CAMPAIGNING LEGAL GUIDE: CAMPAIGNS TARGETING CORPORATES

2019

REUTERS/VINCENT WEST

Bates Wells

THOMSON REUTERS FOUNDATION

CAMPAIGN BOOTCAMP

ACKNOWLEDGEMENTS

The Thomson Reuters Foundation is extremely grateful to the following authors of this Guide. This Guide would not have been possible without their expertise, time and commitment to pro bono work.

Bates Wells

David Davies and Natalie Knight-Wickens sit within Bates Wells' Corporate & Commercial team. In addition to advising on general corporate and commercial matters, they see more and more businesses are operating a "triple bottom line", aiming to benefit society and the environment alongside financial success (this is the "Impact Economy") and are both part of Bates Wells' dedicated Impact Economy practice group to champion and support this kind of business.

Rupert Earle leads Bates Wells' media law team. He has 30 years of experience in media, public/regulatory, advertising and consumer law, both contentious and non-contentious. His advice on defamation and privacy law includes advice to media organisations, campaigning groups, regulators and trade associations; and advice to business and individuals whose rights are infringed, including applying for disclosure orders in relation to social media, seeking injunctions, conducting complaints under IPSO and Ofcom codes.

DISCLAIMER

This Report and the information it contains is provided for general information purposes only. It has been prepared as a work of legal research only and does not represent legal advice in respect of the laws of the United Kingdom. It does not purport to be complete or to apply to any particular factual or legal circumstances. It does not constitute and must not be relied or acted upon as legal advice or create an attorney-client relationship with any person or entity. Neither the Thomson Reuters Foundation nor any other contributor to this Report, accepts responsibility for losses that may arise from reliance upon the information contained in this Report or any inaccuracies herein, including changes in the law since the research was finalized in 2019. Legal advice should be obtained from legal counsel qualified in the relevant jurisdiction(s) when dealing with specific circumstances. Neither the Thomson Reuters Foundation not any other contributor to this Report is holding itself, himself or herself out as being qualified to provide legal advice in respect of any jurisdiction as a result of his or her participation in or contribution to this Report.

ABOUT US

The Thomson Reuters Foundation acts to promote socio-economic progress and the rule of law worldwide. The Foundation runs initiatives that inform, connect and ultimately empower people around the world: access to free legal assistance, media development and training, editorial coverage of the world's under-reported stories and the Trust Conference.

TrustLaw is the Thomson Reuters Foundation's global pro bono legal programme, connecting the best law firms and corporate legal teams around the world with high-impact NGOs and social enterprises working to create social and environmental change. We produce groundbreaking legal research and offer innovative training courses worldwide. Through TrustLaw, over 120,000 lawyers offer their time and knowledge to help organisations achieve their social mission for free. This means NGOs and social enterprises can focus on their impact instead of spending vital resources on legal support. TrustLaw's success is built on the generosity and commitment of the legal teams who volunteer their skills to support the NGOs and social enterprises at the frontlines of social change. By facilitating free legal assistance and fostering connections between the legal and development communities we have made a huge impact globally.

We have supported grassroots organisations to employ their first staff members, helped vulnerable women access loans to start their first businesses and brought renewable energy lighting to slums. Free legal assistance on these small projects has had a big impact on local communities working to overcome poverty and discrimination. At a global scale, we have supported legal reform activities to protect the rights of millions of domestic workers, changed legislation to support victims of violence, produced guides to protect people who experience street harassment, and crafted tools to support the prosecution of trafficking offenders.

Legal research reports and other TrustLaw publications are legal resources that take an in-depth look at a legal issue in a number of countries. This may be in the form of a comparative analysis of laws in different countries, or a legal landscape analysis. These resources aim to help TrustLaw members advocate for legal reform, inform policy activities or propose legal amendments.

Our resource library can be found on the TrustLaw homepage at www.trust.org.

ABOUT BATES WELLS

Bates Wells is a leading law firm for charities and campaigning organisations. The firm's specialist politics, elections and campaigning law team helps political parties, candidates, donors, charities and issue-based campaigners navigate the complex regulatory environment that can be relevant to their electoral and policy goals. The multi-disciplinary team works across all areas of campaigning law, from election and referendum law to campaign finance, transparency of lobbying, data privacy, charity law, public law, strategic litigation, advertising and reputation-management.

Bates Wells regularly advises on the biggest political issues of our time, including Brexit, where it advised Britain Stronger in Europe – the official Remain campaign. The firm is rated for electoral law advice in both Chambers and Legal 500, which has referred to it as an "incomparably excellent' team, which 'uniquely understands the broader issues'.

For more information, please contact Simon Steeden at s.steeden@bateswells.com. Simon is a partner in the charity and social enterprise team at Bates Wells and co-leads its specialist political and campaigning law team.

ABOUT CAMPAIGN BOOTCAMP

Campaign Bootcamp is a charity dedicated to ensuring that people most impacted by injustice are leading campaigns that affect their lives, from better housing to fairer treatment of migrants and LGBTQ+ rights. Our graduates wage important, successful campaigns, testify before Parliament, appear in the national and international press, organise demonstrations, get elected to local government, and change laws.

We do this work because we've found that today it's far too hard for ordinary people, especially those in marginalised communities, to challenge those in power. Because of this, injustices persist and millions of people do not live happy, safe and fulfilled lives.

Our programmes are designed to be accessible to anyone who wants to make change happen. If you want to learn how to run powerful campaigns go to www.campaignbootcamp.org to find out more about our training, including how to apply. You can also check out our range of stories, free resources, and our blog about our programmes and what our graduates get up to outside of camp.

Campaign Bootcamp Residential is a week-long training programme that supports you to develop the skills, confidence, and community to run powerful campaigns.

The training brings together 35 budding campaigners and activists from across the country (and sometimes further afield) to learn and build a community together.

In the course of a week, Campaign Bootcamp will take you on a journey through planning and running an effective campaign, giving you space each day to work out how what you have learnt applies to the work that you are doing. Each day has a different theme reflecting a different part of your campaign. By the end of the week, you will come out with a campaign strategy that you can take forward to make change happen. To gain the skills, community and confidence you need to run your campaign at the Campaign Bootcamp residential, apply today at www.campaignbootcamp.org/apply.

CAMPAIGN BOOTCAMP

TABLE OF CONTENTS

FOREWORD

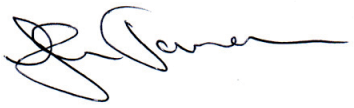
Many of the organisations TrustLaw supports engage in campaigning activities, community engagement and advocacy, with the aim of highlighting and solving social problems and encouraging systemic change.

The closing space for civil society means that campaigners are under increasing pressure to run campaigns for social change that are not only politically effective but are also run in compliance with the law. Campaigners do not always have the time or expertise to analyse and understand a complex and evolving legal landscape and, as a result, may unwittingly break the law, restrict their activities unnecessarily through defensive decision making, or be discouraged from engaging at all.

In collaboration with Bates Wells and Campaign Bootcamp, TrustLaw's goal is to support the development of a resilient and informed campaigning community by publishing this series of legal guides for campaigning and advocacy organisations in the United Kingdom.

The guides offer campaigners advice and tips on how to comply with the laws that apply to their day-to-day activities. These guides aim to arm campaigners with the legal information needed to navigate issues including: political activities, election and lobbying laws; defamation and campaigns that target companies; hacktivism and shareholder activism; the right to protest and laws relating to marches, assemblies and police powers; using social media and online campaigns; data protection and direct marketing.

We hope that these guides will ultimately empower campaigners to act with confidence and achieve the positive outcomes they seek.



Glen Tarman
Director of TrustLaw
Thomson Reuters Foundation

DEFAMATION: LIBEL AND SLANDER

REUTERS/STEFAN WERMUTH

DEFAMATION: LIBEL AND SLANDER

1. ORGANISATIONS WHO CONDUCT CAMPAIGNS WITH THE AIM OF INFLUENCING THE BEHAVIOUR OF CORPORATES MAY BE VULNERABLE TO DEFAMATION CLAIMS FROM THE CORPORATES THEY TARGET.

What is defamation?

1.1 Defamation is concerned with protecting a person (both individuals and corporates) from the effects of publication by a third party of untrue statements which damage that person's reputation. While Article 10 of the European Convention on Human Rights (ECHR), incorporated into English law by the Human Rights Act 1998, provides a high level of protection to the right to freedom of expression, that right is subject to certain conditions and restrictions. By seeking to protect the reputation of those subject to harmful false statements, defamation laws serve a legitimate purpose and impose a necessary restriction on freedom of expression.

1.2 Campaigning organisations seeking to influence the behaviour of corporates will invariably find themselves publishing material which is critical of the activities of those companies. In order to try to defend or restore their reputation in the face of any such critical reports or campaigns, companies may attempt to bring a defamation claim against those with responsibility for their publication. In that regard, a claimant can bring a claim against any or all of the author, the editor, and the corporate body (as the commercial publisher) of the allegedly defamatory statement. Furthermore, anyone responsible for distributing the statement complained of can potentially be liable, as can a website host where the statement is published on the internet.

1.3 The time limit for bringing a claim in defamation (the "*limitation period*") is within one year of the statement being published. The courts may exercise their discretion to extend this period if is equitable to do so, but this is rarely done in practice.

1.4 English defamation laws have been criticised in the past for being "*claimant friendly*". This perception of the law as favouring the interests of claimants over those publishing critical statements, even on clear public interest grounds, has resulted in campaigning organisations becoming more cautious about what they publish in order to avoid a defamation claim and the financial and reputational harm that may often accompany it. This discouragement, and sometimes even entire inhibition, of legitimate criticism by the threat of legal action is known as the "*chilling effect*".

1.5 The introduction of the Defamation Act in 2013 has gone some way to combatting these concerns by introducing several new measures intended to make it more difficult to bring a claim in England. Some of these issues are considered further below.

2. WHAT ARE THE ELEMENTS OF A DEFAMATION CLAIM? ARE THERE ANY COMMON MYTHS AND MISCONCEPTIONS OF WHICH ORGANISATIONS AND THEIR EMPLOYEES SHOULD BE AWARE?

2.1 There are three elements to a defamation claim. We will consider these in turn.

2.2 Identification of the Claimant

(a) It must be possible to identify the claimant either directly or indirectly, as the person whom the statement concerns. A person will plainly be identified when he/she is named but that is not a requirement in itself and a claimant can also be identified by, for example, a description or a photograph. A statement which is intended to refer to one person may also unintentionally give rise to a claim by another person who happened to have the same name or who might otherwise be identified by the statement.

(b) An incorporated legal body such as a company or a charity can bring a claim in their own name (although note the additional requirement for companies trading for profit of showing serious financial loss – see below). Additionally, individuals within these organisations can bring a claim in their personal capacity if the statement complained of sufficiently identifies them. This may occur where a particular individual is closely associated with the organisation in the minds of the public or because certain allegations may apply indirectly to those in charge such as the directors or trustees.

(c) It is not possible for an unincorporated association to sue (or to be sued) in its own name or in the names, whether individually or collectively, of their members. However, as with incorporated legal bodies, individuals within the association can bring a claim in their personal capacity if they are sufficiently identified by the words complained of.

(d) Democratically elected bodies including governments and local authorities generally cannot sue for defamation. This is on the public policy grounds that this would constitute an undue restriction on freedom of expression as it is thought that such bodies should be open to uninhibited public criticism. This restriction also applies to political parties. However, there is no bar to representatives of such bodies suing for defamation if the criticism is directed at them as individuals rather than in respect of their public role. Similarly, there is no bar on members of Parliament suing for defamation where allegations have been made against them personally.

2.3 "Defamatory" statement about the claimant

(a) A claimant in a defamation action must prove that the statement conveys a defamatory meaning (or imputation). This is also known as the "*sting*" of the defamation.

(b) However, before deciding whether a statement is defamatory, it must first be established what it means. The meaning attributed to a statement by a court will not necessarily be the same as that intended by the publisher. The intention of the publisher is irrelevant when establishing meaning so it will be no defence to claim that any meaning was unforeseen or accidental.

(c) Statements will be given their "*natural and ordinary*" meaning. The "*natural and ordinary*" meaning is what a reasonable and ordinary person would understand from it. The law will also treat each statement as having only one such meaning. Thus, while in reality, a statement may be open to more than one equally valid interpretation, this "*single meaning rule*" will be applied by the courts to find the dominant meaning of the publication.

(d) Statements may also be given an "*innuendo*" meaning which is a meaning only apparent to individuals who are privy to certain facts. Thus, a statement which may not appear defamatory on its face may acquire a defamatory meaning when read by a person in possession of this special knowledge. For example, to state that a person has been seen entering a particular house would be an innocuous statement to most readers, but not to those who happened to know that the address was a brothel.

(e) Meaning is derived from a reading of the publication as a whole, so that if a damaging allegation is made but is corrected or neutralised with sufficient prominence later in the publication, the overall meaning will not be defamatory. In other words, the bane and the antidote must be taken together. Similarly, while headlines and photographs may have greater impact on the ordinary reader than the rest of a report, a claimant nonetheless cannot seek to discard any curative words so that his claim focuses exclusively on any disparaging statement. However, whether any qualifications in the publication are capable of overcoming a defamatory sting will depend upon the facts.

(f) Once the meaning is established, the claimant must demonstrate that the words are defamatory. There are a number of tests which can be applied when doing so and generally a statement will be considered defamatory if it would tend to:

(i) lower the subject in the estimation of reasonable or right-thinking members of society;

(ii) bring the subject into ridicule, hatred or contempt within society; or

(iii) cause the subject to be shunned, avoided or cut off from society.

The first of these tests is the most commonly used in practice but the others will also be relevant depending upon the circumstances.

(g) It has always been the case that a defamatory statement must have a tendency to adversely affect in a substantial way the attitude or opinions of others towards the claimant. However, following the introduction of the Defamation Act 2013, this threshold has been raised so that a statement will only be defamatory if it has caused "*serious harm*" to the reputation of the claimant. This is considered further below.

2.4 Publication

(a) A statement is published if it is communicated to at least one person other than the claimant. However, whilst it is not exclusively a numbers game, where the extent of publication has been minimal, the court may be asked to consider whether a "*real and substantial*" tort has been committed. If it has not, the claim is liable to be struck out on the basis that to permit it to continue would amount to an abuse of the court's process. The extent of publication will also be a relevant factor when the court

considers whether "*serious harm*" has been (or is likely to be) caused to the claimant's reputation. The claimant bears the burden of proving that publication has taken place but where publication has been to the world at large (e.g. publication in a newspaper or on a website or on social media) that will usually be considered a sufficient basis upon which to bring a claim.

(b) Publication occurs at the location where the statement is seen or heard by the publishee rather than where it is made. A letter is published at the place where it is read by the recipient. Internet pages are published where they are accessed so a claim in relation to a defamatory statement on a website can potentially be brought in any country where that page can be accessed.

(c) The law of defamation is divided into libel and slander according to the method of publication. Where the defamatory statement has been published in permanent form (e.g. in writing) it is classified as libel. Slander is the publication of defamatory statements in temporary form, generally oral communication. However, where words are spoken but are published in media (e.g. in videos, on the radio or on television) that will be held to be libel.

3. WHAT IS THE DEFINITION OF HARM? IS IT DIFFERENT FOR INDIVIDUALS AND BUSINESS ENTITIES? ARE THERE EXCEPTIONS?

3.1 As noted above, a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. This "*serious harm*" threshold was introduced by the Defamation Act 2013 as one of the measures to try to prevent the abuse of defamation laws in England by raising the bar for claimants wishing to bring defamation actions.

3.2 In determining whether serious harm has occurred or is likely to occur, the court will consider a number of factors including the nature of the statement itself, the gravity of its meaning, the nature and extent of its publication, the identity of the publishees, the nature and extent of the claimant's existing connections in the jurisdiction and the claimant's reputation among those who were likely to have read the statement.

3.3 Harm to the reputation of a body that trades for profit will not be held to be serious unless it has caused or is likely to cause the body "*serious financial loss*". A claimant company must therefore prove that such loss (meaning a loss of profits or increased losses rather than a reduction in turnover) was caused by a defamatory statement in the publication complained of. This may require a claimant company to produce convincing documentary or expert evidence.

4. WHEN DOES THE ENGLISH COURT HAVE JURISDICTION OVER A DEFAMATION CLAIM?

4.1 There are a variety of scenarios in which a claimant may bring a defamation action in England and Wales. A defendant domiciled here can always be sued in respect of publications for which it is responsible. However, the Brussels Regulation provides that a person domiciled in an EU member state may be sued in the courts where the harmful event occurred. In defamation claims, that will be where the defamatory statement was published (as to which see paragraph 2.4(b) above), even if that is not the member state in which they are domiciled.

4.2 A claimant can therefore usually bring a claim in England and Wales in the following circumstances:

(a) The defendant is domiciled in England and Wales.

The claimant will be able to claim in respect of the entirety of the harm alleged to have been caused by the defamation.

(b) Publication has taken place in England and Wales and the defendant is domiciled in an EU Member State or a state which is a contracting party to the Lugano Convention.

Pre Brexit, the claimant will only be able to claim in respect of the harm caused in England and Wales. For example, if 250 copies of a French newspaper had been distributed in England, the English courts will have jurisdiction over the French publisher, but will only be able to award damages in respect of the harm suffered by the publication of those 250 copies even if thousands of copies had been distributed throughout France. After Brexit, and subject to any transitional arrangements if agreement is reached with the UK, the courts will apply the old common law rules to determine which is the most appropriate forum, having regard to the extent of publication, location of reputation witnesses and so on.

(c) Publication has taken place in England and Wales and the defendant is not domiciled in either the United Kingdom, another Member State or a state which is a contracting party to the Lugano Convention.

In this situation, the Defamation Act 2013 requires the claimant to show that of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place to bring the action. This section aims to address the issue of "libel tourism" (a term used to describe cases with a tenuous link to England and Wales which are brought in this jurisdiction). This means that in cases where a statement has been published in this jurisdiction and also abroad the court will be required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. For example, in Wright v Ver [2019] EWHC 2094, recent UK resident Craig Wright, with a worldwide reputation in relation to cryptocurrencies, failed in a claim against St Kitts resident, Roger Ver, over an allegation posted by Mr. Ver on YouTube and Twitter that Mr. Wright had fraudulently claimed to be Satoshi Nakamoto, developer of Bitcoin. YouTube viewers and Twitter followers in the US outnumbered those in the UK by 4 to 1, and Mr. Wright had failed to do enough to satisfy the court that England and Wales was the most appropriate place to litigate.

4.3 **Where does the burden of proof lie?** The burden of proof is on the defendant. The claimant need only prove the elements considered at paragraph 2 to establish a defamation action. Most importantly, he does not need to prove that the statement is false. It is up to the defendant to prove either that what he has published is true or to avail himself of one of the other defences available to him. A discussion of the defences to a defamation action is found below.

5. WHAT ARE THE DEFENCES AGAINST A DEFAMATION CLAIM? WHAT IS THE STANDARD OF PROOF?

5.1 Where a claimant has a prima facie cause of action, the defendant must seek to establish a defence. There are many defences to a defamation claim. The most commonly applied ones are discussed below:

(a) Truth

It is a complete defence if the defendant can establish on the balance of probabilities the meaning of the publication that can be demonstrated to be substantially true. It is not required to show that every detail of what was said was true as long as it is not essential to the sting of the publication.

It is no defence to a defamation claim for the defendant to show that he was merely repeating a statement previously told to him by a third party. For example, if X writes that "*Y told me Z is a thief*", it will not be sufficient for X to prove merely that Y did in fact tell him that. X would need to prove the truth of the underlying statement (that Z is a thief) because the defamatory meaning conveyed by the repetition of this statement of fact will be considered to be the same as the original statement. This is known as the "*repetition rule*".

Note that any evidence must be admissible in court – hearsay evidence, evidence from anonymous or confidential witnesses or overseas evidence may all present difficulties.

(b) Honest opinion

The Defamation Act 2013 abolished the common law defence of "*fair comment*" and replaced it with the statutory defence of "*honest opinion*". The Act provides for three conditions which must be met in order to successfully establish the defence. The defendant must show:

(i) that the statement was a statement of opinion;

(ii) that it indicated, in either general or specific terms, the basis of the opinion; and

(iii) that an honest person could have held the opinion on the basis of any fact which existed when the statement was published, or anything asserted to be a fact in a privileged statement published before the statement of opinion was published.

The defence will be defeated if the claimant shows that the defendant did not hold the opinion or, if it was published by the defendant but made by another person, that the defendant knew or ought to have known that the other person did not hold the opinion.

Whilst certain statements will clearly be regarded as opinions (e.g. reviews of books, plays, events or shows), it can often be difficult to differentiate between what is a statement of opinion and what is a statement of fact.

In the case of *British Chiropractic Association v Singh (2010)*, a campaigning journalist wrote an article in the Guardian's "*Comment and Debate*" section which stated that the claimant association made claims for its treatments for which there was "*not a jot of evidence*" and that "*it happily promotes bogus treatments*". Having been found to be a statement of fact in the

High Court, this decision was ultimately overturned in the Court of Appeal where it was held to be an expression of opinion.

The courts will therefore consider carefully whether a statement is one of fact or genuinely one of opinion such that it will not be possible for publishers to try to hide a factual allegation behind a defence of honest opinion, for example, by following it with the words "*... in my opinion*". The requirement to detail the basis of the opinion by reference to underlying facts prevents publishing "*opinions*" which are essentially spurious. It will be the publishers' responsibility to prove the truth of these facts.

(c) Publication on a matter of public interest

The defendant must establish that:

(i) the statement was, or formed part of, a statement on a matter of public interest; and

(ii) the defendant reasonably believed that the publication of the statement was in the public interest.

In assessing what is in the public interest, the courts have rejected the concepts of "*newsworthiness*" as too wide and "*what the public need to know*" as too restrictive. The courts have previously considered a matter to be in the public interest where it relates to the public life of the community and those who take part in it, including activities such as the conduct of government and political life, elections and public administration. It also applies more widely to embrace matters such as the governance of public bodies, institutions and companies which give rise to a public interest in disclosure. However, it does not include matters which are personal and private where there is no public interest in their disclosure.

Whether a defendant reasonably believed it to be in the public interest to publish the statement will be assessed taking into account all of the circumstances of the case. Relevant factors when assessing whether publication is in the public interest include the steps taken to verify the allegations, the reliability of any sources, whether there was any urgency to publish, whether the allegation was put to the subject prior to publication, and whether the publication took the response into account. The law makes allowances for editorial judgment in deciding whether it was reasonable for a defendant to believe that publishing a story was in the public interest.

(d) Privilege

The defences of privilege are based on the public policy ground that there are certain occasions where it is in the public interest to allow a defendant's freedom of speech to prevail over a claimant's right to protect their reputation even where the statement is false. Traditionally, there are two types of privilege which can apply:

(i) Absolute privilege

There are certain limited circumstances where a person is completely protected from allegations of defamation regardless of whether those allegations are demonstrably

false or even where they are actuated by malice (i.e. where the person has an improper motive for making the statement).

Absolute privilege will apply to statements made in parliamentary proceedings, and to statements in any report or paper published by, or under the authority of, either House of Parliament. It also applies to statements made in the course of judicial or quasi-judicial proceedings and to fair, accurate and contemporaneous reports of any public judicial proceedings in the UK, abroad and any international court or tribunal established by the UN Security Council or by an international agreement.

(ii) Qualified privilege

The protection conferred by privilege is often qualified so that it will be lost if the claimant can show that the defendant was actuated by malice in publishing the defamatory statement. Broadly there are two main subcategories of qualified privilege.

(A) The first is statutory qualified privilege which is conferred on a number of publications by section 15 of the Defamation Act 1996 (as amended by the Defamation Act 2013). These are set out in a table in Schedule 1 of the 1996 Act and include fair and accurate reports of public proceedings before a legislature, a court, a government inquiry and an international organisation or conference anywhere in the world, and of certain documents, or extracts from such documents, issued by those bodies and from any public register.

Qualified privilege also attaches to fair and accurate copies of, extracts from, or reports of government and legislative notices, court documents, public meetings and sitting of local authorities, press conferences, public meetings, general meetings and documents of listed companies, findings and decisions of associations, scientific and academic conferences, and reports designated by the Lord Chancellor. However, no defence will be available in respect of such publications if the defendant refused or neglected to publish any statement by way of explanation or contradiction upon request by the claimant.

(B) The second is qualified privilege at common law which protects persons in circumstances where they have a legal, social or moral duty or interest to make a statement, and the person to whom the statement is made has a corresponding or reciprocal duty or interest in receiving it. Common examples are reporting incidents to the police and writing employment references. The privilege will not protect against the publication of material which is extraneous or irrelevant to the privileged occasion nor will it apply where the publication extends to those who do not have the required interest in receiving it.

6. WHAT LEVEL OF FACT-CHECKING IS REASONABLE?

6.1 In cases where a defendant is seeking to rely on the defence of publication in the public interest, it will need to satisfy both limbs of the test described above. The second limb of the test requires the defendant to show that he reasonably believed that the publication of the statement was in the public interest. The defendant must therefore prove both (1) that he believed that publishing the statement was in the public interest (a subjective test), and (2) that his belief was reasonable (an objective test).

6.2 Part (1) will require a publisher to explain why he personally believed and why he came to the conclusion that publishing the statement was in the public interest. Part (2) requires the publisher to then show that this belief was reasonable. Here, the court will, as set out above, have regard to a number of factors, one of the most important of which will be the steps taken to verify the information.

6.3 The standard expected of a publisher is not that of perfection, and the inclusion of minor errors or failures will not usually prevent a defendant from relying on the public interest defence. However, the careless or negligent publication of false allegations is likely to result in a failure of the defence. This is because it will not be in the public interest to publish something with the knowledge that it was false or with reckless disregard as to whether it was true.

6.4 The standard expected of a publisher will also not be the same in every situation. The courts have held that a belief that publication was in the public interest will be considered reasonable if it has been arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case. Among the circumstances relevant to the question of what enquiries and checks are needed, consideration should be given to the subject-matter of the report, the particular words used, the range of meanings the defendant ought reasonably to have considered that those words might convey, and the particular role or position of the defendant in question.

6.5 There is therefore no uniform standard of verification that a publisher must demonstrate if it anticipates that it may need to rely on the public interest defence. However, as a general rule, the more serious the allegation, the greater the steps a publisher will be expected to take to verify prior to publication.

7. WHAT STEPS SHOULD A CAMPAIGNER TAKE IF SHE GETS HER FACTS WRONG AND MISTAKENLY ACCUSES A CORPORATE OF SOMETHING IT DIDN'T DO?

7.1 One of the central factors relevant to whether a publisher can properly rely upon a defence of publication in the public interest will be that it can show it put any allegations to the subject prior to publication. Also relevant will be whether the publication subsequently took any response into account.

7.2 It is therefore advisable to engage in a dialogue with the subject, providing a fair opportunity to respond to any allegation that you intend to make. This will ensure not only that the prospects of being able to rely on the public interest defence are improved, it may also help to assess the subject's position and to assist in identifying which allegations are most contentious and therefore require the greatest caution before making a decision to publish them.

7.3 However, if, despite taking the requisite steps to verify a report and to obtain the subject's side of the story, a publisher mistakenly publishes something which it has no hope of defending, it should try to remedy the situation as quickly as possible. For online publications, this will include taking down the offending article and, in all cases, publishing a full and prompt apology and/or correction in a suitably prominent location. It is sensible to try to agree the terms of any such apology or correction with the potential claimant.

7.4 The courts have also indicated that the publication of a prompt and effective apology may also go some way to preventing a claimant from establishing serious harm to his reputation. Thus, where an apology is sufficient to eradicate or at least minimise any unfavourable impression caused by the original publication, the serious harm threshold is unlikely to be met.

7.5 Where a claimant has been defamed unintentionally, section 2 of the Defamation Act 1996 sets out what is known as the "*offer of amends*" procedure which enables defendants to bring a swift resolution to such matters. Using this procedure, the defendant must offer to publish a suitable correction and a sufficient apology, and pay damages (if any) and the claimant's costs. If an offer of amends is accepted, the claimant cannot bring or continue defamation proceedings but it can obtain an order that the agreed terms are enforced. If not accepted by the claimant, the defendant can rely on the offer of amends as a complete defence, unless the claimant can prove malice.

8. WHAT ARE THE REMEDIES?

8.1 The court can order a number of remedies in favour of a claimant following the successful pursuit of a defamation action. The chief remedy is an award of damages although a successful claimant will also usually be granted an injunction to prevent further publication or repetition of the libel or slander. The losing party will also usually be ordered to pay the winner's costs where they have been reasonably incurred.

(a) Damages

There are four types of damages which are available, any or all of which may be awarded:

(i) General: The basic rule is that damages are awarded as compensation rather than as punishment. In defamation claims, an award of damages compensates the claimant for injury to reputation and feelings, as well as vindicating the claimant's good name. Corporate claimants cannot recover damages for hurt feelings. Damages will vary according to the gravity and extent of the defamation with the highest awards of around £300,000 reserved for widespread allegations of, for example, paedophilia or terrorism. Few claims against campaigning groups reach trial, because of the disparity in resources, and because corporates realise that suing a campaigning group may cause significant adverse PR. In 1997 McDonalds Corporation was awarded £40,000 in damages against two campaigners from London Greenpeace, Helen Steel and David Morris. Costs dwarfed damages, and the European Court of Human Rights in 2005 ruled that the trial and award were in breach of Articles 6 and 10 of the European Convention.

(ii) Special: These compensate the claimant for actual monetary loss suffered by the claimant as a result of the defamation. The claimant must make clear the basis on which special damage has been calculated which could be by way of loss of sales or contracts.

(iii) Aggravated: These damages, which are also compensatory in nature, are available where the defendant has conducted itself in a spiteful or vindictive manner which causes further injury to the claimant and which may include unjustifiably refusing to apologise, persisting in an unfounded assertion that the publication is true or cross-examining the claimant in an insulting way.

(iv) Exemplary: Otherwise known as punitive damages, these may be awarded to punish the defendant for outrageous conduct and to mark disapproval of that conduct. These must be specifically claimed by the claimant and will only be available where the defendant has deliberately or recklessly defamed the claimant with a view to profit and where compensatory damages are inadequate.

(b) Injunction

A successful claimant will usually be granted an injunction against the defendant to prevent further publication of the libel or slander.

A claimant may wish to apply for an interim injunction before trial to prevent the threatened publication of potentially defamatory statements. However, there is a long-standing common law rule against prior restraint in defamation so that if the intended defendant indicates that it intends to prove that what it has published is true, such an injunction cannot be granted unless the imputation conveyed by the publication is plainly untrue.

(c) Removal of statement by third parties

The Defamation Act 2013 introduced a measure enabling a court to order the removal of a defamatory statement from a website or to prevent a person who is not the primary publisher of the statement from selling, exhibiting or distributing material containing the statement.

(d) Statement in open court

A court may give permission for a statement to be made by the claimant, defendant or jointly, to be read in open court with the aim of putting the record straight and/or vindicating the claimant's reputation following the settlement of a claim. The statement must be submitted for approval of the court in advance.

(e) Publication of summary of court's judgement

The Defamation Act 2013 granted courts the power to order the defendant to publish a summary of the judgment. The court will also dictate the wording of the summary, together with the time, manner, form and place of the publication if the parties cannot agree.

9. ARE THERE ANY OTHER CLAIMS THAT AN INDIVIDUAL OR A COMPANY MIGHT BRING AGAINST AN ORGANISATION IN RELATION TO THE PROTECTION OF ITS REPUTATION?

9.1 There are a number of other actions which may be available to a company or an individual seeking to protect their reputation. Unless otherwise stated, the limitation period is six years from when the statement was published.

(a) Malicious falsehood

This action applies to statements published by the claimant which are false but not defamatory, published maliciously, and where they are calculated to, and did, cause actual damage. Malicious falsehood is commonly used in respect of claims which denigrate the claimant's business. This claim has a limitation period of one year.

(b) Breach of confidence

There are three essential elements in an action for breach of confidence:

(i) The information must have the "*necessary quality of confidence*";

(ii) It must have been imparted in circumstances imposing a duty of confidence (eg as part of a contract of employment); and

(iii) There was an unauthorised use of the information to the detriment of the confider.

A duty of confidence will not exist where the information is already in the public domain, and a breach of the duty may be justified to correct a false impression or to expose wrongdoing – eg some illegal or immoral dealing, hypocrisy, improper practice or concealment, or incompetence. However the public interest in favour of publication must be sufficiently significant to outweigh the public interest in the observance of duties of confidence – see Brevan Howard Asset Management v Reuters [2017] EWCA Civ 950.

On the other hand, the law of confidence may also help to assist campaigning organisations seeking to protect the identity of their own confidential sources. A corporate seeking to identify a troublesome whistleblower may go to court for an order requiring the campaigner to identify its source (for example using the Court's jurisdiction following the case of Norwich Pharmacal v Commissioners of Customs and Excise 1974 AC 133). The courts recognise that good journalism often depends on journalists being able to protect their sources. The Contempt of Court Act 1981 Section 10 provides that "*No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime*".

(c) Misuse of private information

This action arose out of the tort of breach of confidence, shaped by the need for the courts to secure the conformity of domestic law with the rights guaranteed by Article 8 of the ECHR. It therefore guards against intrusions into the claimant's personal and private life. There is a two stage test to be applied. The first stage is to decide whether the claimant has a "*reasonable expectation of privacy*" in relation to the information in question. If so, the second stage is to conduct a balancing exercise between the individual's right to privacy under Article 8 and the publisher's right to freedom of expression under Article 10. A claim for misuse of private information can be used to prevent publication of material that is either false or true. It has been particularly used recently to seek an injunction and/or damages in respect of publication of details of an ongoing police or regulatory investigation – e.g. ZXC v Bloomberg [2019] EWCH 970 (subject to appeal).

(d) Data protection

The EU's General Data Protection Regulation (**GDPR**) imposes obligations on "*data controllers*" – those who control personal data about individuals – to ensure that such data is obtained, used and retained in accordance with 6 data protection principles, in particular fairly and lawfully. It also gives data subjects various rights, including to access the personal data which an organisation holds on them, and to have it rectified or deleted if inaccurate or no longer relevant or necessary for the purposes for which it was obtained. A data subject may also bring a claim for damages if unjustified processing has caused damage or distress. In addition a data subject who considers his data protection rights to have been infringed can make a request to the Information Commissioner's Office to carry out an assessment of whether the defendant has complied with the data protection laws. The ICO may serve enforcement notices and impose substantial fines. More details of GDPR may be found in the separate guide to data privacy issues.

Campaigning groups may be interested in the partial exemption from compliance with certain provisions of the GDPR where personal data are processed for the purpose of journalism, at Part 5 of Schedule 2 of the UK's Data Protection Act 2018 (which puts skin on the bones of GDPR). The European Court of Human Rights and the ICO have given a wide meaning to "journalism" (see the ICO's decision in Global Witnesses' favour in a claim brought against them by Beny Steinmetz, a mining magnate, in 2014). However, the data controller must be satisfied that the data is being processed with a view to publication in the public interest, and that compliance with the first 5 principles (there is no exemption from the 6th, data security) is incompatible with the purpose of journalism.

If the journalism exemption is not available, the campaigning group will need to identify another lawful basis to process personal data, such as it being in their or another person/organisation's legitimate interests, which is not outweighed by the interests of the data subject (GDPR Article 6(1)(f)). In the case of special category data (eg concerning racial or ethnic origin, political opinions, religious or philosophical belief, sex or sexual orientation, health), or data as to criminal convictions and offences, the circumstances in which such data

can be processed (if not for journalistic purposes) are very limited under GDPR and the Data Protection Act 2018, and specific advice should be sought.

(e) Unlawful interference with trade

Unlawful interference with trade is known as an 'economic tort'. Essentially it is the act of causing loss by unlawful means, within the context of an individual or organisation's trade or business. This tort could apply in the context of a campaigning organisation's activities against corporate entities – e.g. a call for a boycott, using some unlawful means (e.g. defamation).

(f) Trespass

Trespass is the unlawful presence of a person on land in the possession of another. This includes wrongfully setting foot on it, taking possession of it, unlawfully remaining there after the expiration of the authority and using it unlawfully for a purpose other than for the purpose granted. The trespass must be a direct intrusion of another's real property. The only defences to trespass to land include license (either express or implied permission from the possessor to be on the land), necessity and justification by law, and they are difficult for campaigners to run. Mere generation of publicity is unlikely to constitute necessity. The courts will seek to balance the property rights of the claimant corporation (under Article 1 of the First Protocol to the European Convention) against the freedom of expression and assembly rights of the campaigners (under Articles 10 and 11 of the European Convention). Actual damage to the claimant's property will make running a defence even more difficult. In *Monsanto Plc v Tilly [2000] Env. L.R. 313 campaigners against genetically modified foods had uprooted crops, and in Fish & Fish Ltd v Sea Shepherd UK [2015] UKSC 10 the marine conservation charity had damaged the fish-farming company's tuna cages.*

Examples relevant to campaigning might include entering a building without permission as part of a picket, or affixing stickers to products of a shop in protest.

It may be possible to obtain an injunction to prevent a trespass from continuing, or to prevent an anticipated trespass from taking place. If the trespass is past, damages might be sought. Aggravated trespass, in which a person first trespasses and then attempts to obstruct or disrupt, either directly or through intimidation, a lawful activity being engaged in or about to be engaged in on a property, is a criminal offence contrary to the Criminal Justice and Public Order Act 1994 Section 68. In Bauer v DPP 2013 EWHC 634 (Admin) continued occupation of a store by UK Uncut campaigners as part of a general protest against tax evasion (not it appears necessarily by that particular store owner), together with shouting and chanting as part of the protest, were found to constitute aggravated trespass.

The related tort of nuisance may be relevant, as might various public order offences.

(g) Harassment

Harassment is both a civil wrong and a criminal offence – Prevention of Harassment Act 1997. It is a course of conduct (ie on more than one occasion) targeted at an individual, which is calculated to alarm or cause him/her distress, and is oppressive and unreasonable. The

criminal offence is punishable with a fine currently not exceeding £5,000. This may arise in the course of campaigns against figures such as politicians or company directors.

(h) Infringement of intellectual property rights

It may be necessary or desirable to use an organisation's name, trade marks and logos as part of a focus on their activities.

Use in the course of trade (which is widely defined) of a trade mark in an unfair manner without due cause may constitute trade mark infringement under the Trade Marks Act 1994. Fair use simply to identify the entity being targeted by a justifiable campaign should not be problematic.

More difficulties arise with any material copied from the targeted organisation which is likely to be the product of skill and labour. This might be as modest as its corporate logo, or some advertising lyrics associated with it. The reproduction might constitute infringement of copyright under the Copyright, Designs and Patents Act 1988, and there are only limited defences – for example fair dealing for the purpose of criticism or review, or (as a result of a recent amendment to the Act) parody, caricature or pastiche.

Care must be taken in any parody or similar campaign not to cause confusion with the brand owner being targeted – an action for passing off could otherwise be the result.

(i) Breach of social media platform terms and conditions

Campaigners will be subject to the terms and conditions of use of social media platforms they employ to conduct their activities, such as Twitter and Facebook. For example, Twitter's Terms of Service stipulates that they have the right to remove content that violates the User Agreement, including for example, impersonation, unlawful conduct, or harassment. Similarly, Facebook also reserves rights to remove content that is unlawful, misleading, discriminatory or fraudulent or which violates its Community Standards, one of which is hate speech (content that directly attacks people based on the protected characteristics). Infringement of intellectual property rights will be prohibited by all platforms, given the exposure of the platform itself to damages claims once put on notice of the infringement. Both Facebook and Twitter rely on users to report any posts that do not conform to their standards.

ONLINE CAMPAIGNS

REUTERS/KACPER PEMPEL

ONLINE CAMPAIGNS

1. MANY CAMPAIGNS ARE NOW CONDUCTED VIRTUALLY ON SOCIAL MEDIA PLATFORMS LIKE FACEBOOK AND TWITTER. WHAT ARE THE COMMON LEGAL AND REPUTATIONAL RISKS THAT ORGANISATIONS SHOULD BE AWARE OF WHEN USING SOCIAL MEDIA PLATFORMS?

1.1 The laws of defamation apply equally to publications on social media. Whilst the proliferation of seemingly uninhibited comments and allegations may give rise to the impression that the world of social media is a lawless space, that is not the case. The meaning of what is published in social media may reflect the fact that it is invariably "a casual medium in the nature of a conversation rather than carefully chosen expression", to which people's reaction is "impressionistic and fleeting" (Stocker v. Stocker [2019] UKSC 17). However, publication of a defamatory statement via a tweet or a Facebook post can result in liability and damages.

1.2 A recent example of this was a claim brought by the left-leaning food writer and activist Jack Monroe against the controversial and right-leaning media personality Katie Hopkins. The case concerned tweets by Ms Hopkins which the judge found to bear the meaning that Ms Monroe "*condoned and approved of the… vandalisation by obscene graffiti of the women's war memorial in Whitehall, a monument to those who fought for her freedom*". The case was decided in 2017, with the judge finding for the claimant and awarding £24,000 in damages for the publication of two defamatory tweets.

1.3 Ms Hopkins denied that the tweets had caused Ms Monroe "*serious harm*" as required by the Defamation Act 2013 and the judgment provides several interesting observations on this point as they apply to what he referred to as the "*dynamic and interactive*" conversational world of Twitter. The judge found that a tweet can (like a broadcast) have a significant impact upon those who have read it notwithstanding its transience. He also considered that a reader would not discount the allegation simply because it was made by Ms Hopkins on Twitter, despite her lawyer asserting that it was the "*Wild West*" of social media and not as authoritative as newspapers.

1.4 As discussed previously, defamation is not simply a numbers game, but generally the more followers the offending tweeter has the greater the likelihood that serious harm will be caused to the reputation of the victim on the grounds that more people are likely to read the tweet even if it is later deleted. The harm may increase further if the defamatory tweet is re-tweeted by other users and higher damages may be recoverable as a result of such republications provided that they were a foreseeable consequence of the original tweet. This "*grapevine effect*" is perhaps most acute online where certain publications have the capacity to go viral at an unprecedented rate.

1.5 There may also be a risk that a campaigning organisation could be held legally liable for the actions of others, such as volunteers, interns or individual employees, who may, for example, send a 'rogue' tweet which is defamatory and causes serious harm, as above. This is the principle of vicarious liability. Vicarious liability can only arise where there has been a wrong committed by the primary wrongdoer, who must be in breach of a relevant duty. This often arises in an employment relationship, where the employer is liable for the actions of their employees. Vicarious liability can also be established where the claimant cannot specifically identify the person who has caused it. In this instance, the claimant would rely on the fact that the duty of care owed to the claimant had been broken.

1.6 The steps to find vicarious liability are twofold: first a relationship between the perpetrator and the employer must be determined to be capable of giving rise to vicarious liability and secondly, the court must consider whether there was a sufficient connection between the act or omissions of the perpetrator and the relationship (between the perpetrator and the employer) to justify a finding of vicarious liability. An extreme example is Various Claimants v WM Morrisons Supermarket PLC [2017] EWHC3113 (QB), in which the court found Morrisons to be liable for the uploading to the internet by an internal auditors with a grudge against Morrisons of the payroll data of 10,000 employees. The court held that the motive of the perpetrator and the gross abuse of position were irrelevant. Vicarious liability can be applied and the employer is liable where the employee's actions are within the "field of activities" assigned to him. The judgment was upheld by the Court of Appeal but is due to be considered by the Supreme Court.

2. WHAT STEPS SHOULD ORGANISATIONS TAKE TO ENSURE THAT STAFF MEMBERS USE SOCIAL MEDIA RESPONSIBLY? FOR EXAMPLE, SHOULD ORGANISATIONS DEVELOP AND IMPLEMENT A SOCIAL MEDIA POLICY? WHAT ARE THE ESSENTIAL ELEMENTS OF SUCH A POLICY?

2.1 It is advisable to provide the appropriate training on defamation and other related legal issues for staff members who are public-facing. This will include those who use social media on behalf of the organisation so that they are aware of the risks and understand the boundaries of what is considered lawful and acceptable.

2.2 Any social media policy must also seek to differentiate between an employee's personal use of social media and any professional social media activity which is required as part of the job. Employees should, for instance, be required to include a disclaimer on personal profiles or accounts to make clear that their views are their own and do not necessarily reflect those of the organisation.

2.3 Organisations should ensure that they have a recognised and authorised account so that they can manage and control the output. Steps should also be taken to ensure that only particular staff members, who have received the relevant training, should be permitted to use the account.

2.4 Crisis management strategies should be put in place so that organisations are able to respond quickly and effectively to any legal claims.

3. WHAT IS HACKTIVISM AND IS IT LEGAL OR ILLEGAL? (E.G. PUBLISHING OR ACCESSING PRIVATE DOCUMENTS, CORPORATE INFORMATION OR PERSONAL DETAILS OF WEBSITE USERS/ OWNERS; DEFACING WEBSITES; DISTRIBUTED DENIAL OF SERVICE ATTACKS ON WEBSITES). WHAT ARE THE PENALTIES? DOES IT MAKE A DIFFERENCE IF THE TARGET IS BASED OUTSIDE THE UK?

3.1 Hacktivism does not have a legal definition and can encompass a variety of activities. However, broadly speaking, it involves the carrying out of malicious and often illegal cyber activity for political or social ends. Hacktivists may operate alone or as part of an often ill-defined and leaderless collective. One of the best known hacktivist groups, "Anonymous", has been carrying out cyber campaigns since 2003 and continues to be the most active and prominent of these groups.

3.2 Examples of the kinds of activities that may come under the umbrella of hacktivism include:

(a) Distributed Denial of Service attacks: the use of multiple computers to generate a targeted and excessive level of traffic towards a particular website with the intention of crashing it.

(b) Website defacements: the vandalisation of a website usually involving the unauthorised posting of messages or images which the hacktivist wishes to promote.

(c) Website redirects: causing people to view an alternative website when they go to the domain name in question.

(d) Information theft: the unauthorised accessing of a computer network in order to obtain information held on that network often with the intention of publicly releasing it online.

3.3 The Computer Misuse Act 1990 is the main piece of legislation in the UK governing attacks against computer systems which may constitute hacktivism. The Act creates a number of offences involving the use of a computer to secure knowingly unauthorised access to any program or data held in any computer. Penalties under the Act range from a fine or a prison sentence of 1 year to life imprisonment (pursuant to amendments by the Serious Crime Act 2015) where the unauthorised act causes or creates a risk of serious damage to human welfare in any place (e.g. loss of life, illness or injury, disruption of a supply of money, food, water, energy or fuel), the environment of any place, the economy of any country or the national security of any country.

3.4 The Terrorism Act 2000 also covers actions "*designed seriously to interfere with or seriously to disrupt an electronic system*" and where the use or threat is designed to influence the government or to intimidate the public and is made for the purpose of advancing a political, religious, racial or ideological cause.

3.5 The territorial scope of the Computer Misuse Act is wide; it provides jurisdiction to prosecute where there is a "*significant link*" with the domestic jurisdiction which includes the fact the accused or the target computer was in England and Wales. The Serious Crime Act 2015 extends the existing categories of a "*significant link*" so that it provides a legal basis to prosecute a UK national who commits certain offences whilst outside the UK, where the offence has no other link to the UK, other than the offender's nationality, provided the act constituted an offence in the country where it took place.

3.6 The publication of confidential information obtained through hacking into computer networks is also likely to constitute the civil wrong of breach of confidence, and may involve misuse of private information and breach of GDPR, as discussed elsewhere.

Consumer marketing and advertising

4. TO WHAT EXTENT DO THE CODES OF THE ADVERTISING STANDARDS AUTHORITY (ASA) APPLY TO CAMPAIGNING ORGANISATIONS AND WHAT ARE THE MAIN REQUIREMENTS UNDER THE CODES THAT CAMPAIGNERS SHOULD BE AWARE OF?

4.1 The Advertising Standards Authority (ASA) is the independent body that administers the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code) which is the rule book for non-broadcast advertisements, sales promotions and direct marketing communications. The ASA also administers the UK Code of Broadcast Advertising (BCAP Code) which applies to all advertisements on radio and TV services licensed by Ofcom.

4.2 The CAP Code does not define advertising. Rather, it lists categories of communications to which it applies. However, the Code sets out certain categories of material to which it will not apply, some of which are likely to be relevant to material published by campaigning organisations. Editorial content is specifically excluded from the CAP Code, as are communications for causes and ideas in non-paid for space (except where they contain a direct solicitation for donations as part of the organisation's fundraising activities). "*Non-paid for space*" applies both online and offline, and includes, for example, leaflets, mailings and an organisation's own website and social media channels.

Marketing and advertising which falls within the remit of the Code must broadly be legal, decent, truthful, honest and socially responsible. It should not contain anything which is likely to mislead, or to cause serious or widespread offence and must not encourage illegal or anti-social behaviour. The ASA may be more accepting of the use of stark or upsetting imagery in an ad that is seeking to raise awareness of an important issue than one which is seeking to advertise an everyday product or service, but it would be a mistake to think that the ends always justifies the means, particularly when it comes to misleading advertising; and clearly an organisation should not imply that it is charitable when it is not.

5. WHAT ARE THE MAIN REQUIREMENTS UNDER THE COMMUNICATIONS ACT 2003 THAT CAMPAIGNERS SHOULD BE AWARE OF?

5.1 The Communications Act 2003 prohibits any political advertising on television and radio. The term "political" is widely defined to include: influencing the outcome of elections or referendums, bringing about changes of the law, influencing the policies or decisions of local, regional or national governments, influencing the policies or decisions of persons on whom public functions are conferred by or under the law or international agreements, influencing public opinion on a matter which, in the UK, is a matter of public controversy, and promoting the interests of a party or other group of persons organised for political ends, whether in the UK or elsewhere.

5.2 Animal Defenders International sought to challenge a bar on its TV ad against the use of animals in advertising, but in *Animal Defenders International v UK [2013] ECHR 362*, the European Court of Human Rights upheld, as compatible with Article 10 of the Convention, the breadth of the Communications Act prohibition. Notwithstanding the NGO's right to impart information and ideas of general interest which the public was entitled to receive, the UK was entitled to maintain the prohibition to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.

2. https://www.electoralcommission.org.uk/__data/assets/pdf_file/0009/224955/UKPGE-2017-Overview-of-non-party-regulated-campaign-activity.pdf

SHAREHOLDER ACTIVISM AS A CAMPAIGN TACTIC

REUTERS/KHALED ABDULLAH

SHAREHOLDER ACTIVISM AS A CAMPAIGN TACTIC

What is shareholder activism?

Shareholder activism refers to a broad range of practices by which the shareholders of a company (also know as the company's "members") can seek to affect change or hold companies to account by using the rights and influence attached to their shareholding (or seek to acquire a shareholding in order to do this). Traditionally, shareholder activism has referred to financially motivated influencing work, with shareholders and hedge funds using their rights to increase shareholder value or to force changes to the board where a company is underperforming. However, shareholdings can also be used to affect social and political change, as explored in this guidance. In the UK, organisations such as ShareAction are set up specifically to make use of this avenue for change (amongst other corporate influencing tactics).

How does shareholder activism work?

There are a number of ways in which holding shares in a company can enable activists to influence the behaviour or activities of corporate entities. In the UK (noting that the options available will depend on the jurisdiction in which the company is incorporated), tactics can include:

1. Requisitioning general meetings

- Section 303 of the Companies Act 2006 ("**CA 2006**") provides that the members of a company can require the directors of the company to call a general meeting where:
    - Members representing at least 5% of a company's paid up shareholding request them to do so (excluding treasury shares); or
    - In the case of a company without a share capital (i.e. a company limited by guarantee), members representing at least 5% of the total voting rights of all the members who are entitled to vote at general meetings.
- The form of request of a company's members must comply with formalities set out at section 303(4) and 303(6) CA 2006, being that:
    - The request must state the general nature of business to be dealt with at the meeting;
    - It may include the text of a resolution that may properly be moved and is intended to be moved at the meeting;
    - It may be in hard copy or in electronic form; and
    - It must be authenticated by the person or persons making the request.

- Section 304 CA 2006 provides that the directors of the company must call a general meeting within 21 days from the date they become subject to this requirement and provide for the general meeting to be held on a date not more than 28 days after the date of the notice convening the meeting.

- Forcing a general meeting can in itself generate significant publicity and can be a useful tool in providing a platform for activist members to express their views or calls for change.

- An even more direct influencing tactic (as part of engaging the power to requisition a general meeting) is the ability to also require the inclusion of resolutions in the notice of a general meeting (see 3 below).

- General meetings are a powerful tool for activist investors. A general meeting gives shareholder activists an opportunity to:

    • consider resolutions to effect changes to the company, commonly changes to the board of directors;

    • ask difficult questions of the board, thereby raising their specific concerns and potentially promoting discussion of topics that the target company may otherwise wish to avoid;

    • present persuasive arguments to the other shareholders relating to the particular issue/s they are seeking to address; and

    • encourage active engagement in the debate with the hope of garnering support for the cause and building momentum for positive change.

- At the very least, general meetings are administratively burdensome for a company and can have major time and cost implications. Causing such disruption to the company can be beneficial for an activist investor. It puts further pressure on the target company to pay closer attention to the concerns they are raising.

2. Asking questions at general meetings

- Shareholders have the right to speak at general meetings, and can use that right to ask questions of the board.

- There are special rules relating to traded companies (i.e. companies admitted to trading on a regulated market in a European Economic Area state) – section 319A CA 2006 provides that members of traded companies can require an answer to any question posed relating to the business of a general meeting. However, the board have rights to refuse to answer such questions, including if it would disclose confidential information or 'would not be in the best interests of the company' to reply.

3. Working with company resolutions

a. Proposing resolutions at general meetings convened by shareholders

- Where shareholders/members have used their rights to call a general meeting as discussed at section 1 above, they also have the right to propose the text of any resolution to be voted upon at the general meeting they have convened[1].

1. Section 303(4)-(5) CA 2006

- The resolution must be set out within the call for a general meeting, which must comply with the formal requirements listed at section 1 above.
- The Company can refuse to put the resolution forward (but may be concerned about the perception of doing so) if:
    - » it would, if passed, be ineffective (for example, because the company's constitution does not allow the proposed activity to take place);
    - » it is defamatory of any person; or
    - » it is frivolous or vexatious.

b. Proposing resolutions at AGMs

- The right to put forward a resolution for consideration at the AGM (in addition to other general meetings) is only available to members of public companies. The right is not attached to the requirements discussed at section 1 (i.e. it is not only available where the members in question have convened the meeting), but the same principles apply where the company wishes to reject a proposed resolution on the basis of it being ineffective, defamatory or frivolous/vexatious.[2] The directors of a public company may be particularly concerned with the potential consequences of rejecting resolution requests in terms of investor relations.
- Such a request can be made either by:
    - » members representing at least 5% of the total voting rights of all the members who have a right to vote on the resolution at the annual general meeting to which the requests relate (excluding any voting rights attached to any shares in the company held as treasury shares), or
    - » at least 100 members who have a right to vote on the resolution at the annual general meeting to which the request relates and hold shares in the company on which there has been paid up an average sum, per member, of at least £100.[3]
- There are formal requirements where members of a public company wish to engage this right. Each resolution request must:
    - » be in hard copy form or in electronic form;
    - » identify the resolution of which notice is given;
    - » be authenticated by the person or persons making it; and
    - » be received by the company no later than 6 weeks before the AGM to which the request relates or, if later, the time at which notice is given of that meeting.[4]

2. Section 338(2) CA 2006
3. Section 338(3) CA 2006
4. Section 338(4) CA 2006

c. Voting against resolutions

- Shareholder activists may be able to block resolutions, either alone or with sufficient support from other shareholders. Special resolutions will be an easier target, in that the threshold required for the resolution to pass will be 75% of those eligible to vote on the resolution, as opposed to a simple majority in the case of an ordinary resolution.
- Even if the resolution is not successfully blocked, voting against it with support can in itself garner publicity for the issues raised.

d. Resolve to remove a director

- Where shareholder activists believe that a change of leadership is required to push through their agenda for social change, they may choose to propose the removal of a director or directors to make a significant impact on the way in which the company is operating.
- There may be rights within a company's articles of association (or other governing documents that sit alongside the articles) that give specific rights to the company's members in relation to director appointments, including rights to ratify proposed appointments or to remove directors from office. Members have a right to the governing documents of a company, and can request these to check what rights could be engaged to remove a director. Companies' articles of association are also available for free download from Companies House.
- Notwithstanding the provisions in the company's governing documents, section 168 CA 2006 provides that a company may remove a director by ordinary resolution. This right cannot be excluded within the company's articles of association (though there are methods of getting around the possibility of a director being removed in this way in a private company – such as the director in question being given enhanced voting rights on such a resolution). Members of a company could use their rights discussed at (a) and (b) of this section to propose such a resolution (though additional special provisions apply, requiring special notice to be given (see sections 168(2) and 312(1) CA 2006). The company must send a copy of the intended resolution to the affected director forthwith (which must be circulated to shareholders) and that director then has the right to make written representations to the company and speak at the general meeting.
- Members could also use their rights discussed at (c) to vote against a resolution proposing the appointment of a new director or re-election of an existing director.

4. Accessing a company's register of members

- While there are methods by which individual activists with small shareholdings can impact the behaviour of a company, there is often much greater power in numbers (whether that be a group of shareholder activists working together, or a shareholder activist with a substantial shareholding). In particular, one direct method of shareholder activism is to gain support of a sufficient number of other shareholders to pass shareholder resolutions.

- It is a legal requirement for a company to keep a register of members.[5] Where a company has a share capital, the register must also include details of the number of shares held by each member and, where necessary, the class of those shares held[6]. The register of members must be kept available for public inspection at a company's registered office or an alternative place as notified to Companies House in the same part of the UK as the company's registered office address[7]. This information will enable an activist shareholder to identify the other members of the company, and also each member's individual shareholding. Where institutional shareholders are listed (i.e. companies or partnerships owning shares rather than individuals), you will need to understand the key decision makers instructing those institutional shareholders to vote as they do. Targeting those decision makers may be essential to ensure that the support of shareholders representing the relevant shareholding threshold is achieved.

5. Members' statements

- Shareholders have the power to require the company to circulate to the other members entitled to receive notice of a general meeting a statement of not more than 1,000 words with respect to:

  (A) a matter referred to in a proposed resolution to be dealt with at that meeting; or

  (B) other business to be dealt with at that meeting[8].

- Once the company has received a request from members representing at least 5% of the paid up capital of the company with voting rights at general meetings of the company (excluding any voting rights attached to any shares in the company held as treasury shares), it is required to circulate the statement[9].

- Shareholder activists can use this as another instrument to raise awareness of their concerns and to rally support, prior to a general meeting, of the requisite proportion of shareholders to support a resolution to enact corporate change.

6. Additional powers relating to traded companies

- Where a shareholder of a traded company puts a question to the company, in relation to the business being dealt with at a meeting of the company, the company in question must cause that question to be answered[10]. There are restrictions on this power, which shareholder activists should be aware of. Questions should be designed with the restrictions in mind to ensure the company is obliged to issue a response. The restrictions are such that the company is not required to give an answer to a question of this kind if:

  » to do so would (i) interfere unduly with the preparation for the meeting, or (ii) involve the disclosure of confidential information;

5. s. 113(1) CA 2006
6. s. 113(3) CA 2006
7. s. 114 CA 2006 and Part 2, section 3 of Companies (Company Records) Regulations 2008 (SI 2008/3006)
8. s. 314(1) CA 2006
9. s. 314(2) CA 2006
10. s. 319A(1) CA 2006

» the answer has already been given on a website in the form of an answer to a question; or

» if it is undesirable in the interests of the company or the good order of the meeting that the question be answered.[11]

5.3 Shareholders of a traded company have the power to request that the company includes in the business to be dealt with at an AGM any matter (other than a proposed resolution) which may properly be included in that business.[12] A company is required to include a matter of this sort once a request has been received to do so unless it is defamatory, frivolous or vexatious.[13] A company is required to include such a matter once it has received requests from —

(a) members representing at least 5% of the total voting rights of all the members who have a right to vote at the meeting, or

(b) at least 100 members who have a right to vote at the meeting and hold shares in the company on which there has been paid up an average sum, per member, of at least £100.[14]

7. Other routes of action

5.4 Shareholder activists have used public campaigns as an effective tool for change where private methods have been unsuccessful. Activist investors could utilise social media platforms to spread their message or publish open letters in local or national newspapers to rouse public interest. Companies will be keen to minimise adverse press and any reputational damage. Companies will also be minded to avoid any costs resulting from defending its image publicly. By utilising public campaigns, shareholder activists may place themselves in a stronger bargaining position when making propositions to the company.

5.5 As a last resort, legal action could be threatened. This is a costly option, but one which can be effective in forcing companies to listen. Members can bring a 'derivative claim' in respect of an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company[15]. A member of a company may also apply to the court on the ground that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least that member), or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.[16] The threat of legal action can force companies to reconsider their actions in the hope of avoiding expensive litigation and potentially detrimental publicity.

11. s. 319A(2) CA 2006`
12. s. 338A(1) CA 2006
13. s. 338A(2) CA 2006
14. s. 338A(3) CA 2006
15. s. 260(3) CA 2006
16. s. 994(1) CA 2006

Are there any other rules should shareholder activists consider before launching a campaign in relation to a company?

Shareholder activists should be aware of the following obstacles which may impede the progress of their campaigns:

5.5.1 **Regulatory aspects & market abuse** – shareholder activists in public companies should be conscious of the rules governing market abuse.[17] This can include insider dealing, unlawful disclosure of inside information and market manipulation. Activist investors must be very careful when using information relating to the company in the public domain to ensure they do not do so in a misleading or reckless manner.[18] They may fall foul of regulations if they share information in such a way that could detrimentally affect the share price of a company.

5.5.2 **Defamation** – shareholder activists should be aware of the law relating to slander and libel when making statements which could be detrimental to the company's reputation or financial standing.

5.5.3 **Notification of major shareholdings** – subject to a few exceptions, Part 21A CA 2016 requires companies to create and maintain a record of people with significant control over a company (PSC register). However, as many shares in public companies are held through nominees searching the shareholders' register may not reveal the true identity of the beneficial interest in the shares. Accordingly, a member of a listed company must notify that company where the percentage of voting rights he/she holds or is deemed to hold through direct or indirect holding of certain financial instruments reaches, exceeds or falls below certain prescribed thresholds.[19] For companies whose shares are quoted on the AIM market, there are disclosure of changes to significant shareholding requirements under AIM Rule 17.

5.5.4 Furthermore, even an unlisted public company may also give notice to any person whom the company knows or has reasonable cause to believe to be interested in the company's shares.[20] The notice may require the recipient to confirm the nature of the interest and may request further supplemental information. If the person fails to provide the information requested the company may apply for a court order directing that the shares be subject to certain restrictions. The above procedure assists a company in understanding the exact make-up of its shareholder base. With shareholder activism increasing in popularity, this power may help to alert companies to potential activist behaviours.

5.5.5 **UK Takeover Code** – the Takeover Code applies to offers for public companies (including unlisted public companies, and in very limited circumstances, to offers for private companies). Where the Takeover Code applies, activist investors should be aware that if a group of shareholders acquires 'control' of a company they are required to make a takeover code compliant offer to every other shareholder in the company, offering to purchase their shares for cash. 'Control' is defined as an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights of a company, irrespective of whether such interest or interests give de facto control.[21] It may be that shareholders come together to support an activist agenda. If that grouping amounts to more than 30% shareholders should be aware that this requirement may inadvertently be triggered.

17. Regulation (EU) 596/2014 (the Market Abuse Regulation)
18. s. 89(1) Financial Services Act 2012
19. DTR 5 The Financial Conduct Authority's Disclosure and Transparency Rules
20. S.793(1) CA 2006
21. Rule 9 of The City Code on Takeovers and Mergers

CASE STUDIES

REUTERS/JONATHAN BACHMAN

CASE STUDIES

A whistleblower tells a campaigner that a certain corporate is deliberately evading its tax obligations. The campaigner would like to draw attention to the issue by writing a blog but is worried about what might happen if the whistleblower is wrong. Would the campaigner or her employer be sued for publishing the blog? What steps should she take to protect herself before she publishes it?

Tax evasion is a criminal offence, and the campaigner and her employer could certainly be sued for defamation by the corporate and those individuals identified or readily identifiable as responsible for its tax affairs, if the information cannot easily be proven to be true. One option would be to use the information provided by the whistleblower to write a piece posing questions of the corporate entity, suggesting morally discreditable tax avoidance rather than evasion, or unwitting non-payment of tax, by reference to publicly accessible information – eg accounts – and see how the company responds. If the campaigner wishes to go the whole way at the outset, she should do whatever she can to verify the whistleblower's credentials, the whistleblower's motivation (preferably not "malicious") and the information (eg with an expert tax adviser scrutinising it).

Ideally, she should put her allegations to the corporate for comment before publication, and reflect those comments in the publication, in order to increase the prospect of being able to rely on the public interest defence under the Defamation Act. But she will need to be careful not to identify the whistleblower if the whistleblower is fearful of the consequences exposure. Any threats of litigation might be met with a request by the campaigner for pre-action disclosure of the corporate's crucial internal documentation concerning its tax affairs.

The corporate might seek an injunction (if notified in advance) or damages for breach of confidence. This implies that the information is true, and if it does indeed expose tax evasion there should be a good defence to any breach of confidence action.

A **campaigner working to prevent modern slavery has discovered that a toy manufacturer has been using child labour in its factories. He wants to raise awareness about the problem by changing the name of one of the manufacturer's most popular toys. He plans on sticking labels with the new name over some of the toys that are being sold in stores and putting up notices next to the toys, saying they have been made by children. The campaigner then wants to take photos of the toys and post them on social media. What would be the legal consequences of doing this? How far can campaigners go when criticizing big brands?**

The most immediate legal issue is likely to be trespass in the relevant retailers' stores, and in relation to the manufacturer/retailers' property being interfered with. The retailer will probably remove the material swiftly, but if the conduct is repeated the retailer, and/or the manufacturer, may seek an injunction for trespass and (if the campaigner's activities are interfering with customers

in store), nuisance, or seek to involve the police on grounds of aggravated trespass. The courts are likely to question whether more than a one off escapade such as this is justifiable. For example, has the campaigner sought to dissuade the manufacturer from using child labour by other means first, and are the relevant authorities in the UK (eg under the Modern Slavery Act 2015) and overseas doing nothing promptly to address the problem? Good justification for the campaigner's actions will also be required to head off an action for unlawful interference with trade.

Posting photos of the toys on social media, identifying them by reference to the manufacturer's name as having been made by child labour, may constitute infringement of copyright. The toys may have copyright protection, and reproduction in a photo of a three dimensional product can amount to infringement of copyright. In addition the packaging may incorporate copyright-protected images. Use of something akin to the manufacturer's trade mark may constitute trade mark infringement (tarnishment) unless there is good justification for the usage. The key again will be whether the campaign is proportionate to the harm caused by the use of child labour, and whether the manufacturer wants to run the potentially adverse public relations risks of litigation in such circumstances. A more likely tactic is for the manufacturer to demand that the social media platform takes the campaign online for breach of the ISPs terms about infringement of intellectual property. The campaigner will need to chose a robust (perhaps US based) platform, or be resigned to a short campaign.

There might also be a defamation issue, if a specific factory or enterprise in the manufacturer's supply chain is identifiable to social media users as responsible for a specific toys identified by the campaigner's posts as made with child labour, when that enterprise does not use child labour (albeit that others in the manufacturer's supply chain do) – ie the campaigner must be sure he has identified the correct products.

A small non-profit organisation recently set up Facebook and Twitter accounts. They don't know much about social media so they have put an intern in charge of the accounts. They later discover that the intern has been making inappropriate and inaccurate tweets directed at other charities, politicians and celebrities. They are worried they might be sued or might receive complaints. What steps should they take to save their reputation and to stop something similar from happening in future?

The organisation should ensure that it has a social media policy in place which all staff and interns who may have access to social media accounts are bound by and should ensure that someone with sufficient responsibility signs off on content prior to it being posted wherever possible (and particularly with more controversial campaigns). Tweets made in a personal capacity should not use the organisation's twitter handle.

If a campaign group makes a discovery that inappropriate and inaccurate tweets have been published, it should delete them (provided that it still has access to the accounts) to minimise damage and should ensure that accounts and passwords remain in the control of the organisation to ensure the entity is not locked out of its own platforms. It may wish to publish an apology, as long as this is not going to draw greater attention to the issue. It should part company with the intern. If the organisation is a charity, it might need to make a serious incident report to the Charity Commission.

Around election times, organisations should take extra care to ensure that there is a sign off system for social media content – please see our guidance on charity campaigning law and election law.

THOMSON REUTERS
FOUNDATION

www.trust.org