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Addressing strategic lawsuits against public participation (SLAPPs): a critical interrogation of legislative, and judicial responses

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ABSTRACT
Strategic Lawsuits Against Public Participation (SLAPPs) are abusive legal actions or threats brought by powerful parties to suppress criticism. This article is the first to interrogate the efficacy of the policy and legislative responses to SLAPPs in Europe and in England and Wales. It is also the first to provide extensive analysis of how SLAPPs have, to date, been treated by domestic courts, and how judges have applied the Civil Procedure Rules to the phenomenon. In assessing the existing early disposal mechanisms that have hitherto been deployed in these cases, and the early disposal mechanism prescribed in the Economic Crime and Corporate Transparency Act 2023 anti-SLAPP provisions, it argues that they are flawed, and in the case of ECCTA, a false dawn for tackling SLAPPs. Furthermore, and significantly, it advances an alternative model for a novel dedicated SLAPP early disposal mechanism.

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KEYWORDS SLAPPs; Defamation; Civil procedure; Europe; England and Wales

Introduction

Strategic Lawsuits Against Public Participation (commonly known as 'SLAPPs') refers to the improper, coercive use of legal action or threats of legal action by powerful individuals or companies to suppress criticism. Such vexatious claims represent a weaponisation of the law to exploit power and wealth inequalities between parties, ultimately inhibiting scrutiny and debate on matters of public interest. Although, as we explain in Part 1, law and literature on SLAPPs and anti-SLAPP law is well-established in jurisdictions such as the US and Canada, it has, until relatively recently been neglected at European and UK domestic levels. This has, however, begun

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to change. SLAPPs have become a focus of attention in the UK for legislators, policymakers, NGOs, and regulators due to high-profile controversial cases, ongoing work by the European Commission, European Parliament, and the Council of Europe (CoE), and intense domestic debate regarding the true nature and extent of the SLAPP 'problem'.

This article is the first to interrogate the efficacy of the policy and legislative responses to SLAPPs across Europe and in England and Wales.[1] It is also the first to provide extensive analysis of how SLAPPs have, to date, been treated by domestic courts, and how judges have applied the Civil Procedure Rules (CPR) to the phenomenon. It assesses the existing early disposal mechanisms that have hitherto been deployed in these cases, and the new anti-SLAPP early disposal mechanism prescribed in the Economic Crime and Corporate Transparency Act 2023 (ECCTA), arguing that they are flawed, and in the case of ECCTA, a false dawn for tackling SLAPPs. Furthermore, and significantly, it advances an alternative model for a novel dedicated SLAPP early disposal mechanism.

It begins in Part 1 with an assessment of recent European-level and English anti-SLAPP activity. In doing so, we set out the limitations and high benchmarks of existing early disposal mechanisms in English law, arguing that a dedicated free-standing early disposal mechanism for litigated SLAPP claims is needed. But we contend that the current domestic measures set out in ECCTA are too narrow, and out of kilter with the European approaches, and will therefore not adequately address litigated SLAPPs. This informs analysis in Part 2 which focuses on the domestic judicial treatment of SLAPPs to date, and the deployment of the CPR to tackle them. We demonstrate that with the right early disposal measures in place, courts would be well-equipped to deal with alleged SLAPP claims at an early stage. Our assessment of long-standing caselaw regarding the strike out of abusive claims demonstrates that the SLAPP-type claim is not a new phenomenon. Rather there exists an established judicial approach to assessing such cases, which is flexible, anti-formalist and purposive. Furthermore, rooting out SLAPP claims is entirely consistent with core civil law principles, particularly the overriding objective. However, our analysis reveals that although SLAPPs terminology has recently started gaining traction in the courts, judges do not yet have the tools they need to directly address such issues. As a result, judges flag up issues of concern in alleged SLAPP claims, but avoid definitively labelling them as such, reaching early disposal

[1]Where we discuss the domestic position on SLAPPs, our predominant focus is on the law and policy of England and Wales. This is because, as we discuss in Part 2, the legislative developments to date only apply to England and Wales. However, we draw upon case law from the wider UK and Ireland where relevant. Thus, the remainder of this article will refer to 'England' and 'English law', but such references shall be taken to also include Wales. We take this step to aid brevity and clarity and not to deny the importance of the Welsh nation or experience.

outcomes via alternative 'safer' grounds. Thus, Part 3 draws on this interrogation of domestic case law and European-level activity to advance novel reforms for a more effective anti-SLAPP early disposal mechanism that better aligns with European approach, the CPRs' overriding objective and historic approaches to abusive claims.

Part 1: Policy and legislative responses to SLAPPs in Europe and England

Countries such as the US and Canada have recognised SLAPPs for decades and have well-developed anti-SLAPP legislation,[2] jurisprudence and scholarship[3] on the phenomenon.[4] This Part assesses the European-level and domestic responses to SLAPPs. In doing so, it begins with an overview of the current available data regarding the European position on SLAPPs, which identifies England as a SLAPP hotbed. We demonstrate that at a European-level responses to the SLAPP phenomenon are gaining momentum, as evidenced by the recent development of anti-SLAPP law and policy led by European institutions,[5] the transposition of the EU Anti-SLAPP Directive by member states into domestic law,[6] and the Coalition

[2]To date, over 30 US states have adopted anti-SLAPP laws, including California, Arkansas, Arizona, Delaware and, in July 2024, Pennsylvania. See also: Geoffrey Robertson KC, *Lawfare* (TLS Books 2023) 8; Nicole J Ligon, 'Solving SLAPP Slop' (2023) 57(2) U Rich L Rev 459, 467; Christopher Whelan, *Lawyers on Trial: Hired Guns or Heroes* (2nd edn, Hart Publishing 2024), 114. In Canada, Ontario (Protection of Public Participation Act 2015), British Columbia (Protection of Public Participation Act 2019), and Quebec (Code of Civil Procedure 2014, s 54) have introduced anti-SLAPP legislation.

[3]For example, from Canada, see: Chris Tollefson, 'Strategic Lawsuits Against Public Participation: Developing a Canadian Response' (1994) 73 Can Bar Rev 200; Susan Lott, 'Corporate Retaliation Against Consumers: the Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada' (Public Interest Advocacy Centre, 2004); Hilary Young, 'Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs' (2013) 46(2) UBCL Rev 529; Byron M Sheldrick, *Blocking Public Participation The Use of Strategic Litigation to Silence Political Expression* (Wilfrid Laurier University Press, 2014); David A Potts and Erin Stoik, *Guide to the Law and Practice of Anti-SLAPP Proceedings* (Irwin Law 2022); Hilary Young, 'Canadian Anti-SLAPP Laws in Action' (2022) 100 Can Bar Rev 186; Evan Brander and James L Turk, 'Global Anti-SLAPP Ratings: Assessing the Strength of Anti-SLAPP Laws' (Centre for Freedom of Expression, Toronto Metropolitan University 2023). From the US, see Penelope Canan and George W Pring, 'Strategic Lawsuits Against Public Participation' (1988) 35(5) Soc Probs 506; Penelope Canan and George W Pring, 'Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches' (1988) 22 L & Soc'y Rev 385; George W Pring and Penelope Canan, *SLAPPs: Getting Sued For Speaking Out* (Temple University Press 1996); Victor J Cosentino, 'Strategic Lawsuits Against Public Participation: An Analysis of the Solutions' (1991) Cal W L Rev 399; TA Waldman, 'SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation' (1992) 39 UCLA Law Rev 979; D Mark Jackson, 'The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting *New York Times v Sullivan*' (2001) 9(2) Wm & Mary Bill Rts J 491; Lili Levi, 'The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism' (2017) 66 Am U L Rev 761; Andy Black, 'Anti-Anti-SLAPP: How the Judiciary's Narrowing of California's Anti-SLAPP Law Could Thwart Legislative Intent' (2021) 94 S Cal L Rev 144; Ligon (n 2).

[4]Other jurisdictions have limited anti-SLAPP laws. For instance, in Australia, the Australian Capital Territory introduced the Protection of Public Participation Act 2008 following *Gunns v Marr & Ors*, Supreme Court of Victoria 9575 of 2004, which targeted environmental defenders.

[5]European Commission, European Parliament, and the Council of Europe.

[6]See (n 20) for examples of the Directive's transposition into member states' domestic law.

Against SLAPPs in Europe (CASE).[7] We then turn our attention to the English position, first by suggesting that the UK is a forum of choice for SLAPP instigators because of the claimant-favourable conditions created by English defamation law, and then, secondly, comparing the UK government's response to SLAPPs with that of the European institutions. Here we argue that domestic policy and legislative action on SLAPPs is out of kilter with Europe. We contend that although a free-standing early disposal mechanism for SLAPP claims is necessary and welcome in the light of the limitations and high benchmarks of existing civil measures, the controversial ECCTA anti-SLAPP provisions are too narrow and will not enable courts to effectively address litigated SLAPPs.

SLAPPs in Europe: what the data tells us

The relative scarcity of anti-SLAPP law and policy within Europe as compared to the US and Canada is indicative of the intense and polarised debate on the existence and extent of SLAPPs. In the UK, this debate is at least partly hindered by the dearth of official quantitative and qualitative data regarding SLAPPs from the UK government. Indeed, until 2023, the same could be said for the European institutions.[8] SLAPPs that progress to formal proceedings – and are therefore recorded and easier to quantify – are likely to represent only a fraction of SLAPP cases. SLAPPs most frequently take the form of a threat of legal action, without ever progressing to formal proceedings. This, combined with the fact that these threats may be made through an agent – such as reputation management firms – operating outside of legal regulatory oversight, means that this dearth of official data is unsurprising. However, despite difficulties obtaining accurate data on SLAPPs, the European Parliament, and CASE, have attempted to fill this gap. Because the European Parliament's study relates to EU states,[9] and because it broadly reflects CASE's research, for the purpose of this article we refer to CASE's report. CASE's research supports anti-SLAPP advocates who recount recent high-profile litigation,[10] and cases of self-

[7] See <https://www.the-case.eu/> accessed 5 September 2024.

[8] In 2023 a study, commissioned by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament to analyse SLAPP cases and threats which were initiated in 2022 and 2023 in the EU, was published. However, its scope is confined to the EU, and therefore does not consider the UK. See Justin Borg-Barthet and Francesca Farrington, 'Open SLAPP Cases in 2022 and 2023: The Incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union' (Policy Depart for Citizens' Rights and Constitutional Affairs, European Parliament, Nov 2023).

[9] ibid 8–12.

[10] In the UK, the publisher HarperCollins and the author Catherine Belton were sued for defamation by Roman Abramovich in respect of certain passages in her book 'Putin's People: How the KGB Took Back Russia and Then Took on the West' (*Abramovich v HarperCollins Ltd* [2021] EWHC 3154 (QB)). The claim was settled. Similarly, *Financial Times* journalist Tom Burgis and HarperCollins were sued for defamation by Eurasian Natural Resources Corporation Limited (*Eurasian Natural Resources Corporation Ltd v Burgis and HarperCollins Ltd* [2022] EWHC 487 (QB)) in respect of Burgis's book *Kleptopia*. The claim was

censorship to prevent litigation,[11] to reinforce their argument that there is a pressing 'SLAPP problem' that threatens free speech.[12] The grim prospect of having to defend speech in highly expensive, and stressful legal proceedings can intimidate critics, investigators or whistle-blowers into silence, so that crucial matters of public interest are not brought to light. Thus, beyond the SLAPP instigator's primary target(s), SLAPPs pose wider harms to the public sphere and discourse, by depriving citizens of the information necessary to enable meaningful debate and effectively hold power to account. CASE thus identifies the need, in the UK and across the continent, for legal reform to provide comprehensive anti-SLAPP protection. In fact, since its creation in March 2021, CASE has provided a body of data that points towards an increase in SLAPPs across Europe (although this dataset is restricted to SLAPPs that proceeded to formal litigation).

In its 2022 report[13] CASE found 570 SLAPP cases in 29 European countries between 2010 and 2021, noting an increase in the number of cases of 43.5 per cent in 2019, 15.2 per cent in 2020 and a slight decrease of 2.6 per cent in 2021. Its 2023 report[14] provides further evidence of this upward trend in SLAPPs, identifying over 820 SLAPPs, compared with the 570 in the 2022 report. The CASE data shows that journalists (248 lawsuits/30.2 per cent) and media outlets (203 lawsuits/24.7 per cent) are most likely to be sued, followed by editors (98 lawsuits/11.9 per cent), activists (80 lawsuits/9.7 per cent) and NGOs (44 lawsuits/5.4 per cent), with

dismissed. For further examples, see Susan Coughtrie, ''London Calling': The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom' (Foreign Policy Centre, October 2022); Robertson (n 3) 4–11. For examples from Europe, see Dunja Mijatović, 'Time to take action against SLAPPs' (*Council of Europe*, 27 October 2020) <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps> accessed 2 December 2024.

[11]Such as the delayed publication of *Billion Dollar Whale* and the blocked UK publication of Karen Dawisha's *Putin's Kleptocracy*. See UK-Anti-SLAPP Coalition, 'Countering legal intimidation and SLAPPs in the UK: A Policy Paper' <https://www.ecpmf.eu/wp-content/uploads/2021/07/Policy-Paper-Countering-legal-intimidation-and-SLAPPs-in-the-UK.pdf> accessed 5 September 2024.

[12]See, eg, Coughtrie (n 10); UK Anti-SLAPP Coalition <https://www.englishpen.org/posts/campaigns/uk-anti-slapp-coalition-model-anti-slapp-law/> accessed 5 September 2024; Mijatović (n 10).

[13]CASE, 'Shutting Out Criticism: How SLAPPs Threaten European Democracy,' <https://www.the-case.eu/wp-content/uploads/2023/04/CASEreportSLAPPsEurope.pdf> accessed 2 December 2024.

[14]CASE, 'SLAPPs: a threat to democracy continues to grow,' <https://www.the-case.eu/wp-content/uploads/2023/08/20230703-CASE-UPDATE-REPORT-2023-1.pdf> accessed 2 December 2024. The report defines SLAPPs as

> abusive lawsuits filed to shut down acts of public participation, including public interest journalism, peaceful protest or boycotts, advocacy, whistleblowing, academic comments, or simply speaking out against the abuse of power. SLAPPs target anyone who works to hold the powerful to account or engage in matters of public interest: so-called "public watchdogs". (at 7)

The report explains that its data collection was 'through a "snowball sampling" method' which 'refers to a method of chain referral sampling that involves "collecting a sample from a population in which a standard sampling approach is either impossible or prohibitively expensive, for the purpose of studying characteristics of individuals in the population."' (at 9 and fn 3). The report acknowledges its limitations, including 'the data gathered for this report only covers court-recorded lawsuits, and does not therefore consider the extent to which the act of issuing an aggressive legal threat can itself shut down acts of public participation (ie, by causing an immediate retraction)' (at 11–12).

instigators predominantly being businesses or businesspersons (335 lawsuits/40.8 per cent), politicians or people in the public service (227 lawsuits/27.6 per cent) or state-owned entities (113 lawsuits/13.7 per cent).

According to the 2023 report, defamation is the most common cause of action used by SLAPP instigators. Significantly, it identifies England as a SLAPP hotbed, and the 'forum of choice' for would-be SLAPP instigators;[15] a finding supported by other organisations, such as Index on Censorship (IoC),[16] and the Reporters Without Border Index.[17] In 2020, The Foreign Policy Centre (FPC) found that the UK was the most frequent country of origin for legal threats after journalists' home countries. And, remarkably, it was almost as frequent a source of these legal threats (31 per cent), as all EU countries (24 per cent) and the US (11 per cent) combined.[18] As we explain below, this is partly attributable to the specific features of English defamation law.

European-level anti-SLAPP developments

Although the EU Anti-SLAPP Directive[19] was adopted in the European Parliament in early 2024,[20] our focus will be on developments relating directly to the UK. Although it will not apply to the UK, the Directive contains similar features to, and shares the spirit of, the CoE's 'Recommendation on countering the use of strategic lawsuits against public participation

[15]As well as Malta, France, Turkey, Croatia, Greece, and Georgia.

[16]The IoC ranked the UK in the third tier of countries, below almost all other Western European Countries, for freedom of expression, and was graded as only 'partially open' in respect of media freedom, due to the "chilling effect" of, inter alia, SLAPPs: <https://www.indexoncensorship.org/indexindex/> accessed 10 September 2024.

[17]The IoC places the UK in 24th place, citing as a reason for this ranking a 'proliferation of … SLAPPs [which] has helped make London the "defamation capital of the world", with journalists from the UK and around the world forced to defend their reporting in British courts' <https://rsf.org/en/country/united-kingdom> accessed 10 September 2024. See also Coughtrie, n 10; Platform to Promote the Protection of Journalism and Safety of Journalists and Council of Europe, 'War in Europe and the Fight for the Right to Report' (Council of Europe, 2023) 51–52.

[18]Susan Coughtrie and Poppy Ogier, 'Unsafe for Scrutiny: Examining the Pressures Faced by Journalists Uncovering Financial Crime and Corruption Around the World' (*The Foreign Policy Centre*, 2 November 2020) <https://fpc.org.uk/publications/unsafe-for-scrutiny/> accessed 5 September 2024. See also Coughtrie (n 10).

[19]Council Directive 2024/1069/EC of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic Lawsuits Against Public Participation') [2024] OJ L, 2024/1069.

[20]For further analysis, see: CASE, 'The Anti-SLAPP Directive creates a promising minimum standard for Member States,' 27 February 2024 <https://www.the-case.eu/latest/the-anti-slapp-directive-creates-a-promising-minimum-standard-for-member-states/>. In July 2024, Malta was the first EU member state to transpose the Directive (see 'Malta transposes EU's anti-SLAPP directive,' *Times of Malta*, 31 July 2024). In the same month Ireland published its Defamation (Amendment) Bill 2024, which if enacted will transpose the Directive (see <https://www.gov.ie/en/press-release/d297d-minister-mcentee-and-minister-browne-publish-defamation-bill/> and <https://data.oireachtas.ie/ie/oireachtas/bill/2024/67/eng/initiated/b6724d.pdf>). And in August 2024 Greenpeace reported that it used the Directive to 'push back' against a 'meritless, US $300 million lawsuit from US-based fossil fuel company Energy Transfer' (see: 'Greenpeace International Uses First EU Anti-SLAPP Directive,' 3 August 2024, <https://popularresistance.org/greenpeace-international-uses-first-eu-anti-slapp-directive/>), all accessed 5 September 2024.

(SLAPPs)'[21] (hereafter referred to as 'Recommendation on SLAPPs'). As discussed below, because the UK is member state of the CoE, the Recommendation should inform its response to SLAPPs.

The CASE research discussed above has been a catalyst for the emergence of anti-SLAPP law, policy, and jurisprudence at a European level, although the European institutions have responded more pro-actively than the judiciary. In 2022, in *OOO Memo v Russia*,[22] the European Court of Human Rights (ECtHR) used the term 'SLAPP' for the first time. It explicitly referred to the CoE's Commissioner on Human Rights 'Time to take action against SLAPPs' *Comment*,[23] and recognised 'the growing awareness of the risks that court proceedings instituted with a view to limiting public participation bring for democracy'.[24] Although this indicates that SLAPPs are now on the Strasbourg Court's radar, its broad acknowledgment that the phenomenon poses a risk to democracy must be tempered by the fact that only four of the seven judges seemed to consider the 'growing awareness' of SLAPPs as pertinent.[25] Furthermore, as the case was not referred to the Grand Chamber, the relevance of this aspect of the judgment has not, to date, been considered further, nor has the Court made any further reference to SLAPPs in its subsequent case law. Thus, its impact on the potential development of a SLAPPs jurisprudence remains to be seen.

Beyond the courtroom however the development of European anti-SLAPP law and policy is gathering pace. The CoE's Committee of Experts on SLAPPs[26] integrated the Strasbourg court's observations in *OOO Memo* into its Recommendation on SLAPPs,[27] which was adopted by the Committee of Ministers in April 2024. Coe was the UK's independent member of that Committee, and saw first-hand the appetite from, not only European institutions, such as the CoE[28] and the European Commission,[29] but also from the CoE member states to create a Recommendation with the widest possible scope to give states the tools to tackle different forms of SLAPPs.

Although Recommendations are not formally binding on member states, they are influential, and the Committee of Ministers can ask member governments for information on action taken in relation to them.[30] Thus, six key

[21]Recommendation CM/Rec(2024)2 of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation (SLAPPs), 5 April 2024.
[22]*OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022).
[23]ibid [23], citing Mijatović (n 10).
[24]ibid [43].
[25]The judges who considered it to be relevant were Judges Pavli, Roosma, Zünd and Krenc. To the contrary, see the joint concurring opinion of Judges Ravarani, Serghides and Lobov, ibid. For further analysis of the case, see D Voorhoof, '*OOO Memo v Russia*, Claims by Executive Bodies breach Article 10,' *Inforrm*, 5April 2022.
[26]https://www.coe.int/en/web/freedom-expression/msi-slp, accessed 5 September 2024.
[27]Recommendation on SLAPPs (n 21).
[28]ibid.
[29]European Commission, SLAPPs, COM(2022) 177, final 2022/0117 (COD), 27 April 2022.
[30]Article 15b, Statute of the Council of Europe Treaty 1949.

features of the Recommendation on SLAPPs are significant. First, it sets out various characteristics that can be used by a tribunal as *indicators* for *identifying potential* SLAPPs.[31] By adopting this nuanced, spectrum-based approach, the CoE sought to circumvent the problematic task of offering a definitive definition of SLAPPs which might prove under- or over-inclusive. This is because a narrow and restrictive definition would limit the efficacy of the Recommendation by failing to account for the amorphous nature of SLAPPs, yet on the other hand, an over-wide definition could prevent legitimate and meritorious claimants from being able to protect their rights to reputation and privacy. Second, it identifies and categorises specific types of SLAPPs, including cross-border SLAPPs, multiple or coordinated SLAPPs, and SLAPPs targeting anonymous public participation, each of which display distinct features and raise unique issues.[32] Third, it urges states to adopt a range of comprehensive procedural safeguards to better protect SLAPP targets, relating to, for instance, effective case-management,[33] early dismissal mechanisms,[34] stay of proceedings,[35] and restitution of legal costs, whereupon determination that a claim constitutes a SLAPP, the court can order the claimant to bear all the costs of the proceedings.[36] Fourth, it sets out a variety of remedies for targets where a case is deemed a SLAPP, including recommending that costs are capped[37] and the provision of pecuniary and non-pecuniary damages for SLAPP victims.[38] This extends to recommending the facilitation of independent non-judicial remedies ‘such as alternative dispute resolution, mediation and press councils’.[39] Fifth, it advocates a ‘culture of transparency’, which includes states ‘providing the possibility for the publication of courts’ findings’[40] and establishing a public register of cases that have been classified as SLAPPs.[41] Sixth, it advances a variety of support measures for SLAPP targets and victims, such as legal, financial and psychological support, and it encourages states

[31]Recommendation on SLAPPs (n 21).
[32]ibid [10]–[19]. For instance, cross-border SLAPPs involve additional layers of complexity, costs, and stress, as responding to them, and successfully defending them requires expert knowledge of multiple national legal systems. In respect of anonymous public participation, the SLAPP target is often using the mask of anonymity as a layer of protection because they fear for their safety if they were to speak out under their real names. Therefore, in these cases, the potential exposure, and what this may mean for the target, adds a further layer of threat that can be exploited by the SLAPP instigator.
[33]ibid [24].
[34]ibid [25]–[34]. We analyse the efficacy of these mechanisms below, in respect of the domestic legislative developments.
[35]ibid [35]–[36].
[36]ibid [38].
[37]ibid [40] & [43].
[38]ibid [41].
[39]ibid [46]. The independence of such mechanisms is crucial in order to minimise the risk of the process unduly benefitting the more powerful party. It should also be noted that ADR or mediation may not be suitable for certain types of dispute (e.g. those involving allegations of sexual harassment or misconduct).
[40]ibid [47].
[41]ibid [48].

to engage in education, training and awareness-raising around SLAPPs.[42] Incidentally, the adoption of the Recommendation on SLAPPs closely followed the CoE Parliamentary Assembly approving a Resolution that urges member states to strengthen their anti-SLAPP legislation and to coordinate with each other to 'combat' SLAPPs.[43]

This flurry of European-level anti-SLAPP activity has been met with opposition in some quarters. Several leading English media lawyers contend that the so-called 'SLAPP problem' has been overstated, lacks an evidential basis,[44] and that any legal reform or development should be avoided, or at least limited in scope so that measures to protect SLAPP targets and free speech do not have insidious unintended consequences for claimants' fundamental rights. They argue that over-broad anti-SLAPP legislation could conflict with the European Convention on Human Rights by preventing legitimate claimants from being able to pursue meritorious causes of action that could protect their reputation or privacy because it wrongly categorises them as being a SLAPP instigator. In turn, this could create a slippery slope where irresponsible reporting by certain factions of our press is permitted, and legitimate claims are inadvertently deterred.[45] These domestic concerns may have influenced the narrow scope of the ECCTA anti-SLAPP provisions, which we analyse below.

English defamation law as a primary SLAPP vehicle

It is no accident that domestically, as noted above, defamation law is the primary cause of action deployed by SLAPP claimants.[46] English defamation law has an established history of providing conditions that are favourable to

[42]ibid [50]–[59].

[43]Council of Europe, Parliamentary Assembly, 'Countering SLAPPS: an imperative for a democratic society', Resolution 2531 (2024), 25 January 2024, [11]. The Recommendation on SLAPPs also urges 'National coordination and international cooperation,' ibid [60]–[62].

[44]For example, see: Gideon Benaim, 'Why the SLAPPs debate has been overblown' (Simkins, 21 June 2021); Gideon Benaim, 'Strategic Litigation Against Public Participation Bill 2024: Part 1, The Provisions' and 'Part 2, The Problems' *Inforrm*, 6 and 7 March 2024; UK Parliament, Justice Select Committee on SLAPPs (see evidence of Justin Rushbrooke KC), <https://committees.parliament.uk/committee/102/justice-committee/news/170686/committee-takes-evidence-on-governments-proposals-to-tackle-slapps/> accessed 6 September 2024. Iain Wilson has argued that the 'talk of SLAPPs' is 'greatly exaggerated' and that it is used as a 'defendant's wildcard,' Iain Wilson, 'SLAPPs: A real problem or a defendant's wildcard?' *Inforrm*, 25 May 2022. For further comment on this, see Mark Hanna, 'SLAPPs: What are they? And how should defamation law be reformed to address them?' (2024) 16 JML 118.

[45]This point was made by Coe to the UK Parliament Justice Select Committee on SLAPPs and to the UK Ministry of Justice in May 2022, but it does not represent his 'view' on the matter. Rather, it is a critical observation. See also Peter Coe, 'Strategic Lawsuits against Public Participation: a few thoughts' *Inforrm*, 17 June 2022. Iain Wilson, vice-chair of The Society of Media Lawyers, has argued that such legislation 'risks handing more power to the unregulated press,' Michael Cross, 'Government backs SLAPPs legislation' LS Gaz, 23 February 2024. See also Benaim (n 44).

[46]Other laws such as misuse of private information, data protection, copyright and environmental laws may also be used as SLAPP vehicles. A full account of these doctrines is beyond the scope of this work, but they represent an area for further ongoing research into SLAPPs.

claimants. Indeed, the current legislation – the Defamation Act 2013 (DA 2013) – was enacted to address a range of problems that had led London to become known as the 'libel capital of the world'. These problems included claimants bringing actions for trivial reputational damage,[47] prompting the Act's introduction of the 'serious harm' threshold.[48] The growth of 'libel tourism', where claimants brought actions despite tenuous connections to the UK, was also recognised in the legislation, as it introduced a new requirement that England must be the most appropriate place to bring an action.[49] The single publication rule, conceived in the pre-digital mass media age, came to inadvertently extend defamation's strict one-year limitation period and was also subject to reform to address the ongoing nature of online publication.[50] Finally, the DA 2013 overhauled and strengthened the defences in various ways.[51] In making these and related reforms, the DA 2013 sought to 'rebalance' defamation law away from its previous claimant-favoured position.

Against this backdrop, and notwithstanding the DA 2013s reforms, three key features of English defamation law render it particularly claimant-friendly and fertile ground for SLAPPs. First, the section 2 truth defence applies a reverse burden of proof, which means that unless the defendant can prove that the defamatory statement is true on the balance of probabilities, it is presumed to be false. Second, despite section 9 tightening the jurisdiction rules to exclude actions with tenuous links to the UK, the law still permits foreign claimants. Finally, defamation litigation in England attracts high legal costs. The current ceiling for damages awards in defamation claims is £350,000 (which is a considerable sum *per se*),[52] but costs awards can be significantly higher.[53]

[47]eg, *Jameel v Dow Jones & Company* [2005] EWCA Civ 75.

[48]DA 2013, s1(1); Defamation Act Explanatory notes [10]–[11].

[49]ibid s 9; DA 2013 Explanatory Notes [65]–[66].

[50]ibid s 8; The rule prevents an action being brought in relation to the publication of the same material by the same publisher after a one-year limitation period from the date of the first publication of that material to the public or a section of the public. It replaces the longstanding principle that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (known as the 'multiple publication rule'), DA 2013 Explanatory Notes [60]–[62]. See also: Richard Parkes KC and Gideon Busuttil, eds, *Gatley on Libel and Slander* (13th edn, Sweet & Maxwell 2022), 7-006–7-009.

[51]ibid ss 2–7. For a summary of how the defences have been overhauled see the corresponding DA 2013 Explanatory Notes [13]–[35] and, for more detailed, analysis see ibid. *Gatley* chs. 12–18.

[52]In *Gilham v MGN Ltd Reach PLC* [2020] EWHC 2217 (citing *Barron & Others v Collins* [2017] EWHC 162 (QB) per Warby J, [26]) Lewis J (at [32]) held that the upper limit for compensatory damages in defamation proceedings is approximately £300,000 for the 'gravest of allegations' (see also UK Parliament Research Briefing, 'Lawfare and the UK Court System' 19 January 2022 <https://commonslibrary.parliament.uk/research-briefings/cdp-2022-0016/> accessed 5 September 2024). Albeit, in *Lachaux v Independent Print Limited and Evening Standard Limited* [2021] EWHC 1797 Nicklin J (at [222]) recognised that a libel 'at the very top end of the level of seriousness' could lead to an award of damages of up to £350,000.

[53]E.g., the costs in *Vardy v Rooney* [2022] EWHC 2017 (QB) amounted to approximately £1.5 million.

The extensive increase in legal costs, and how this can be exploited by SLAPP instigators, received recent judicial attention in *Connective Energy v Energia*.[54] Although this is an Irish case, the judgment's criticism of exorbitant costs and their role in SLAPPs is relevant to English claims. Resolving a basic contract dispute that had estimated fees of up to €937,000, Twomey J claimed that such extraordinary 'millionaire' costs are a matter of significant public interest.[55] Because they are unaffordable for most people, such cost levels impede access to justice and have a chilling effect on a range of activities including free speech.[56] Furthermore, as Twomey J explained, they can be 'weaponised' to 'blackmail' parties to settle,[57] a dynamic that is leveraged to maximum effect in SLAPP claims.[58] In such cases 'the tail (of legal costs) ends up wagging the dog (of justice). Indeed slapps … are dependant [sic] for their effectiveness on this fact … in order to stifle actions/comment with the threat of litigation'.[59] In the light of these features and, as the cases discussed below demonstrate, English defamation law still has the capacity to accommodate coercive, spurious actions brought to intimidate and silence critics.

Furthermore the legal position regarding protection for reputation has become somewhat complicated in recent years as other doctrines ostensibly concerned with protecting privacy – namely misuse of private information (MPI) and data protection – have expanded to encompass protection for reputation.[60] As a result, claimants may utilise these doctrines to circumvent safeguards (for example, the truth defence and one-year limitation period) built into defamation law.[61] Such deployment of data protection is evidenced in *Trump v Orbis Business Intelligence Ltd*,[62] a case brought by Donald Trump against the firm that created a secret dossier which contained allegations regarding his links with Russia, including activities with sex workers that exposed him to blackmail. The dossier had been leaked and published online in 2017.[63] Trump's claim was dismissed by the court via

[54] *Connective Energy Holdings Ltd v Energia Group ROI Holdings DAC* [2024] IEHC 23.
[55] ibid [4]–[5], [10], [12]–[13].
[56] ibid [26], [37].
[57] ibid [35]. Twomey J is quoting the Irish Supreme Court when using the term 'blackmail'.
[58] 'Who benefits from the continuation of these 'millionaire' rates of pay in the High Court? It would certainly not appear to be litigants (except perhaps [slapp] litigants … because a 'slapp' is likely to be much more effective, in stifling criticism/publicity/litigation, if it comes with a threat of High Court legal costs in the hundreds of thousands/millions [of] euros rather than say with a threat of District Court legal costs in the hundreds of euros,' ibid [14].
[59] ibid [34].
[60] See: *ZXC v Bloomberg* [2002] UKSC 5 (misuse of private information); *Aven v Orbis Business Intelligence Ltd* [2020] EWHC 1812.
[61] For criticism of this development in MPI, see: Nicole A Moreham, 'Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private' (2019) 11 JML 142. In defence of it, see: Robert Craig and Gavin Phillipson, 'Privacy, Reputation & Anonymity Until Charge: ZXC Goes to the Supreme Court' (2021) 13 JML 153.
[62] *Trump v Orbis Business Intelligence Ltd* [2024] EWHC 173.
[63] This was the last of three civil actions brought against the defendant for its creation of the 'Trump' dossier. In the first case, *Aven* (n 60), the claimants partially succeeded and were awarded compensation because Orbis had failed to take reasonable steps to verify one of the allegations in the

a combination of strike out and summary judgment. Steyn J refused Trump permission to amend his case to add a claim for distress and reputational damage under the earlier Data Protection Act 1998 to his existing GDPR claim. This was because he was seeking to add this claim (and new supporting facts) outside of the six-year data protection limitation period and had provided no good reason for the delay, particularly as a person is expected to act expeditiously in vindicating their reputation.[64] For the remainder of the claim the court held that Trump had no reasonable grounds for bringing the action, and no real prospect of successfully obtaining damages. This was because Orbis had deleted all copies of the dossier, and since the GDPR had come into force, it had only dealt with copies for the privileged purposes of defending their case in ongoing litigation.[65] Due to these conclusions, the court did not make any finding on whether Trump's claim constituted an 'abuse of process', though the defendants advocated this strike out ground and the court summarised key principles without directly applying them.[66] Nor did the court get to consider the substantive legal issue of whether the reputation of a court-confirmed rapist, fraudster and inciter of insurrection against a democratically-elected government could be seriously harmed. Though this article's focus is defamation law, *Trump v Orbis* suggests that the implications of the general expansion of MPI and DP to protect reputation – particularly for SLAPPs – warrants further detailed investigation.

In summary, key features of English doctrine and costs culture render it particularly receptive to SLAPP claims. Against this background, domestic counter-mechanisms to address SLAPPs – which we now turn to – assume a particular significance.

Existing early disposal mechanisms

Mechanisms for disposing of cases at an early stage have a crucial role to play in combatting SLAPPs once they are issued at court There are three main ways in which weak, unmeritorious cases can be weeded out by the system early so that cases are dealt with proportionately, efficiently and in accordance with the principles of the CPRs' overriding objective.[67] The ECCTA provisions discussed below would add an additional mechanism to this

dossier (concerning their role in handling illicit cash). The second case, *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2912, involved an unsuccessful libel action brought by a Russian businessman depicted in the dossier. At trial Warby J criticised various aspects of the claimant's case, including the 'limited and unsatisfactory' evidence of the claimant's officers regarding serious financial harm, its failure to call live witnesses and its heavy reliance on hearsay evidence, [59]–[65], [81], [86]–[87], [114]–[116].

[64] *Trump* (n 62) [88]–[89].

[65] ibid [111], [116]–[121], [129].

[66] ibid [93]–[94].

[67] CPR, 1.1 requires the court to 'deal with cases justly and at proportionate cost'. This includes: 'ensuring the parties are on an equal footing'; 'saving expense'; dealing with the case proportionately to the financial position each party and the importance, value & complexity of the case; allotting cases an

selection. The three existing provisions examined here are: summary judgment; summary disposal under the Defamation Act 1996; and, most commonly in alleged SLAPP cases, strike out.

Summary judgment

Summary judgment enables courts to filter out very weak cases (or parts of cases) thus ensuring that costs are saved, and court resources are used efficiently in accordance with the overriding objective. According to CPR 24.3, a court may enter summary judgment regarding whole or part of a case if 'the party has no real prospect of succeeding' and there is 'no other compelling reason why [it] should be disposed of at a trial'.[68] To resist summary judgment, a party must demonstrate that their case is 'realistic' as opposed to 'fanciful', that it 'carries some degree of conviction' and is 'more than merely arguable'.[69] Summary judgment thus has the capacity to address one key feature of SLAPPs, namely that such claims are 'partially or fully unfounded'.[70] This characteristic is acknowledged in other jurisdictions with more developed anti-SLAPP frameworks. For example, as the Canadian Supreme Court has stated, a SLAPP

> claim is merely **a façade** for the plaintiff who is **in fact manipulating** the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs.[71]

But summary judgment must detect such 'facades' and weak claims within the practical limits of such hearings. Via this process, a court can and should decide short points of law that the parties have argued.[72] But dealing with factual matters may be more difficult. The court does not take a claimant's assertions at face value and evidence of factual matters is often adduced.[73] However, the court must also avoid a 'mini-trial', and should not enter summary judgment where a fuller investigation into the facts is necessary.[74] This means that summary judgment is not suitable for legally or factually complex cases (and SLAPP instigators are likely present their cases as such to avoid it).

'appropriate share of the court's resources' taking into account demand. CPR, 1.3 requires the litigating parties to help the court further the overriding objective.

[68]CPR, 24.3.

[69]*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339, [15].

[70]Recommendation on SLAPPs (n 21), SLAPP indicator (b), 4.

[71]Emphasis added. *Ontario Ltd v Pointes Protection Association* (2020) SCC 22 [2]. For further analysis of this case, see Peter Coe, 'An analysis of three distinct approaches to using defamation to protect corporate reputation from Australia, England and Wales, and Canada' (2021) 41 LS 111, 116–118.

[72]*Easyair* (n 69) [15].

[73]ibid *Gatley* (n 50) 32–030. See, eg, *Duchess of Sussex v Associated Newspapers* [2021] EWHC 273, [12].

[74]Though nor should a case be permitted to go to trial 'because something may turn up,' ibid. *Easyair* (n 69) [15].

Section 8 application

Sections 8–11 of the Defamation Act 1996 afford a tailored process for summary disposal of defamation actions. Section 8 allows the court to dismiss a claim or defence if it has no 'realistic prospect of success' and 'there is no reason why it should be tried'.[75] It requires the court to have regard to various factors when making its decision, including the severity of the allegation, the degree of conflict in evidence and – particularly salient in SLAPP cases – 'whether all the persons who are or might be defendants … are before the court'.[76] Section 8 is now rarely used and has been termed a 'slightly antique procedural weapon' that has been 'left to gather dust'[77] because CPR 24 summary judgment now covers the same ground and holds advantages over section 8. In particular, CPR 24 enables summary disposal of specific issues as well as a whole case, it does not limit claimant damages to £10,000 (as section 8 does) and it enables the court to order a party to pay money into court if it deems a party's success improbable.[78]

Strike out

Though it overlaps with the summary judgment requirements discussed, strike out is currently the most pertinent and commonly-used early disposal mechanism in alleged-SLAPP cases. According to CPR 3.4(2) a court may strike out all or part of a case if there are 'no reasonable grounds for bringing or defending the claim', that it 'is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings' or where there has been 'failure to comply with a rule … or court order'.[79] Because strike out is a draconian power, it is exercised in very limited circumstances and is used cautiously.[80] The strike out requirements set a very high benchmark and are met 'only in the most clear and obvious case'.[81] For example, even where an action is found to be mixed – including both false and genuine claims – the court will not necessarily strike out the full claim, but allow the genuine part to proceed and apply appropriate costs sanctions.[82] As Lord Clark has stated, 'The power to strike out is not a power to punish but to protect the court's processes'.[83] Cases that are highly fact sensitive or where legal viability is unclear (e.g. because it concerns an area of

[75]DA 1996, s8(2)–(3).
[76]ibid s8(4).
[77]*Alsaifi v Amunwa* [2017] EWHC 1443, [56]–[57].
[78]*Gatley* (n 50) 32–027. The position on applying for early disposal under CPR 24 *and* s8 is ambiguous and *Gatley* suggests 'current practice is generally to proceed under Pt 24 only,' 32.029.
[79]CPR, 3.2(2).
[80]*Bezant v Rausing (& 16 Others*) [2007] EWHC 1118, [130].
[81]*Broxton v McClelland & Another* [1995] EMLR 485 (CA) 498. Approved in *Wallis v Valentine* [2002] EWCA Civ 1034, [31].
[82]*Summers v Fairclough Homes Ltd* [2012] UKSC 26, [30], [51]–[52].
[83]ibid [45].

developing case law) will be inherently unsuitable for strike out.[84] For the purposes of strike out, the primary facts as stated in the claimant's Particulars of Claim are assumed to be true.[85] Evidence regarding pleadings in statements of case is inadmissible. But evidence is invariably adduced to support a strike out ground (e.g. failure to comply with a rule or abuse).[86]

It is evident from this examination that these existing mechanisms for the early disposal of *litigated* SLAPP cases are limited in three ways. First, they set onerous benchmarks that must be met in order to apply. Second, they are not equipped to deal with cases of legal or factual complexity. Third, they are not appropriately tailored to the specific features, needs and dynamics of SLAPPs. Despite this, Part 2 demonstrates that they do have a potential value and application in rooting out *alleged* SLAPP claims. But it is clear that, as per other jurisdictions, a free-standing anti-SLAPP measure is needed to strengthen protections against abusive claims. The previous UK government's preferred anti-SLAPP solution was introduced in the ECCTA 2023 reforms, to which discussion now turns.

Anti-SLAPP developments in England

Although there has been recent policy and legislative activity in relation to SLAPPs domestically, the current position under English law diverges from the European response.

As discussed above, a range of European organisations and formal reports[87] have claimed that England is a SLAPP hotbed because of its claimant-friendly defamation law. In response to such findings, one may have expected the UK government to investigate and, if necessary, tackle the issue. In 2022 it seemed that this would happen, with the Ministry of Justice issuing a Call for Evidence on SLAPPs, which was soon followed by the government's response to the submitted evidence.[88] Both publications primarily focussed on the role played by defamation law in facilitating SLAPPs. However, this activity was followed by a period of silence until amendments to tackle SLAPPs concerning economic crimes – applicable in England and Wales only[89] – were proposed to the Economic Crime and Corporate Transparency Bill (which became ECCTA in October 2023). Thus, despite the previous government's initial stated interest, tackling SLAPPs through defamation law reform fell off the list of priorities.[90]

[84] *Kelly v O'Doherty* [2024] NIMaster 1, [12]–[15]; *Bezant* (n 80) [43]; *Gatley* (n 50) 32–042.
[85] *Duchess of Sussex* (n 73), [11]. See also *Wallis* (n 81) [33].
[86] *Gatley* (n 50) 32–030.
[87] CASE (n 13) and (n 14).
[88] Ministry of Justice, 'SLAPPs: Government Response to Call for Evidence' (20 July 2022).
[89] ECCTA, s 218(2).
[90] Peter Coe, 'Strategic Lawsuits Against Public Participation (SLAPPs) and the Economic Crime and Corporate Transparency Act 2023' (2024) 29 Comms Law 1, 2.

Although ECCTA has only been in force for a few months, it remains to be seen whether its anti-SLAPP provisions will remain on the statute book long enough to achieve their aim, as potential repeal *was*, and *perhaps still is*, on the horizon. The provisions' limited scope – which we discuss below – apparently prompted the Private Members' Strategic Litigation Against Public Participation Bill[91] (hereafter 'SLAPPs PMB'), which was put forward by the (now former) MP, Wayne David, in February 2024. *If enacted* it will repeal sections 194 and 195 of the Act.[92] Prior to the 2024 general election, the last Conservative government publicly supported the Bill, stating: '[It] builds on the work the Government began in [ECCTA]' and that it 'has cross-party support, and will update the measures in the 2023 Act to cover a broader scope – blocking SLAPPs across all types of litigation, including sexual harassment, not just economic crime'.[93] Although the Bill addressed the ECCTA anti-SLAPP provisions' limited scope, it was nevertheless described as 'deeply flawed', a 'rushed cut and paste' of the 'poorly drafted' ECCTA anti-SLAPP provisions,[94] and in need of a 'significant' redraft.[95] Consequently, in early May 2024 significant amendments were tabled, but these were also widely criticised.[96] However, because the SLAPPs PMB was not included in the pre-general election 'wash-up', its content and future remain uncertain (its passage is currently stalled at the House of Commons 'Committee stage').[97] Therefore, this article focuses

[91]Strategic Litigation Against Public Participation HC Bill (2023–2024) [21]. The Bill as originally drafted is available here: <https://publications.parliament.uk/pa/bills/cbill/58-04/0021/230021.pdf>. Its Explanatory Notes are available here: <https://publications.parliament.uk/pa/bills/cbill/58-04/0021/en/230021en.pdf> accessed 6 September 2024. The Notes explain that a purpose of the Bill is to address ECCTA's limited scope. See page 3, [10].

[92]Strategic Litigation Against Public Participation HC Bill (2023–2024) [21], cl 3.

[93]Press Release, 'Government backs bill to end intimidatory SLAPPs lawsuits stifling free speech' (23 February 2024) <https://www.gov.uk/government/news/government-backs-bill-to-end-intimidatory-slapps-lawsuits-stifling-free-speech> accessed 3 December 2024.

[94]Cross (n 45). See the comments from Iain Wilson and Hugo Mason. The UK Anti-SLAPP Coalition has said that the 'shortcomings found in … [ss.194 and 195] have been reproduced almost word-for-word in the Bill': UK Anti-SLAPP Coalition, 'Economic Crime and Corporate Transparency Bill: Anti-SLAPP Amendment: Analysis and Suggested Amendments' (UK Anti-Slapp Coalition, June 2023); See also Benaim, *Inforrm* (n 44); Mark Hanna, 'There are obvious problems with the SLAPPs Bill, but what should be done about SLAPPs?' *Inforrm* (16 April 2024).

[95]The Law Society Press Release, 'More needs to be done to make SLAPPs legislation workable' (23 February 2024) <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/more-needs-to-be-done-to-make-slapps-legislation-workable> accessed 3 December 2024.

[96]Strategic Litigation Against Public Participation HC Bill (2023–2024) [216]. The amended version of the Bill is available here <https://publications.parliament.uk/pa/bills/cbill/58-04/0216/230216.pdf> accessed 6 September 2024. For criticisms of the amendments, see eg, Inforrm Editorial, 'SLAPPs Bill: Serious issues remain to be addressed,' *Inforrm* (2 May 2024); Inforrm Editorial, 'SLAPPs Bill: New Amendments, delete all and replace with ill-thought out "Model Anti-SLAPP law"' *Inforrm* (6 May 2024).

[97]According to UK Parliament, the 'wash-up period refers to the last few days of a Parliament before dissolution. Any unfinished business is lost at dissolution and the Government may need the co-operation of the Opposition in passing legislation that is still in progress. In the past some Bills have been lost completely, while others have progressed quickly but in a much-shortened form.' See UK Parliament Wash-up at <https://www.parliament.uk/site-information/glossary/wash-up/>. For the SLAPPs PMB

on the law as it stands under ECCTA. As we explain below, ECCTA sets out a new dedicated mechanism to enable issued SLAPP claims relating to economic crimes to be disposed of at an early stage in proceedings. Introducing such a process is *prima facie* necessary and justified because the existing early disposal mechanisms are limited and ill-equipped to deal with SLAPP claims. Nevertheless, as we explain below, the ECCTA anti-SLAPP provisions are flawed and out of step with the European-level response – particularly the CoE's Recommendation on SLAPPs. As such, they add very little to the existing mechanisms, and therefore represent something of a false dawn for adequately tackling SLAPPs in England and Wales.

The ECCTA Early disposal mechanism: a false dawn for tackling SLAPPs

Sections 194 and 195 of ECCTA prescribe the creation of a new dedicated early disposal mechanism for SLAPP claims. Specifically, section 194(1)(a) and (b) require the CPRs to make provision for ensuring that claims may be struck out before trial where the court has determined they are a SLAPP, and where the claimant has failed to show that it is 'more likely than not that the claim would succeed at trial'. Thus, section 195(1) provides a four-stage definition, stating that a claim is a SLAPP if:

> (a) the claimant's behaviour in relation to the matters complained of in the claim has, or is *intended* to have, the effect of restraining the defendant's exercise of the right to freedom of speech, [and] (b) any of the information that is or would be disclosed by the exercise of that right has to do with economic crime, [and] (c) any part of that disclosure is or would be made for a purpose related to the public interest in combating economic crime, and (d) any of the behaviour of the claimant in relation to the matters complained of in the claim is *intended* to cause the defendant: (i) harassment, alarm or distress, (ii) expense, or (iii) any other harm or inconvenience, beyond that ordinarily encountered in the course of properly conducted litigation.[98]

There is, undoubtedly, a *prima facie* appeal to sections 194 and 195. The existing summary judgment mechanism discussed above can only be exercised where a party has 'no real prospect of success at trial', whereas, under these provisions, if the claim meets the section 195(1) definition of a SLAPP, under section 194(1) the claimant must demonstrate the strength

passage through Parliament see UK Parliament Parliamentary Bills, Strategic Litigation Against Public Participation Bill at <https://bills.parliament.uk/bills/3544> both accessed September 2024.

[98]Emphasis added. This SLAPP definition is supplemented by s195(2) which provides guidance on how courts should approach applying factors (a) and (c) of the definition. When interpreting these two factors the court should disregard laws that limit free expression, such as defamation law which is explicitly listed in s 195(2). This prevents legal arguments (e.g. based in defamation) from being imported into this early disposal mechanism and thus undermining its efficacy. It keeps the interpretive field (e.g. for determining public interest speech) suitably expansive.

of their claim to a slightly higher standard to continue. In principle we support the introduction of a new, free-standing process for litigated SLAPP claims to address the limitations and very high benchmarks of existing early disposal measures. Nevertheless, we must acknowledge that any early disposal mechanism can never be a panacea because of their inherent limitations. SLAPPs are, by their nature, vexatious, malicious, and unmeritorious – consequently, it is not in the instigator's interests that their claim proceed too far through the legal system for fear it will be summarily dismissed. For instigators, the optimal result is achieved when the mere *threat* of legal action cows the target (and perhaps other parties) into silence or retraction. Furthermore, these threats may come through 'agents', such as reputation management firms operating outside of the any legal professional regulatory or ethics body. Therefore, legal, and procedural mechanisms, such as those facilitating early dismissal, can be blunt instruments against SLAPPs as they can only address a narrow class of litigated SLAPPs, leaving pre-action SLAPPs untouched. This is compounded by the fact that the introduction of an early dismissal mechanism could add to, rather than mitigate, the existing problem with SLAPPs, as it presents an added layer in the litigation process that could potentially lead to lawyers becoming embroiled in legal argument.[99] In turn, this is likely to increase costs, whilst also adding to the physical, emotional, and mental toll that will almost always be taken on SLAPP targets. Yet even allowing for the inherent limitations of any early-disposal mechanism, the measure set out in sections 194 and 195 of ECCTA is flawed for the two following reasons.

Inadequate SLAPP definition

The section 195(1) four-stage SLAPP definition set out above is inadequate because it is too narrow and rigid. A claim is a SLAPP if the disputed content relates to economic crime, and disclosure of such content is in the public interest in combatting economic crime. Thus, the provisions only cover economic crime, and therefore do not tackle the more general use of SLAPPs (regarding, for example, sexual misconduct[100] or environmental harms[101]). The provisions would only apply to SLAPP claims seeking to

[99]On the other hand, we acknowledge that, in theory at least, such procedures can help those threatened with litigation to resist the effects of the threat, and perhaps also deter some threats in the first place. Thus, it is at least arguable that the threat itself may be less effective if SLAPP targets are aware of viable mechanisms for resisting the threatened litigation. That said, we are grateful to Hilary Young for pointing out that in a Canadian context – which we suggest provides an exemplar of the reality of the situation – such measures have, in fact, proved to be incredibly burdensome in many cases, especially those with contested facts (e.g. see the *Galloway v AB* (2020) BCCA 106 litigation and Young's analysis of the case, and such measures in 'Canadian Anti-SLAPP Laws in Action' (n 3)).

[100]e.g., Mandi Gray, *Suing For Silence: Sexual Violence and Defamation Law* (UBC Press 2024).

[101]e.g., CASE, 'Shell lawsuit against Greenpeace: A blatant attempt to stifle environmental activism' (17 May 2024) <https://www.the-case.eu/latest/shell-lawsuit-against-greenpeace-a-blatant-attempt-to-stifle-environmental-activism/#:~:text=This%20claim%20represents%20one%20of,damage%

restrain the defendant's comments about economic corruption and would thus not cover most of the recent alleged SLAPP cases discussed later in Part 2. This undue limitation has, understandably, been widely criticised.[102] The previous government's response was that '[a]t least 70 per cent of [reported SLAPP] cases … were connected to financial crime and corruption',[103] and that ECCTA 'presents the earliest opportunity to pursue reforms that address a significant proportion of SLAPP activity featuring economic crime'.[104] Furthermore, the previous government stated that it was 'considering future legislative options to introduce comprehensive anti-SLAPP measures as soon as parliamentary time allows',[105] before it lost the general election in July 2024. Thus, the UK response is out of step with Europe, and the English regime's limited scope falls far short of the comprehensive measures that CoE member states, including the UK, are encouraged to adopt by the CoE's Recommendation on SLAPPs set out above.

Another contentious aspect of section 195(1) is that categorising a claim as a SLAPP turns on the claimant's intention, in that they must restrain (or intend to restrain) the defendant's free expression,[106] and also *intend* to cause them harassment, alarm or distress, expense or any other harm or inconvenience beyond that usually encountered in litigation.[107] Section 195(4)(a) to (c) provides a non-exhaustive list of factors the court *may* take into account to determine the claimant's intention, including: whether the claim is a disproportionate reaction to the matters complained of by the defendant; and whether the costs incurred by the claimant are disproportionate to the remedy sought; whether the claimant has selectively targeted the defendant because they have fewer resources to defend the claim as compared to another individual the claimant could have proceeded against, but chose not to; whether the claimant has failed (or it is anticipated they will fail) to comply with a pre-action protocol, rule of court or practice direction,

20caused%20by%20Shell%27s%20operations>; Emily Black, 'Shell hits Greenpeace with intimidation lawsuit: threatening $8.6m damages claim and protest ban to silence climate demands' (9 November 2023) <https://www.greenpeace.org.uk/news/shell-hits-greenpeace-with-intimidation-lawsuit-threatening-8-6m-damages-claim-and-protest-ban-to-silence-climate-demands/#:~:text=Oil%20giant%20Shell%20has%20launched,damages%20claim%20and%20an%20injunction> both accessed 6 September 2024.

[102]eg, UK Anti-Slapp Coalition, 'Economic Crime and Corporate Transparency Bill: Anti-SLAPP Amendment: Analysis and Suggested Amendments' (UK Anti-SLAPP Coalition, June 2023); Cross, n 45 (see the comments made by the President of the Law Society, Nick Emmerson and, in the same article, Iain Wilson called the provisions 'poorly drafted').

[103]Authors' addition. Gov.uk, Policy paper, *Economic Crime and Corporate Transparency Act: strategic lawsuits against public participation (SLAPPs)* (26th October 2023) (updated 1 March 2024) citing London Calling (n 11) at <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-act-2023-factsheets/economic-crime-and-corporate-transparency-act-strategic-lawsuits-against-public-participation-slapps#fnref:1> accessed 3 December 2024.

[104]Gov.uk Policy paper, ibid.

[105]ibid.

[106]ECCTA, s 195(1)(a).

[107]ibid, s 195(1)(d).

or to comply with or follow a rule or recommendation of a professional regulatory body. This element of the definition is problematic because it requires a court to make a subjective judgement as to the claimant's state of mind to determine whether the litigation can be deemed a SLAPP.[108] Such intentions will often be practically and evidentially difficult (at best) to assess. However, although this criticism is *prima facie* valid when the provision is considered in isolation, as we demonstrate in Part 2, the courts are experienced at inferring a claimant's intention from the objectively observable conduct of a case. Such an approach can and should be taken when determining whether a claim is a SLAPP. But, as we argue in Part 3, it should be undertaken on the basis of a broader range of factors than those set out in section 195(4).

Costs culture

Section 194(4) provides what the government refers to as a 'costs protection scheme',[109] whereby a SLAPP defendant will not have to pay the claimant's costs unless directed by a judge.[110] This provision is, we suggest, undermined by the excessive English costs culture we referred to above, particularly in respect of defamation claims.[111]

In its *Response to the Call for Evidence on SLAPPs* the government suggested that SLAPP defendants could be protected by a £5,000 costs cap.[112] And, in its response to the criticisms levelled at the ECCTA provisions the previous government said that: '[w]e will cap costs via secondary legislation. We will work with the [CPR] Committee to introduce a costs protection scheme to stop costs from racking up and address the stark inequality of arms in SLAPPs cases'.[113] However, as Coe has previously pointed out,[114] if a cost protection scheme is to be successful, or costs are to be capped for SLAPP claims, then costs need to be capped for all defamation claims

[108]Strategic Litigation Against Public Participation HC Bill (2023–2024) [21], as originally drafted, see (n 91) included the same requirement for the intention of the SLAPP instigator to be subjectively identified. However, the recently tabled amendments to the Bill include the removal of the requirement to prove subjective intention (see n 97 for the amended version). This follows the Law Society calling for 'the inclusion of an objective test to define a SLAPP case.' See The Law Society, n 95; See also Coe, n 90, 3; UK Anti-SLAPP Coalition, 'The UK Anti-SLAPP Coalition calls for the Anti-SLAPP PMB to be amended to ensure it protects everyone speaking out in the public interest' (20 February 2024) <https://antislapp.uk/2024/02/20/anti-slapp-pmb-amendments/> accessed 3 December 2024.

[109]Press Release, 'Government backs bill to end intimidatory SLAPPs lawsuits stifling free speech' (23 February 2024) <https://www.gov.uk/government/news/government-backs-bill-to-end-intimidatory-slapps-lawsuits-stifling-free-speech> accessed 3 December 2024.

[110]ECCTA, s194(4) provides that 'Civil Procedure Rules include provision for securing that, in respect of a SLAPP claim, a court may not order a defendant to pay the claimant's costs except where, in the court's view, misconduct of the defendant in relation to the claim justifies such an order.'

[111]See (n 53).

[112](n 88) 50, [239].

[113](n 103).

[114]Peter Coe, 'We aren't Going to Cure the 'SLAPPs Problem' Until the Cost of Defamation Litigation is Cured' Editorial (2022) 27 Comms Law 167.

(and also for other causes of action attracting high costs that are used as SLAPP vehicles). This is because, as we have previously stated, the nature of SLAPPs means that the *threat* is often more than enough to prevent the public participation, in whatever form it takes. As we know, this *threat* takes effect before any formal claim is started. For example, even with the ECCTA early dismissal mechanism in place, a SLAPP target receiving a pre-action defamation letter will still not know whether the claim is a SLAPP, or whether they are faced with a legitimate claim for defamation that could be allowed to proceed. Therefore, the threat is supported, and is given weight, by the costs incurred and the damages awarded for legitimate defamation claims. This means that at the point at which the *threat* is made and received the target will still face the uncertainty of not knowing whether the claim will be held to be a SLAPP. The target thus continues to bear the significant financial risk that a case might not be deemed a SLAPP, resulting in their liability for substantial costs and damages. Arguably, this intended safeguard therefore adds an extra layer to the litigation process, shifting the issue 'down-stream' but ultimately failing to address the inchoate chilling effect of pre-action SLAPP threats on publications.[115]

In conclusion, for the reasons we have set out, the ECCTA early disposal mechanism will add very little to the existing processes. In Part 3 we propose a more effective anti-SLAPP measure that would overcome these flaws and would provide a more effective safeguard against litigated SLAPP claims. Our proposed reforms are informed by the next Part of this article, where we undertake a detailed examination of both the long-standing history of courts dealing with abusive claims and recent cases where allegations of SLAPPs have been raised.

Part 2: The treatment of SLAPPs in domestic courts

In this part we analyse the treatment of SLAPPs (and similar cases) in domestic courts. It starts by investigating long-standing case law regarding the strike out of abusive claims. This demonstrates that SLAPP-type claims are by no means a new phenomenon, and the established judicial approach to assessing such cases is flexible, anti-formalist and purposive. Furthermore, rooting out SLAPP claims is entirely consistent with core civil law principles, particularly the overriding objective. As such, a dedicated SLAPP-based early disposal mechanism would not be a radical reform, but a natural development of established case law and core principles. Next, this Part proceeds to consider recent strike out judgments to demonstrate that SLAPP discourse is already starting to gain traction in the courts. It reveals that whilst judges have been reluctant to formally characterise claims as SLAPPs, they have

[115] ibid.

nevertheless criticised such claims and often reached early disposal outcomes via process-based grounds. This demonstrates that, with the right early disposal measures in place, courts would be well-equipped to deal with alleged SLAPP claims at an early stage.

Abusive claims

There is an illuminating body of strike out case law that demonstrates how courts deal with allegedly abusive claims. As this section shows, the approaches and principles in this field are highly relevant for courts dealing with alleged SLAPP cases.

Abusive claims are by no means a new phenomenon and they represent a significant and established type of strike out case, even prior to the CPR 1998. Any examination of 'abuse' in this context should begin with Lord Diplock's 'classic' statement that that abuse can occur in 'very varied' circumstances, and that a case may comply with 'the literal application' of procedural rules, but 'nevertheless be manifestly unfair to a party to litigation' or 'bring the administration of justice into disrepute among right-thinking people'. Furthermore, Lord Diplock claimed it 'would not be appropriate to lay down a test or rule' to determine abuse and 'it would be unwise to create fixed categories'.[116] Abuse of process 'comes in many guises'.[117] Despite such definitional reticence, the presence of abuse must be very clearly demonstrated.[118] If it is established, the court then exercises its discretion whether to strike out the claim.[119]

Despite its purportedly elusive nature, case law sets out two broad and potentially overlapping categories of abuse: first, where the claim achieves 'a collateral advantage beyond the proper scope of the action'; second where litigation is conducted not to vindicate a right, but rather 'in a manner designed to cause the defendant problems of expense, harassment … [etc.] beyond those ordinarily encountered in the course of properly conducted litigation'.[120] Both categories entail the action being brought for an ulterior motive. But a claimant's ulterior motive – e.g. animosity or vindictiveness – are irrelevant to the issue whether abuse is present.[121] Such an

[116] *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 (HL) 536. Later quoted in *Kelly* (n 85) [61]. It must be noted that despite the nobility of Lord Diplock's sentiments, they were made in the course of justifying strike out of a civil action brought by the 'Birmingham Six' against the police for physical assaults inflicted upon them whilst in custody. The Law Lords found that the civil action was an abuse of process as it represented a 'collateral attack' on their criminal convictions for terrorist bombings that had killed 21 people rather than a claim for damages. The convictions of the Birmingham Six were later deemed unsafe and they were freed on appeal in 1991.

[117] *Bezant* (n 80) [126]; [127].

[118] *Kelly* (n 84) [61].

[119] *Asturion Foundation v Alibrahim* [2020] EWCA Civ 32.

[120] *Wallis* (n 81) [31]; *Broxton* (n 81).

[121] *Broxton*, ibid.

ulterior motive is insufficient to constitute abuse *per se*, and, as Sir Stuart-Smith has claimed, would in any event be very difficult to ascertain, 'forcing a judicial trek through the quagmire of mixed motives'.[122] So these forms of abuse also require the claimant to use legal proceedings so as to seek some aim above and beyond what could possibly be achieved in the course of regular litigation.

To the two non-exhaustive categories of abuse identified, we may add two additional overlapping grounds identified by *Gatley*: claims that re-open legally resolved matters; and cases that are 'not worth the candle' (termed *Jameel* abuse, discussed below).[123] We now analyse each of these categories in turn.

Improper collateral purpose

When gauging whether an action has been brought for an improper collateral aim, the claimant's purpose is assessed objectively by reference to what a reasonable person in the claimant's situation would seek in pursuing the action.[124] *Wallersteiner v Moir*[125] is an early case where the court struck out a libel claim for abuse of process. It is also arguably a prototype SLAPP, demonstrating that English courts were dealing with SLAPP-type cases some years before the terminology had been coined. The plaintiff was a company director who had been engaged in complex, dubious trading activities to gain control of a company. He brought a libel action against a defendant shareholder who circulated a letter to other shareholders which claimed that Wallersteiner's activities appeared fraudulent and accused him of unlawful activities in his dealings regarding the company. The Court of Appeal upheld strike out of the libel claim as an abuse of process. Lord Denning's leading judgment noted the plaintiff's track record of 'gross delay and default' in the conduct of proceedings.[126] Crucially, he found that Wallersteiner had no intention of pursuing and resolving the libel action; rather he had used it as a basis to shut down internal investigation and criticism of his conduct by (incorrectly) claiming any such discussion was *sub judice* (i.e. under judicial consideration and barred from public discussion). Lord Denning was highly critical of this tactic[127] and of the plaintiff's approach to litigation as a strategic 'war of attrition':

> If he fought it long enough, he might be able to break Mr Moir's nerve, exhaust his limited resources, make him give up trying, so that the case would never come to trial. By this means the public would never get to know the truth.

[122]Quoting Glass JA, *Wallis* (n 81) [31].
[123]Gatley (n 50) 32–038 & 32–040.
[124]ibid, [32]; *Goldsmith v Sperrings Ltd & Others* [1977] 1 WLR 478, 499E, *per* Scarman LJ.
[125]*Wallersteiner v Moir (No 1)* [1974] 1 WLR 991 (CA).
[126]ibid 1001–1002.
[127]ibid 1004–1005.

> … Such was, **I believe**, the state of mind of Dr Wallersteiner. **He would not, of course, confess it**. But his whole conduct throughout this case warrants the **inference**.[128]

This passage is significant because of its relevance to a modern-day SLAPP. Here Lord Denning accepted the limits that prevent courts gaining true knowledge of a litigant's state of mind but pointed to observable conduct that could be used as a credible basis to infer such an intention. In this way, Lord Denning found that the claim represented an abuse of process, designed to thwart justice rather than achieve it. *Wallersteiner* sets out the key principle that libel cannot be used as a gag to improperly stifle discussion.[129] This can be contrasted with the outcome in *Broxton v McClelland* (1995) where the plaintiff's conduct of litigation did not warrant criticism, and no evidence of impermissible collateral advantage was present.[130]

The difficulties of ascertaining whether a claimant is pursuing an illegitimate collateral purpose are demonstrated by the Court of Appeal split in *Goldsmith v Sperrings* (1977).[131] Here, the plaintiff, James Goldsmith, brought a defamation action against *Private Eye* magazine for publishing claims about his business dealings and friendship with the disgraced Lord Lucan. This case concerned a cluster of additional defamation actions Goldsmith brought against 37 newsagents and distributors of the magazine. He did not seek damages or costs from the newsagents in settlement, but an undertaking that they would never distribute *Private Eye* again. As such, this represented an attempt to close off the distribution channels of the magazine, a tactic that was partially successful; a number of the distributors accepted the plaintiff's terms and the magazine's sales fell by around 10 per cent. But there was disagreement between the judges as to whether these claims should be struck out as an abusive action brought for an improper purpose. The majority held not, claiming that any threat to press freedom was a result of the existing law on distributor liability. Furthermore, Goldsmith's aim of cutting off distribution was ultimately in furtherance of vindicating his reputation. But Lord Denning dissented, finding that the abusive action was brought for a collateral purpose beyond the legitimate scope of the legal process.

[128]Emphasis added, ibid, 1006.

[129]Early support for this principle is also found in *Rex v Editor of the Daily Mail ex parte Factor* (2 Mar 1928) Times Law Reports, vol xliv, 303, 306–307. John Factor brought a delayed libel action against the Mail for its earlier publication of a series of stories revealing his fraudulent trading of worthless shares to the public. In this case he argued the Mail was in contempt by continuing to report on his conduct, thus preventing a fair defamation trial. Lord Hewart CJ found against Factor, holding that he did not aim to pursue his libel action to trial, but merely in order to stifle criticism of his actions until he could flee the country.

[130]*Broxton* (n 81).

[131]*Goldsmith* (n 124) 478.

Despite its minority status, aspects of Lord Denning's approach in *Goldsmith* resonate with modern courts addressing SLAPP issues. His judgment was attuned to the nuance and complexity of determining 'abuse', as recognised by later courts, and two related aspects of his approach are significant in this regard. First, Lord Denning drew a distinction between a formal case that is legally proper 'on the face of it' and extrinsic evidence which may demonstrate that same case is using the legal process for an improper purpose.[132] In doing so, Denning acknowledged a potential gap between the formal, technical appearance of a legal claim and its real, ulterior purpose. Second, Lord Denning paid close attention to the facts of the dispute, particularly the 'unprecedented' way this litigation had been conducted.[133] He was particularly critical of: the random, indiscriminate way in which multiple newsagents had been selected for target (some incorrectly); the way in which they were served with two writs each without any pre-action correspondence; the terms upon which settlements were negotiated; and the 'most oppressive' effect upon the defendants in terms of time and expense.[134] As discussed below, these factors closely correspond with indicators that contemporary measures identify as materially relevant to determining the existence of a SLAPP action. With the benefit of hindsight, Lord Denning's highly fact-sensitive, purposive, pragmatic approach in *Goldsmith* is preferable to the majority's because it more effectively responds to modern covert SLAPP tactics, and it pre-empts the crucial CPR values set out in the overriding objective.[135]

Conducting proceedings to cause harassment etc.

The second form of abuse, conducting proceedings in a manner designed to cause an opponent excess harassment and expense, is especially pertinent to SLAPP claims. Crucially, this ground covers pre-action conduct prior to the issue of proceedings.[136] As Lord Bingham has stated,

> The hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and

[132]'The issue of a writ for libel is an act which is lawful in itself, but if it is done with the predominant purpose of stifling discussion … then it is unlawful. Once the court is satisfied that such is the predominant object of it, it will stay the action as an abuse of the process of the court.' Ibid, 489–490.

[133]ibid 486.

[134]ibid 494–497.

[135]It should be noted that Lord Denning's pragmatism took on an arguably idiosyncratic turn in *Goldsmith* (n 124) when he undertook his own research on the issue of distributor liability and decided this issue on the basis of legal points that were not argued by the plaintiff or defence counsel. However, s1 Defamation Act 1996 was later enacted and provides distributors with an innocent dissemination defence.

[136]*Wallis* (n 81) [32].

> that it involves an abuse of process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.[137]

This abuse ground is aptly illustrated in *Wallis v Vantine* (2002) which concerned a libel claim brought during an ongoing acrimonious neighbour dispute. Here the Court of Appeal rejected the claimant's argument that his motive for bringing the action could not be impugned at strike out; this is not a purely subjective test,[138] but is held to objective standards. The court thus upheld the finding that the claim had been brought for the dominant purpose of causing the defendants harassment and expense for a mere technical publication of negligible effect (to the claimant's partner).[139] The court noted that *Wallis* had involved multiple libel actions and that the claimant had evaded providing information about how he was funding his litigation costs whilst also using these proceedings to stave off bankruptcy.[140]

A further example is provided in *Bezant v Rausing* (2007). An employment dispute led to the claimant bringing three civil actions – in contract, libel and misfeasance – against his former employer and multiple other defendants who had variously assisted the employer (including family members and hired representatives). The court struck out all three claims on the basis that each one constituted a form of abuse.[141] First, as discussed below, the claimant's misfeasance case was an 'objectionable' attempt to obtain compensation by using common law to circumvent and re-open employment law claims that had already been resolved in the defendant's favour.[142] Second, the claimant's libel case was deemed a form of *Jameel* abuse (also discussed below) because it sought damages for allegations in a privileged solicitor's letter that had been mistakenly opened by the claimant's daughter (though no witness statement from the daughter had been provided).[143] Finally, Gray J noted that the claimant had brought actions across multiple jurisdictions against multiple defendants and found that the contract claim sought to achieve an impermissible collateral advantage. It caused disproportionate expense and harassment to the defendant, creating pressure to settle for a sum that far exceeded the amount the claimant might be awarded by a court.[144] In short, the contract claim was a '**vehicle**

[137] *HM Attorney General v Paul Evan John Barker* [2000] WL 191122.
[138] *Wallis* (n 81) [36].
[139] ibid [28], [34]–[36].
[140] ibid [24]–[25]. Note that such features are present in recent alleged SLAPP cases and, as will be seen, align with the 10 indicators set out in the Council of Europe's Recommendation on SLAPPs (n 21).
[141] *Bezant* (n 80) [135] and [145].
[142] ibid [126]–[128], [131] and [138]–[140].
[143] ibid [73]–[74], [79]–[80], [129], [133] and [144].
[144] ibid [132], [136] and [141].

constructed by Mr Bezant … which is **in reality** designed to extract the maximum amount of money from Dr Rausing'.[145]

Further to the two broad categories discussed, *Gatley* offers two further types of abuse to which we now turn. Again, these categories are not rigidly fixed and may overlap with those already covered.

Re-opening resolved issues

According to *Gatley*, attempts to re-open issues that have been judicially determined may constitute abuse, as illustrated in *Schellenberg* (1999).[146] Here the court struck out a libel claim against the *BBC* for a radio report that the claimant, a Scottish island owner, had tried to evict islanders from their home and business. This report echoed, albeit more narrowly, earlier reports by other media defendants whom the claimant had previously attempted to sue for libel before settling out of court due to weaknesses in his case and costs risks. Eady J claimed this new action was a 'desperate exercise in damage limitation' and any potential benefit was outweighed by the expense to the parties and public court resources.[147] He also claimed it was an abuse to re-litigate issues which were squarely within the subject-matter of earlier litigation.[148] One justification for such a limitation is that 'there should be finality in litigation and … a party should not be twice vexed in the same manner', and this is supported by the overriding objective's emphasis on saving costs and proportionality.[149] As discussed below, recent alleged SLAPP cases have raised concerns about the related practice of a claimant bringing multiple overlapping claims concerning the same substantive facts.

Jameel abuse

A further category of abuse encompasses proceedings that are 'not worth the candle', termed '*Jameel* abuse' after the case in which the Court of Appeal struck out a Saudi-based claimant's defamation action for a US newspaper's online publication to five subscribers within the English jurisdiction.[150] The *Jameel* focus on a proportionality assessment of a claim is consistent with, and informed by, CPR principles. Lord Phillips explained that two developments – the CPR overriding objective and the HRA 1998 requirement that the courts administer law in an ECHR-compliant way – had resulted in a

[145]Emphasis added, ibid [143].
[146]*Schellenberg v BBC* [2000] EMLR 296. See also *Hunter* (n 116) [126]. *Gatley* (n 50) 32.038.
[147]*Schellenberg*, ibid 319
[148]ibid 319–322.
[149]Quoting Lord Bingham. *Bezant* (n 80) [127]–[128] and [138].
[150]*Jameel* (n 47). See also *Gatley* (n 50) 32-035–32-040.

change of judicial approach to allegedly abusive libel actions, to the extent that historically successful actions would be treated differently if brought in the present day.[151] This resulted in the court taking a more active role in allegedly abusive cases:

> An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.[152]

This demonstrates that the degree of judicial scrutiny, pro-activity and (to a lesser extent) wider legal culture can be broadly shaped by overarching frameworks, a promising indicator for the efficacy of statutory and CPR reforms regarding SLAPPs. *Gatley* points to a decline in *Jameel* applications in recent years because the introduction of DA 2013 serious harm requirement 'is now doing much of the work' in rooting out pointless or frivolous claims. But *Jameel* still has a role to play in this context; because 'the precise nature and reach of the [*Jameel*] jurisdiction is not' clear and it is thus wider than serious harm requirement,[153] a potentially useful quality in the context of SLAPPs.

The abuse categories and principles discussed in this section demonstrate that the issues and challenges raised by alleged SLAPP cases are not new and English courts have been dealing with them for decades, albeit less frequently than at present. We now look towards how these principles have played out in contemporary cases.

SLAPPs in the UK courts

In contrast to the flurry of recent anti-SLAPP policy and legislative activity discussed in Part 1, SLAPPs issues have not featured prominently in the English courts. Nevertheless, at the time of writing, there is evidence that SLAPPs terminology is starting to find its way into courts, primarily in defamation actions and strike out applications. In this section we analyse recent cases, focusing on English judgments, but drawing upon select UK and Irish cases where relevant. It should be noted that courtroom uses of the term 'SLAPP' discussed here are not based on a legally agreed definition and any such categorisation does not lead to formal consequences *per se*. As such, allowance must be made for various parties' diverging usage of the term. Nevertheless, even accounting for variation of meanings, these cases

[151] *Jameel*, ibid [55]–[56].
[152] ibid [54].
[153] *Gatley* (n 50) 32–040, especially fn 305.

helpfully reveal a core consensus about problematic litigation conduct that the courts should address.

There is evidence that defendants are using the term to support their legal arguments in select recent cases. The most high-profile example is *Banks v Cadwalladr* (2022) where, despite the claimant's failure at trial, Steyn J stated 'it is neither fair nor apt to describe this as a SLAPP suit'.[154] This finding was later criticised by the Anti-SLAPP Coalition.[155] Despite being deployed by the defendant to bolster their case and characterise the claim against them as coercive and/or improper, SLAPPs terminology had negligible traction in *Banks*. However, there is evidence that SLAPPs discourse has the potential to exert a greater influence on case law going forward independently of any ECCTA reforms, particularly in early disposal hearings.

An example is found in *Amersi v Leslie*[156] involving a defamation action brought by an international businessman and Conservative party donor who sought a prominent Middle Eastern role and peerage. The defendant, a Tory MP, had circulated memos to select party members outlining concerns about Amersi's previous business dealings and Russian links. The defendant sought strike out of the action on the basis that it did not establish serious harm to reputation and that it was a SLAPP constituting an abuse of process.[157] Nicklin J struck out Amersi's claim on the former basis because he had pleaded serious harm based on a single composite harm caused by all 22 distinct imputations in the memos.[158] This was contrary to both established principles of defamation and an earlier court order to amend his pleadings to rectify this deficiency.[159] The claimant's case on serious harm was merely inferred and not supported by adequate evidence, e.g. witness statements from the memo recipients.[160] Nicklin J deemed the claimant's 'speculative' approach to evidencing serious harm 'surprising', 'risky' and stated that proceeding to trial involved a 'potentially massive waste of [Court] resources'.[161]

Because he struck out Amersi's claim on the serious harm point, Nicklin J held it unnecessary to rule on the abuse ground, but he nevertheless offered some salient observations on this issue.[162] Whilst conceding that the 'hurdle'

[154] *Banks v Cadwalladr* [2022] EWHC 1417 [9], later appealed at [2023] EWCA Civ 219.
[155] Cited by The Bar Council, 'SLAPP: A Question of Definition?' (28 June 2022) <https://www.barcouncil.org.uk/resource/slapp-a-question-of-definition.html> accessed 6 September 2024.
[156] *Amersi v Leslie* [2023] EWHC 1368.
[157] ibid [52] & [138]. The claimant resisted this, seeking to amend his particulars of claim to clarify his case on the serious harm his reputation suffered as a result of the memos.
[158] ibid [35], [67], [164], [232] and [235].
[159] ibid [67], [70]–[71], [148]–[150], [158] and [159].
[160] ibid [37], [75], [158] and [162]. Witness evidence gathered by the defendants indicated that recipients' views of the claimant had not been seriously harmed by the memo, and where they were lowered it was due to a range of factors, including the media coverage of the dispute that had been instigated by the claimant.
[161] ibid 1368 [184]. Elsewhere, Nicklin refers to the claimant's 'tactical approach' [192].
[162] ibid [235], [239] and [241].

to establish abuse is 'high', Nickin J flagged up various aspects of the claimant's conduct and motive that gave 'real cause for concern'.[163] First, he noted the 'surprising' delay in the claimant issuing the action.[164] Second, he criticised the claimant's 'exorbitant approach to litigation' and, in particular his failure to comply with a court order to disclose the legal costs he had incurred in the action.[165] Instead, Amersi provided a schedule of costs he would seek to recover, a sum of £80,844 that was at odds with press interviews where he claimed to have spent £260,000 on legal costs.[166] Nicklin J claimed that the court needed this information to 'resolve whether a party is using his/her greater resources to intimidate or bully an opponent'[167] and reiterated his earlier comments in this litigation:

> Modern case management has moved on somewhat since the 1800s. The court now takes a much more active interest in the cost of litigation, **particularly when litigation engages Article 10 rights**. The days when the Court simply provided a playing field and an umpire/referee, and generally left the parties to play the game they chose are gone. The Court will want to look carefully at the history of this litigation … to see whether it is being conducted efficiently, for a legitimate purpose, and at proportionate cost.[168]

Third, the claimant's motive for bringing the action was questionable. He had issued an earlier 'deliberate and tactical' data protection claim that was discontinued, and in press interviews had expressed a wish to take the defendant 'to the cleaners'. Nicklin J claimed 'Subjecting a person to successive civil claims can be the hallmark of abusive conduct'.[169] Elsewhere, it was suggested that Amersi had been selective in his litigation, choosing not to target another senior Tory, Sir Nicholas Soames, who had also been involved in the memos, or newspapers who reported on them.[170] Furthermore, there was evidence from media interviews and the claimant's own witness statements to suggest he was using the action to embarrass the Conservative Party.[171]

A further example of SLAPP discourse gaining judicial traction is the highly complex, contentious litigation of *Hemming v Poulton*[172] concerning ongoing defamation and data protection actions brought by former M.P.

[163] ibid [239]–[240].
[164] ibid [128] & [240].
[165] ibid [43]–[44].
[166] ibid [47]–[48].
[167] ibid [47].
[168] Emphasis added, ibid [44]. Later quoted in *Hemming v Poulton* [2023] EWHC 3001 [226]. This arguably echoes the comments of Phillips LJ in *Jameel* (n 47) [54]. See also: *Arrow Nominees Inc & Others v Blackledge & Others* [2001] BCC 591 (CA) [54]–[56] *per* Chadwick LJ.
[169] ibid (*Amersi*) [240]. It was suggested that this earlier DP claim was a means of seeking wide-ranging early disclosure [42], [45]–[46] and [62].
[170] ibid [3], [51] and [59].
[171] ibid [76]–[79] and [240] ('Witness statements in litigation are not to be used for settling scores or advancing some wider agenda').
[172] *Hemming* (n 168).

John Hemming against an independent journalist. The defendant had recounted allegations of historic child abuse against Hemming in a podcast following the failure of the alleged victim's defamation claim against him.[173] Hemming had issued a second data protection claim against the defendant cast in very similar terms to his main claim, and this second claim had been stayed (paused) due to concerns that it was a potential abuse of process.[174] The claimant now sought to lift this stay and the defendant sought strike out. She argued that Hemming was a 'serial litigant' and that his second claim was a SLAPP which constituted an 'abuse of process' as part of a pattern of litigation 'intended to intimidate, and silence her, in particular to increase her costs so as to interfere with her fundraising'.[175] She also argued that the second claim constituted *Jameel* abuse in that its costs were entirely disproportionate to any benefits achievable.[176]

Whilst acknowledging the heated nature of the dispute and expressing reservations about the defendant's conduct,[177] Hill J partially accepted these arguments, refusing to rule out the possibility that Hemming's second claim was an abuse of process.[178] He expressed 'concerns' about a number of factors in the case that 'call[ed] into question whether it is being pursued for an improper collateral purpose', namely causing the defendant expense and harassment.[179] Hill J also expressed 'very real concerns' that the claim constituted an 'abuse of process' by engaging in 'pointless and wasteful litigation'.[180] In particular, Hill J noted that Hemming had brought this new, separate claim that added very little to the main claim and had made 'forceful arguments that it should proceed separately … when it appears tolerably clear that if [it] does proceed … it should be consolidated with [the main claim]'.[181] Furthermore, Hemming had sought to add 'a significant number of claims' to the earlier claim and his co-litigant had sought detailed costs assessments against the defendant for the sum of £95. As a result, Hill J claimed 'the defendant's submission about harassment and oppression appear persuasive'.[182] Ultimately, Hill J declined to use the 'draconian' strike out power at this stage, but also declined to lift the stay on this second claim until the earlier one had been litigated.[183]

[173]See judgment in *Hemming (No 1)*: *Baker v Hemming* [2019] EWHC 2950.
[174]*Hemming* (n 168) [38], [207]–[211].
[175]ibid [219]–[220]
[176]ibid [223]–[226]. Here *Jameel* abuse was treated as a 'third category' of abuse.
[177]ibid [233].
[178]ibid [229].
[179]ibid [231]. The defendant was acting as litigant-in-person at this stage of the proceedings.
[180]ibid [235], [223]–[225].
[181]ibid [230]–[231]. Elsewhere Hill J is critical of the claimant's failure to provide a court-ordered budget of his legal costs: [279].
[182]ibid [232].
[183]ibid [234], [236].

In *Hemming* and *Amersi* we see three interesting approaches in common. First, both courts were reluctant to categorically state whether the case in front of them was a SLAPP or not, an approach also seen in select Irish cases.[184] They avoided resort to strike out on the basis of abuse, acknowledging the high benchmark that must be met. But second, they nevertheless, expressed repeated concerns about specific features or 'red flags' of the claimant's conduct of litigation that led them to (implicitly) suspect potential abuse or SLAPP-type activity. This enabled the courts to highlight the cases as *potential* abuses, providing amber warnings to the parties and public without having to reach the onerous 'abuse' benchmark. Third, the courts situated such concerning conduct firmly within the process-driven overriding objective values of proportionality, costs etc. which enabled the court to side-step difficult questions regarding the claimant's motive(s). By these methods, the courts in both cases achieved a similar outcome via alternative, safer legal grounds and avoided the risk of claimant appeals.

To date, the most significant and detailed judicial treatment of SLAPPs is found in the recent Northern Irish case of *Kelly v O'Doherty*. *Kelly* involved a defamation action brought by a prominent politician, Gerard Kelly, against a reporter who referred to his shooting of a prison warden in the 1983 Maze Prison escape.[185] Kelly had been acquitted of the shooting, but had been convicted of other terrorist acts, and had (ambiguously) recounted his involvement in the shooting in two published memoirs. The court decisively struck out the defamation claim on four grounds and awarded indemnity costs against the plaintiff.[186] In reaching this decision, Master Bell drew upon a range of recent anti-SLAPP activity, including ECCTA, the UK government policy paper and the SRA Warning Notice.[187] He categorised Kelly's claim as a SLAPP, and it thus made history as the first ever UK case to be judicially deemed as such.

Two grounds for strike out are of particular interest here.[188] First, the claim was struck out for being 'scandalous, frivolous and

[184]See the ongoing 'Atlas' litigation where residents challenged a building development in their area. In *Atlas GP Ltd v Kelly and Others* [2022] IEHC 443, Egan J struck out proceedings on the basis they were 'bound to fail, vexatious and frivolous' and deemed it unnecessary to determine whether they were a SLAPP, [16]–[18]. In *Kelly & Others v Ireland & the Attorney General and Atlas GP Ltd* [2022] IEHC 238, Holland J declined to find whether Atlas Ltd's multiple legal actions against residents amounted to a SLAPP, but criticised its 'hyperbolic' and 'applicant-shaming' arguments that delegitimised their genuine concerns and refused Atlas's application to set aside permission for the residents to challenge the development: [6], [8]–[11] and [24]–[25].

[185]*Kelly* (n 84).

[186]ibid [102] and [107].

[187]ibid [65]–[66]. See SRA Warning Notice <https://www.sra.org.uk/solicitors/guidance/slapps-warning-notice/> accessed 10 September 2024.

[188]The third and fourth grounds upon which the NI court struck out the claim were: (3) the case had 'no real prosect of success' under s8 Defamation Act 1996; (4) the claim failed to pass the minimum threshold of seriousness set out in *Jameel* (n 47). Note that the higher 'serious harm' threshold set out in s1 DA 2013 does not currently apply in NI – see, ibid [66].

vexatious'.[189] The claim was 'completely untenable' because publicly available facts, including from Kelly's books, clearly demonstrated that he was (at the very least) an active participant in the incident and thus jointly liable in civil law for the shooting.[190] Second, Master Bell applied the two-stage test to deem the claim 'an abuse of process'.[191] Again, he focused heavily on Kelly's civil liability for the shooting as demonstrated by his own memoirs and concluded that Kelly's instigation of defamation in these circumstances was 'without doubt, an abuse of process'.[192] Here, it is notable that Kelly's case, like Amersi's, partly failed due to comments he had put into the public domain that undermined his claims and assisted the defence. But establishing 'red flags' of conduct will be more difficult for claimants who have a much lower public profile and have deliberately avoided media limelight.[193]

Next, Master Bell exercised discretion to decide whether to strike out the claim.[194] At this stage he placed great emphasis on two related facts. First, Kelly's omission to bring any previous defamation claims despite long-standing and wide-scale reporting of his involvement in the shooting by many sources.[195] Second, the significant fact that Kelly had now chosen to target two individual freelance journalists rather than bringing actions against the media corporations (namely, the *BBC* and *Belfast Telegraph*) who published their claims. This fact was, according to SRA professional guidance, a 'red flag' that indicates a potential SLAPP.[196] Master Bell thus concluded that the action was a 'blatant' abuse because it was not instigated to genuinely protect reputation, but was brought with an improper collateral purpose, namely to intimidate and silence the critical journalists, depriving them of time and resources.[197] Bell claimed categorically that it would be 'utterly unjust' to allow the case to continue and had 'no hesitation' in striking it out.[198]

[189]According to Order 18 Rule 19(1)(b) of the Rules for the Court of Judicature (NI). Note that the CPR do not apply in Northern Ireland, but the civil procedure regime is broadly similar.
[190]*Kelly* (n 84) [56]–[57].
[191]According to Order 18 Rule 19(1)(d) of the Rules for the Court of Judicature (NI). This strike out provision is broadly equivalent to CPR 1998, Rule 3.4(2) which also enables strike out where a case is 'an abuse of the court's process'. Here the court claimed 'the overriding principles are similar, if not identical,' ibid [42].
[192]ibid [62].
[193]See, e.g. the evidential findings in the claimants' favour in Aven (n 60), [161]–[174]. This is not to doubt those findings, but to note that the court accepted the claimant's evidence in the absence of any contradictory evidence.
[194]*Kelly* (n 84), [44]. Here Bell indicated that this second stage would entail a balancing exercise and consideration of proportionality, though his judgment does not technically undertake this in formally structured terms.
[195]ibid [67], [72].
[196]ibid [64], [73].
[197]ibid [64], [68] and [72]–[73].
[198]ibid [73].

Master Bell's discussion of abuse reiterates the limited assistance of formal rules and categories when seeking to determine whether abuse is present. He sets out key principles, including Lord Diplock's 'classic' statement (outlined above) that that abuse can occur in 'varied' ways and a formal test or fixed categories are unhelpful.[199] Similarly, and more specifically, acting with an 'improper collateral purpose' is 'not easy to define'.[200] This judicial consensus that abuse of process may be (by its very nature) evasive and difficult to pin down is particularly salient in the context of SLAPPs. When identifying SLAPPs, courts must shun formalism and look beyond legal texts and definitions to pay close attention to the circumstances of the case, the conduct of the parties and the wider context.

Overall, these cases demonstrate the courts trying resolve alleged abusive claims in a flexible, fact-sensitive, and pro-active – albeit cautious – way within the existing civil framework's limitations. It is therefore apparent that further guidance to assist the courts in pro-actively filtering out abusive and SLAPP claims is warranted. Thus, in the following and final Part of this article we advance a new model for a dedicated SLAPP early disposal mechanism.

Part 3: A dedicated SLAPP early disposal mechanism

As discussed in Part 1, ECCTA requires a new SLAPP-based early disposal mechanism to be added to the CPR's existing suite, and its anti-SLAPP provisions set out the contours of this mechanism. We agree that a *sui generis* SLAPP measure is warranted to temper the exceptionally high benchmarks and decisional limitations of strike out and summary judgment. But, as we argued in Part 1, the ECCTA provisions are limited in keyways and should be cast in stronger and wider terms. In this Part we advance a new model for early disposal of claims, which contains six specific features that the ECCTA (and/or indeed any future) anti-SLAPP early disposal mechanism should have. Such features could be set out in the formal additions to the CPRs that ECCTA prescribes and/or in a supplementary Practice Direction to guide judges dealing with such cases.

First, the measure should apply to all actions involving public interest speech, not just that related to economic crime. This basic threshold question should entail a basic assessment of whether the defendant's proposed expression pertains to the public interest, broadly conceived, i.e. covering

[199]*Hunter* (n 116).

[200]Though it could include achieving 'a collateral advantage beyond the proper scope' of the action, or conducting proceedings 'not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice … beyond those ordinarily encountered in the course of properly conducted litigation.' *Kelly* (n 84) [68].

'matters concerning important social issues or affecting the well-being of individuals or the life of the community or the environment'.[201]

Second, the measure should note or formally recognise that: (1) in most cases the SLAPP label will be deeply contested, and; (2) a court may deem a claim a SLAPP if it is confident of doing so, but need not do so in order to dispose of a claim at an early stage.

Third, the mechanism should reiterate the courts' and all litigants' duties to uphold and further the overriding objective principles and affirm that SLAPP claims directly undermine such principles.

Fourth, the anti-SLAPP mechanism must follow the European lodestar, by fully utilising the ten 'SLAPP indicators' set out in the CoE's recent Recommendation on SLAPPs.[202] The indicators should be considered in any case where the court reasonably believes a credible allegation of a SLAPP is being made. This would require judicial attention to be directed to the presence of these factors in suspected cases. Two of the CoE factors directly reflect the existing summary judgment and strike out requirements, namely whether a claim is partly or fully unfounded and whether it amounts to an abuse.[203] However, in this context they do not function as the very high formal binary benchmarks seen in CPR 24 and 3.4. Instead, they constitute only two factors among many that the court must take into consideration. This flexibility is advantageous as it enables the court to take the weakness of a claim, or dubious, problematic conduct of a case into account and weight it according to the specific facts of a dispute.

Five further CoE indicators would work well for the courts as they relate to the readily observable aspects of a claimant's conduct that have been identified and flagged up in some of the cases discussed in Part 2, e.g.: seeking excessive or disproportionate remedies; use of litigation tactics to drive up costs; deliberate targeting of individuals rather than organisations; multiple actions on the same facts or regarding similar matters.[204] To this, we would add that selective targeting of legal argument (as well as defendants) may also be a relevant factor the courts should note if appropriate. This is discreetly illustrated in *Eurasian Natural Resources v Burgis*,[205] a libel brought by a large company against the author and publisher of the book

[201]Recommendation on SLAPPs (n 21) [4](b). The Recommendation provides a non-exhaustive list of matters that may be in the public interest: 'Politics, current affairs, human rights, social justice, social welfare, education, gender equality, sexual orientation and gender identity, sexual or gender-based harassment or violence, health matters, religion culture, history, corruption, climate and environmental issues are … all examples of topics of public interest, unlike individuals' private relationships or family affairs. Topics may be of public interest at the local, national or international level.'

[202]Discussed in Part 2.

[203]Recommendation on SLAPPs (n 21) [8], indicators (b) and (d).

[204]ibid [8], indicators (c), (e), (f), (i). See also indicator (j): refusal to engage with non-judicial dispute resolution.

[205]*Eurasian Natural Resources* (n 11).

Kleptopia, an exposé of oligarchy, global corruption, and its impact on democracy.[206] In a preliminary hearing on meaning Nicklin J dismissed the claim, rejecting the claimant's argument that the defendants' book stated the company was involved in the murder and suspected poisoning of individuals. However, at the end of the judgment Nicklin J quoted a lengthy passage from *Kleptopia* that he flagged as *prima facie* defamatory for alleging that the claimant company has been a corporate front for serious corruption and various financial crimes. The judge then pertinently added: 'At the hearing I asked [claimant's counsel] whether the claimant's decision not to complain of this or any similar meaning was deliberate. She confirmed that it was'. Nicklin J abruptly ends the point (and judgment) at this devastating, salient point, leaving the reader to reflect upon the facts and the reason behind this decision.[207]

Another two indicators – the claimant's and/or representative's history of legal threats or intimidation and the use of public relations to bully or discredit opponents[208] – require careful consideration because they are difficult to evidence or map, particularly at pre-action stage, for the reasons identified in Part 1. However, our fifth and sixth proposed reforms (discussed below) would start to provide greater reliable information about such activities that the courts (and other parties) could draw upon. The final indicator – exploiting a power imbalance to pressure a defendant[209] – is crucial but may also be inherently difficult to gauge. This is because financial or political imbalances are a feature of our social and economic system, and thus a certain degree of such inequality is unavoidable and arguably not bad *per se*. Furthermore, such imbalances can be (and are) commonly exploited in the course of standard litigation. But despite this, the court can assess this indicator in a nuanced way in the light of two points. First, it accords with the spirit and letter of the overriding objective (to put parties on an equal footing) that the court must uphold. Second, this indicator is merely one factor among many, and it may assume a weight or significance when viewed cumulatively alongside other indicators in a given case, or in certain contexts For example, it would enable inherent societal gender inequalities to be factored into the early-disposal assessments of defamation claims brought against (often) female defendants who have made allegations of sexual violence or misconduct.[210]

[206]Tom Burgis, *Kleptopia* (William Collins 2020).
[207]*Eurasian Natural Resources* (n 11) [38]–[39]. The claimant's selective litigation regarding certain allegedly defamatory statements, whilst ignoring others made by the same defendant was also deemed relevant in: *Rex v Editor of the Daily Mail ex parte Factor* (2 Mar 1928) Times Law Reports, vol xliv, 303, 306.
[208]Recommendation on SLAPPs (n 21) [8], indicator (g) and (h).
[209]ibid [8], indicator (a).
[210]A full account of such issues is beyond the scope of this article, but for further discussion, see: Gray (n 100); Jennifer Robinson, *How Many More Women? The Silencing of Women By the Law & How to Stop It*

These ten CoE indicators have a central role to play in any SLAPP early disposal mechanism because they enable a court to move away from the high binary benchmarks in existing early disposal measures and would enable a more fact-sensitive, nuanced but principled assessment of whether a claim is a SLAPP. Rather than forming a mechanical checklist, these indicators would work akin to the *Murray* factors used to determine reasonable expectation in MPI.[211] For example, the number of indicators made out may be relevant, but not decisive. Courts would also focus on the severity and impact of each indicator in a given case. In this way, the indicators will enable the court to sensibly gauge the tenor of a claim, avoiding the formal, narrow categories that the courts have historically shunned in abuse cases. If a court finds indicators are present and indicate dubious or suspicious conduct on a balance of probabilities, the court may make a finding of SLAPP (and/or abuse) and strike it out on that basis. But separate to such a finding, we argue that under our proposed mechanism a court may also take an intermediate step of identifying a claim as a 'claim of concern' and 'amber flag' it with a brief, standard form of wording at the start of the judgment. The court can take this intermediate step even if it does not formally deem the case a SLAPP or summarily dispose of it.

Fifth, in preparation for an early disposal hearing claimant firms should be required to declare to the court whether they have commissioned, made a referral to or in any way worked with a reputation management firm for the benefit of the claimant and, if so, basic information about that work (reputation firm name, individual agent's name etc.). This will start to provide greater transparency regarding the crucial but clandestine role of such firms in this area.

Sixth, the court service will maintain a record of: (1) claims that have been formally deemed a SLAPP and subject to early disposal, and; (2) claims that have been flagged as a 'case for concern' via the process above. The Solicitors Regulation Authority (SRA) will annually review this information to monitor the firms and individual solicitors acting for claimants in such cases and may investigate professional conduct issues if it deems it appropriate.[212] This proposal would ensure a central record of litigated SLAPPs to enable their

(Endeavour 2022); Rebecca Moosavian and Peter Coe, 'The Personal is Political: Defamation, Public Allegations & Gender Politics', Journal of Media Law (forthcoming).

[211]Stage 1 on the misuse of the common law misuse of private information tort requires the court to determine whether the claimant had a reasonable expectation of privacy. When assessing this expectation, the courts take a highly fact-sensitive and context-specific approach drawing upon a range of factors, including: 'the attributes of the Claimant, the nature of the activity in which the Claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the Claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.' *Murray v Express Newspapers Plc* [2008] EWCA Civ 446, [36].

[212]Note that this is a general outline of a proposed mechanism that may require further adjustments beyond CPR and a Practice Direction.

prevalence to be monitored. Crucially this information would enable periodic monitoring by the SRA that may result in a professional conduct review of firms and/or individual representatives who *repeatedly* facilitate the instigation of such claims.

This measure is likely to be criticised as oppressive and met with fierce resistance from certain firms in the reputation management field. But it is eminently reasonable and justified for four related reasons. First, gathering such information will provide greater transparency and professional accountability in an area that impacts upon public interest, participation, and discourse, as well as collective court resources. Second, it is likely to assist firms in upholding their professional ethical obligations (e.g. not to mislead the courts) and their obligations under the CPR to assist the courts in furthering the values of the overriding objective. Third, it would complement the SRA's ongoing work in this area.[213] Furthermore, SRA monitoring would not be undertaken in a punitive spirit, but in a proportionate way.[214] In other related spheres – for example, finance and money laundering – in recent years we have witnessed the tightening of mechanisms to try and address corruption and crime. Our proposed anti-SLAPP mechanism should be viewed in this wider context as seeking to ensure that media and related laws are not systematically misused or exploited to prevent serious misdeeds coming to light. Finally, this measure complies with proposals set out in the CoE's Recommendation on SLAPPs.[215]

Conclusion

Although SLAPPs are not new, a range of responses to the phenomenon in Europe and in England have recently gained traction because of the threat they pose to free speech, democracy, and the overall health of the public sphere. The efficacy of the various responses to date – comprising of policy, legislative and regulatory activity – remains to be seen. We have established that unfortunately the ECCTA anti-SLAPP provisions are merely a false dawn that will not address the problem (even assuming they do not fade into legislative obscurity). Instead, we have argued that more effective UK government reforms should be guided by the CoE's Recommendation on SLAPPs.

[213]E.g., the SRA's Warning Notice on SLAPPs (n 187); <https://www.sra.org.uk/home/hot-topics/slapps-abusive-litigation/>; <https://www.sra.org.uk/sra/research-publications/conduct-disputes/>; <https://www.sra.org.uk/sra/news/press/2023-press-releases/conduct-dispute-thematic-review/>; <https://www.sra.org.uk/sra/news/press/slapps-thematic-review-2024/>, all accessed 6 September 2024.

[214]Law firms in other areas of law are subject to transparency and accountability for their work, most notably those working in publicly-funded Legal Services Commission-based work.

[215]Recommendation on SLAPPs (n 21) [47]–[49]. These paragraphs advocate: (1) full transparency and publicity regarding SLAPP cases; (2) the collection of data concerning SLAPP cases and the maintenance of a public register of these; (3) the provision of information about SLAPP cases to professional legal bodies.

The novel dedicated SLAPP early disposal mechanism we have advanced here is not a panacea and must be understood as just one prong in a more comprehensive package of legal, political and cultural reforms necessary to effectively address SLAPPs. Nevertheless, our proposal would instigate change that is vital, pressing and readily achievable in the short-term. It would help courts to deal with potential SLAPPs that are already coming before them in a way that continues and develops long-established principles of doctrine and civil procedure. Furthermore, our proposals would overcome many of the shortcomings with sections 194–195 of ECCTA as well as the limitations of existing early dismissal measures that we have identified.

Though the remit of our proposal is necessarily restricted to issued SLAPP claims, aspects of our package *may* start to have a potential indirect effect on the larger and more intractable problem of pre-action SLAPPs. Importantly, by requiring law firms to be more transparent and by shining a spotlight on firms regularly acting for SLAPP instigators, its fourth and fifth features would contribute to building a better evidence base about the SLAPPs phenomenon. It may also act to deter some firms from acting in spurious, dubious claims in the face of more pro-active professional and regulatory scrutiny. Ultimately, there is no silver bullet for tackling SLAPPs. But before we can even contemplate a more effective, comprehensive long-term suite of anti-SLAPP-measures, more research on the extent and nature of SLAPPs is needed, particularly within England.

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