances in which the photographs were taken, and then obtained by the Defendants, are not clear, and it is arguable that they do depict the Claimant in a private or personal setting, along with family members, whose faces we

> cannot see. Whether these publications were sufficiently intrusive entails a fact-sensitive balancing exercise. On the evidence currently available, I do not consider that this exercise can be performed in a manner which defeats this claim."

106. The case against the Sixth Defendant is one step further removed. The circumstances in which the photographs were obtained by the Sixth Defendant is clear (unlike the position in respect of the First to Fifth Defendants): they were obtained from Publication 2. That had been published six months before Publication 9, and no proceedings had been brought asserting misuse of private information in respect of that publication at the time that they were re-published by the Sixth Defendant.

107. Mr Callus is right that a claim for misuse of private information is not necessarily barred by the fact that the information was technically already available to members of the public (see *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB) [2005] EMLR 31 *per* Tugendhat J at [81] where the addresses of sex offenders, although recorded on the public Land Register, were held not to be in the public domain "to the extent, or in the sense" that they were ineligible for protection). Mr Callus relies on *Reklos v Greece* [2009] EMLR 16 to support the proposition that "a photograph of an individual can be private, even if taken in a public place." In that case, photographs of a new-born baby were taken, without the parents' knowledge or consent, in a sterile postnatal unit to which only supervised staff had access.

108. The authorities undoubtedly show that the question of whether a person enjoys a reasonable expectation of privacy is acutely fact sensitive. The Claimant was required to plead (see CPR PD 53 paragraph 8.1, and cf *Candy v Holyoake* [2017] EWHC 373 (QB) *per* Warby J at [49]):

> "1) the information as to which the claimant claims to have (or to have had) a reasonable expectation of privacy;
>
> (2) the facts and matters upon which the claimant relies in support of the contention that they had (or have) such a reasonable expectation;
>
> (3) the use (or threatened use) of the information by the defendant which the claimant claims was (or would be) a misuse; and
>
> (4) any facts and matters upon which the claimant relies in support of their contention that their rights not to have the specified information used by the defendant in the way alleged outweighed (or outweigh) any rights of the defendant to use the information in that manner."

109. Here, I do not consider that there is anything in the pleaded facts, or the evidence, to support a conclusion that the Claimant continued to enjoy a reasonable expectation of privacy in respect of the photographs not only after they had been posted on his child's public social media account, but also after they had been circulating on the internet for six months. In the absence of any pleading, or any sufficient evidential foundation, the Claimant has not established that there is a serious issue to be tried.

(3) Is England and Wales the most appropriate forum for the trial of the claim for misuse of private information and, in all the circumstances, should the court exercise its discretion to permit service of the proceedings out of the jurisdiction?

110. For the reasons given at paragraphs 98-109 above, I refuse permission to serve the Claim Form outside the jurisdiction insofar as it concerns the claim for misuse of private information. The question of whether England and Wales is the most appropriate forum for the trial of a claim for misuse of private information is not therefore material to the outcome of the application.

111. For completeness, I accept that (if the Claimant had established requirements (1) and (2)) England and Wales would be the most appropriate forum for such a trial for reasons that mirror paragraphs 94-95 above: given that the trial of the claim against the First to Fifth Defendants in respect of the very same photographs will proceed in England, it is more appropriate that a claim against the Sixth Defendant should likewise proceed in England rather than by way of parallel proceedings in another jurisdiction.

112. As to the residual discretion, like Jay J (see at [111] and [167]) I do not consider that it would be proportionate for a claim for misuse of private information to proceed if it stood alone. However, I have found the claim in defamation may proceed. On that basis, if the claims for misuse of private information had satisfied (1) the jurisdictional gateway and (2) the merits tests, then I would have found that the claim for misuse of private information could likewise proceed.

Next steps

113. The draft Amended Particulars of Claim need to be further amended to remove the claim for misuse of private information.

114. The claim against the Sixth Defendant should be reunited with the claims against the First to Fifth Defendants. If there is to be an appeal (by either party) then (subject to any order of the Court of Appeal) that should be heard at the same time as the appeal (for which permission has been given) brought by the First to Fifth Defendants. The claim should be stayed pending the outcome of the appeal.

115. If there is no appeal then further steps will need to be stayed pending the outcome of the appeal brought by the First to Fifth Defendants. If that appeal is allowed (such that permission to serve out of the jurisdiction is refused in the case against the First to Fifth Defendants) then the claim against the Sixth Defendant will not proceed further. If that appeal is dismissed then the claim against all defendants can proceed together (albeit in the Sixth Defendant's case it is limited to a claim in defamation).

Outcome

116. The application for permission to serve out of the jurisdiction succeeds in respect of the claim in defamation. That success is dependent on the fact that the claims against the First to Firth Defendants are proceeding in this jurisdiction. It is that factor which means that England and Wales is the most appropriate place to bring a claim, and hence that section 9 of the 2013 Act is satisfied. Were it not for the fact that the

claims against the First to Fifth Defendants are proceeding in this jurisdiction I would have refused permission to serve out of the jurisdiction.

117. The application for permission to serve out of the jurisdiction fails in respect of the claim for misuse of private information. The Claimant has not established a good arguable case that he has suffered alarm or distress as a result of the publication of images of him, and he has not established a serious issue to be tried that he continued to enjoy a reasonable expectation of privacy in respect of the images at the time they were published by the Sixth Defendant.