IN THE COURT OF APPEAL (CIVIL DIVISION) Appeal Court Ref: 2017/2053
ON APPEAL FROM
THE HIGH COURT OF JUSTICE Claim No. HQ15D05048
QUEEN'S BENCH DIVISION
B E T W E E N:

DR ANDREW GUISE

Claimant/Respondent

-and-

RAJEEV SHAH

Defendant/Appellant

APPELLANT'S SKELETON ARGUMENT
FOR PERMISSION TO APPEAL

Overview

1. The proposed appeal raises an important issue of principle in relation to the statutory defence of truth in s.2 of the Defamation Act 2013.

2. It also potentially raises important issues of principle in relation to the application of the tort of harassment to "publication"[1] cases. This will depend on whether it is necessary to consider GOA[2.3] & [2.4]. These are directed to whether the website complained of ("the Website) is capable of amounting to conduct which could form part of a course of conduct amounting to harassment. In contrast, GOA[2.1], [2.2] and [2.5] provide a straightforward route to overturning liability based on what the Judge found or omitted to find.

3. Insofar as is necessary, D will submit that permitting alarm and distress caused by the publication of defamatory imputations to engage the tort of harassment has the potential to distort the careful balance between the protection of reputation and freedom of expression that is struck by the tort of defamation. In rebalancing defamation law in favour of freedom of expression in the 2013 Act Parliament had

[1] D will use this term to describe information made publicly available whether by an individual or commercial publisher.

the overt intention of reducing the number of claims arising from defamatory publications. Instead, it has led to an increase in harassment claims being included as an alternative. The court should be astute to keep the statutory tort within its proper bounds. To permit reliance on the Website as part of course of conduct amounting to harassment would be a significant and impermissible extension of existing case law.

4. The judgment is lengthy and details the history of the relationship between C and D and its breakdown. However, the relevant passages where the Judge states his conclusion on the facts found by him are brief. The appeal is directed solely to errors of principle made by the Judge.

5. The trial was the first to engage the serious harm requirement in s.2(3) of the 2013 Act (set out in f/n)[2]. The only appeal that has been heard in relation to any provision of the Act is *Lachaux v Independent Print Ltd* [2016] QB 402. It concerns the interpretation of the serious harm requirement in s.1 (set out in f/n)[3], which is now a necessary element of the cause of action in defamation. Judgment has been reserved. An appeal to the Supreme Court is a real prospect whatever its outcome, given the novelty and significance of the provision.

6. There is an obvious inter-relationship between s.1 and s.2(3). Both require "serious harm" to reputation to be established. In contrast to s.1, s.2(3) requires the court to factor in the imputations that it has found to be true. D does not challenge the s.1 finding and the proposed appeal is not dependent on the outcome of *Lachaux*. However, it may be that the interpretation of the words "serious harm to the claimant's reputation" as ultimately determined in *Lachaux* will have some relevance.

7. This skeleton argument is intended to be used for the appeal if permission is granted. It is pitched on the basis that submissions within it are correct, not merely

[2] 2(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.

[3] 1 (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

that there is a real prospect of sufficient of them being found to be correct in order to overturn liability in defamation and/or harassment. The Court will bear in mind the hurdle that D must surmount at the permission stage and view the submissions in this context.

The Website, the Rajeevshahdental website and the chronology

8. Supplemental Bundle Tab 1 sets out the text of the Website in the form in which it would have appeared to the reader. The words comprising imputations that were found to be unproved are marked in green. As can be seen from the limited markings, the Website narrates, with substantial accuracy, the relationship between the parties and the circumstances leading to its breakdown.

9. It was written by D on 8 December 2014 when the dispute came to a head. At that stage, on the Judge's findings, C had behaved "very badly", while D had done nothing wrong. The first threat to publicise the dispute had come from C via GDPUK, a specialist website for the dental profession.

10. D was informed of C's plan by his PR agent. His solicitor advised him to consider treating the threat as adverse PR. He then produced the Website detailing his terrible experience of working with C, including the unwarranted payment demands and threats to breach confidence. He intended to use the Website to limit any damage from what he anticipated C would publish about him and his company ("DCPD"). On 9 December D emailed a link to C and his wife (who D had met socially several times) regretting that he had been forced to take such a step and that the Website would remain live unless C signed and returned an attached Non-Disclosure Agreement and explained what information about DCPD he had disclosed.[4]

11. C reacted immediately by repeating his threatened civil action for unpaid fees, now expanded to include "blackmail" and defamation. On 10 December, he launched his own website about D - rajeevshahdental.com ("the RSD Website").[5] As can be seen, it went well beyond replying to the allegations made by D. It included various

[4] Supplemental Bundle, Tab 2.
[5] Supplemental Bundle, Tab 3

breaches of confidence (disclosing DCPD's commercial strategy and financial position) and a number of “outrageously false statements” intended to create a negative impression of D.

12. Upon receiving the link D immediately deactivated the Website and sent C an email suggesting that rival defamatory websites were “not something to which we should descend”, that C should likewise deactivate the RSD Website and the parties meet to try to resolve their dispute. The Judge described this as an outbreak of common sense.[6]

13. C did not respond. He accepted in cross-examination that it would have been “sensible”, but he was “very angry” at the time. The RSD Website remained live, notwithstanding that its ostensible purpose was to respond to the Website.

14. On 12 December C reported D’s email of 9 December 2014 to Thames Valley Police as harassment and blackmail and over the following 15 months repeatedly urged them to take action against D. The matter was finally closed in March 2016 by a case review, requested by C of the decision not to pursue, which firmly rejected C’s arguments in relation to both offences.[7]

15. Having initially reported D for the single act of the 9 December email, on 22 January 2015, C made a further report to the effect that an unknown male had visited his home at around 6pm and referred to "Mr Shah" (“the Visit”). D has always denied that he was responsible, if any visit took place.

16. The Judge heard evidence from C, his wife and D. He decided that a visit had taken place and had not been arranged by C to frame D and produce a course of conduct of two events for the police to investigate. This was because C's wife and child had been present and text messages sent to friends contemporaneously, which referenced D and the visitor in racist terms, suggested an unrehearsed reaction to events by C.[8] The Judge dismissed concerns about the reliability of irreconcilable

[6] Core Bundle, Tab 5 [124].
[7] Supplemental Bundle, Tab 6
[8] [139] – [141].

accounts as the product of the natural limitations on recalling events. He decided that no express threats were made by the visitor, contrary to C's pleaded case, but accepted that D had been referred to. He found that the Visit was frightening to C's wife which had "concerned" C.[9]

17. It could be argued that the Judge failed properly to evaluate the probability of the two competing motives operative as at 22 January: D to send someone round to C's home or C to fabricate the allegation to frame D. For example, he relied on a propensity of D to damage C, in the form of the activation of the Website on 9 December 2014, as probative of D having arranged the Visit, notwithstanding that D had unilaterally taken down the Website within 24 hours and made a sensible offer to seek resolution, which C had rebuffed in anger. In truth, the events of 9 and 10 December were probative of D not having sent someone round to C's home on 22 January.

18. However, D recognises the respect given by an appellate court to such findings of fact and it is not necessary for him to overturn the Judge's finding on the Visit to succeed in the appeal. The Visit is only relevant to the harassment claim. The Judge found that the publications of the Website alone would not have constituted a course of conduct amounting to harassment; it was only when combined with the Visit.[10] In this context, D is plainly entitled to point to the fact that he had unilaterally withdrawn the Website over 7 weeks earlier after a period of publication lasting around 24 hours, while the RSD Website had remained online throughout.

19. The Judge found that the Website was re-activated "at some stage in about February 2015".[11] He made no finding as to D's reason for doing so. D gave reasons for reactivation (which the Website analytics report showed occurred in March, not February): that C had not sought to resolve the dispute as invited, had continued publishing the RSD Website and D had been told that police complaints about both websites would not be pursued.

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[9] [141]
[10] [208] – [209]
[11] [142]

20. In March C emailed D suggesting that if he agreed not to publish the Website it would not be necessary to pursue proceedings". D said that he did not receive the email and the Judge did not find to the contrary.[12]

21. D heard nothing further until he received letters of claim on behalf of C regarding non-payment of fees and defamation (29 October 2015) and outlining a private prosecution for blackmail (6 November).[13] C's case on serious harm set out in the letter of claim was that the Website stopped third parties from engaging him as a business consultant. D responded by denying any liability for unpaid fees or libel, but offering to negotiate terms for taking down both websites.[14] C did not respond to the offer. Although C periodically threatened in emails to D to pursue the private prosecution, D heard nothing further from C's lawyers in that regard.

22. On 12 October 2015 C updated the RSD Website by removing existing material and identifying his proposed claims. On 14 November 2015 he made a posting on GDPUK seeking persons who might be able to support his action against D. The Judge found that this was seen by "many dental professionals".[15] On 21 November D updated the Website to take into account these developments.

23. The Claim Form was issued on 7 December, the eve of the expiry of the limitation period. POC were served on 17 December 2015 advancing claims for libel, harassment and breach of the DPA.

24. The Website was deactivated in December 2016.

25. The RSD Website remained live in its amended form. The Judge made no findings as to its accessibility. D's evidence was that it was the most prominent link when anyone searched his name with "Dental CPD", the name of his business, or the sector he was engaged in.

[12] [142]
[13] Supplemental Bundle Tab 4
[14] Supplemental Bundle Tab 5
[15] [147]

The Defamation claim *Section 2(3)*

26. The stated purpose of Parliament in the 2013 Act was to rebalance defamation law in favour of freedom of expression. This freedom can be measured to a large extent by the tolerance given to the dissemination of information which is false or cannot be proved to be true. Without such protection, the dissemination of truth will be "chilled". To use a phrase favoured by the US Supreme Court, freedom of expression needs "breathing space" to survive.[16]

27. In a variety of ways the 2013 Act provides the means for a defendant to avoid liability for defamation in relation to publications which are (or may be) untrue (in whole or part).

28. S.1 is a key provision in the rebalancing. It requires a claimant to prove as part of the cause of action, that the publication complained of has caused serious harm to his reputation (or that such harm is likely to be caused in the future). Its truth or falsity is irrelevant.

29. The word "serious" imports a high level of adverse consequence.[17] The original draft bill referred to "substantial" but this was replaced with "serious" to enable the bar to be raised.[18]

30. The section requires the court to focus on the actual consequences of the publication. This is to be contrasted with traditional approach of the common law, to subject the words complained to a process of construction to determine their meaning and then consider, in abstract, the "tendency" of the meaning to cause harm. This process was famously characterised by Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 Q.B. 157 at 171F as "artificial and archaic".

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[16] "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive.."" *New York Times Co. v. Sullivan* 376 U.S. 254 per Brennan J at 272.

[17] See, for example, s.224 and 225 of the Criminal Justice Act 2003 and Articles 2(e) and 15 of the EC Council Directive 2004/83/EC of 29 April 2004 in relation to Refugees.

[18] *Cooke & Anor v MGN Ltd & Anor* [2015] WLR 895 at [37]

31. The s.2 defence of truth is a codification of the defence of justification. The only statutory element of justification was the protection given to partly true publications by s.5 of the Defamation Act 1952 (set out in f/n).[19]

32. S. 2(3) follows the structure of s.5. The key difference is the substitution of "seriously" for "materially". "Serious" and "material" are ordinary words. "Serious" provides far more "breathing space" to a defendant.

33. In addition, s.2(3) is necessarily linked to s.1, which had no equivalent in the pre-2013 regime. The court must now consider the likely effect, in practice, of the element of the publication that has been proved to be true by reference to the matters on which it relied for the s.1 finding. This requires a recalculation. The truth defence will only fail if: effect on reputation of the publication as a whole - likely effect if the publication had only contained the true imputations = serious harm to reputation. If any adverse consequence on which the court relied to find that serious harm had been caused would be likely to have been caused if the publication had only contained the proved elements, it can no longer be relied on in establishing serious harm.

34. The burden of proof in s.2(1) – whether an imputation is substantially true – lies on the defendant.[20] It is unclear whether the burden of proof lies on the claimant or defendant in relation to s.2(3). It is not necessary to determine this issue in the present appeal, because of the emphasis placed by C on the "risk averse" propensity of his potential clients. Wherever the burden of proof lies, the assessment of serious harm for the purposes of s.2(3) must necessarily be determined by reference to the factors advanced by the claimant to make good his s.1 case, insofar as they are upheld by the court.

35. The court should consider the way in which the proved and unproved imputations appear in the publication. It is insufficient merely to consider their relative moral

[19] 5. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[20] 2(1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.

gravity in abstract. This will have greater significance where, as in the present case, the imputation found to be the "most serious" is the least prominent.[21]

36. Further, a finding that an untrue imputation is the "most serious" is plainly an insufficient basis for defeating a truth defence. The issue is whether the gulf between the unproved imputations and the proved imputations is so wide as to cause serious harm to reputation.

37. Where an unproved imputation and a proved imputation are of equal gravity and prominence and relate to the same sphere of the claimant's life, it is difficult to see how a truth defence could fail. An imputation can only be the subject of such defence if it makes right-members of society think the worse of the claimant. Once it has been proved that the claimant has been guilty of a type of conduct which would have that effect, it is difficult to see how a further example of such conduct which was unproved could seriously harm the claimant's reputation.

38. The defence of truth is solely concerned with the conduct of a claimant. A defendant's motive in publishing the words is irrelevant. All that matters is whether the claimant has behaved sufficiently badly.

Application to the facts

39. The determination of serious harm for the purposes of s.1 required the Judge to take into account all the imputations in the Website, whether true or false. His findings are at [159] – [162]. At [162] he concluded that "the evidence" established that the Website had caused serious harm to C's reputation. The only evidence identified was "the serious nature of the imputation**s**, the extent of publication and Mr Laskey-Pooley's evidence" [emphasis added].

40. The unchallenged evidence of David Laskey-Pooley, summarised by Judge at [160] was that he had recommended C to a company, which pulled out because of "a website" and that the drug companies who might instruct C were "risk averse and **the existence of the website alone** was damaging" [emphasis added]. In his

[21] See Supplemental Bundle Tab 1.

witness statement, he had said that such companies will be “very careful to select a pair of hands that doesn’t have even the slightest whiff or blemish”.[22]

41. At the conclusion of [162] the Judge stated:

> “As it is apparent that Mr Shah has proved the substantial truth of some of the imputations, I will need to consider whether the imputations which are not shown to be substantially true do not seriously harm Dr Guise's reputation for the purposes of section 2(3) of the Defamation Act 2013.”

42. That evaluation needed to be made “having regard to the imputations which are shown to be substantially true”.

43. The Judge dealt with s.2(3) at [186] and [187]. At [186] recited the provision. At [187] he stated:

> “It is apparent that the most serious meaning, relating to the word "scam" has not been justified. It is true that Mr Shah has proved the substantial truth of important imputations against Dr Guise, and in particular in relation to his behaviour in seeking to damage Mr Shah and to breach confidence, but the imputation which has not been shown to be substantially true seriously harms Dr Guise's reputation. This is having regard to the matters set out above in relation to my finding of serious harm and the fact that this is a serious allegation, which was published in a way which ensured that it had prominence on searches for Dr Guise's name. In these circumstances the defence of truth fails, but the partial justification may be reflected in damages.”

44. This short paragraph contains a number of errors of principle:

44.1. The Judge failed to ask himself what the effect on C’s reputation would have been if the Website had not contained the word “scam”.

44.2. He stated that he had had regard to the “matters” on which his serious harm finding was based. But it is plain that he did so solely by reference to the word “scam” in isolation and without having regard to the parts of the Website found to be substantially true. The evidence of Mr Laskow-Pooley cried out for such an assessment. No doubt, the risk averse drug companies would have not have wanted to employ a consultant involved in a scam. But would they have wanted to employ one who had behaved in the way that the Judge had found C to have behaved? S.2(3) required that question to be asked. The Judge did not do so.

[22] Supplemental Bundle Tab 7.

44.3. The Judge relied on the word “scam” appearing with "prominence" on internet searches which brought up the whole of the Website. But the ordinary reader is taken to read the entire publication and the interested reader would be likely to do so. C did not sue on the search results in isolation.

44.4. Further, the Judge should have taken into account that the word “scam” was isolated and unparticularised and the proved imputations and statements held to be honest opinion would have been of greater significance to the reasonable reader of the website than the unproved.

44.5. In any event, for the reasons stated in [36] above, a finding that “scam” was the “most serious” imputation was not a proper basis for concluding that it has caused serious harm, “having regard” to the proved imputations.

45. In the event that the Court is persuaded that the Judge erred in principle, D will invite the Court to make its own evaluation of s. 2(3) in relation to the primary facts found by him. D will make the following submissions in this regard:

45.1. The only reasonable conclusion is that the imputations that the Judge found to be true – in summary, sending unwarranted bills for sums to which C had plainly no entitlement and when D reasonably objected to paying, seeking to damage him by widespread disclosure of his confidential information and publishing outrageously false statements about him - which reflected “very badly” on the C and showed him to be “someone who cannot be trusted with confidential information”, would have the same tendency to lead the “risk averse” drug companies (or any other reputable business) to shun him. Accordingly, any serious harm to reputation, in the circumstances found by the Judge, could not be consequential on any element of untruth in the Website.

45.2. The overall message of the Website was: “I have had this terrible experience with C (as summarised above) and you should therefore be cautious before employing him”. The word “scam” appeared in the Website, albeit in isolation, and the common law principles of construction required it to

be given a meaning. But it would have had no practical impact on a reader beyond the specific allegations comprising D's terrible experience that were particularised. There is no certainly no basis to conclude that any additional reputational impact could properly be characterised as serious.

45.3. The Judge did not take into account the other unproved imputations in his ruling on s.2(3). He was right to do so. They were less serious than the proved imputations, less significant in the narrative and were merely further instances of unprofessional behaviour. Notably, C did not reply to them in the RSD Website.

The Harassment claim

46. The basis on which the Judge upheld the harassment claim is set out in [205] to [209]. He relied on the publication of the Website and the Visit as constituting a course of conduct that amounted to harassment. There are three straightforward routes to overturning the imposition of liability.

47. First, the Judge found that "this was not a serious course of conduct".[23] The authorities make clear that the course of conduct must be "serious" or "grave" for it to amount to harassment.[24]

48. Second, the Judge found that the publication of the Website "on its own would not have amounted to harassment".[25] The Visit was a single act and could not, of itself, give rise to liability.[26] The authorities make clear that (a) the fewer the incidents the more severe each must be to give rise to liability and (b) the more disparate in time and nature the more difficult it will be to describe them as a course of conduct.[27]

49. Having found that the publication of the Website did not give rise to liability, the Judge had to find (a) some quality about it that when combined with visit gave rise to liability and (b) a link between the two so as to constitute a course of conduct.

[23] At [208].
[24] See [66] below.
[25] It is implicit in [208] and explicit in [209].
[26] S.7(3).
[27] See [67] below.

He did not do so and we are left with the bare finding that the Website "on its own" was insufficient.

50. A consequence is that the judgment gives no indication at what point the tort was committed. As at 22 January 2015, the Website had been offline for over 7 weeks after a period of publication lasting only 24 hours. D had made a sensible and bona fide proposal that both parties should cease publication, which C had rebuffed in anger. C continued to publish the RSD Website. On what basis could the initial publication on 9 December be the first act in a course of conduct in which the Visit, some seven weeks later, was the second? If, on the other hand, the Visit was the first act and the re-activation of the Website "at some stage in about February 2015" was the second so as to create the course of conduct, the Judge ought to have focussed on why D re-activated it. D's reasons, which were not challenged, are set out above at [19].

51. Third (and relatedly), s.1(1)(b) requires the actual or imputed knowledge of the defendant to be directed to the course of conduct. The finding in relation to D's knowledge is directed solely to the visit.[28]

52. D submits that any of the above is sufficient to dispose of the harassment claim.

53. Further or alternatively, D will advance the following submission set out in GOA[2.3]: "the publication of the Website was not capable of amounting to conduct which could form part of a course of conduct amounting to harassment, having regard to all the circumstances, including its content and manner of publication and the Judge's findings as to the conduct of the Claimant."

54. This submission builds on basic principles relating to freedom of expression. Another way of putting it is, as expressed in GOA[2.4]: a finding that the publication of the Website was conduct which formed part of a course of conduct amounting to harassment would be a disproportionate interference with D's Article 10 rights.

Relevant legal principles

[28] At [208]: "Mr Shah knew [sic] amounted to a course of conduct in harassment. This is because there was no other reason for sending around the person to the house of Dr Guise and Dr Blom other than to harass them."

55. This section is divided into three parts. First, the right to publicise wrongdoing by a supplier of goods or services. Second, the general case law on harassment. Third, the case law in relation to harassment by publication.

The right to publicise misconduct by a supplier

56. The case law on harassment illustrates the importance of the "social or working context in which the conduct occurs".[29] The context in the present case is a purchaser of services being treated "very badly" by a supplier and choosing to publicise his experience. Prior to considering the case law on harassment, D submits that it is helpful to consider the legal principles relevant to the right of a consumer to publicise such information.

57. The starting point is the fundamental right to freedom of expression. As Lord Steyn stated in *R v Home Secretary, Ex p Simms* [2000] AC 115 at p.126:

> "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market:' *Abrams v United States* (1919) 250 US, 616, 630 per Holmes J (dissenting). Thirdly, freedom of speech is the lifeblood of democracy."

58. Lord Goff's observation on negative liberty in *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at p.283 is also pertinent:

> "Finally, I wish to observe that I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it."

59. So too Hoffmann LJ's in *R v Central Independent Television Plc* [1995] 1 FCR 521 at p.202. It is directed to a media publication, but is at least, equally applicable to a publication by an individual. Lord Steyn's first identified objective was the "self fulfilment of individuals".

> "The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest.

[29] *Conn v Sunderland City Council* [2007] EWCA Civ 1492 at [12].

> But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."

60. There is no reason, in principle, why a person who has been treated badly by a supplier of goods or services should not make public the misconduct, subject to the usual risks of defamation. The more cautious or legally minded might prefer to report the supplier to any available regulatory body or rely on the misconduct as a cause of action or defence in legal proceedings. But the availability of such remedies does not detract from the fundamental right to seek publicity.

61. Further, there is a public interest in misconduct by suppliers being publicised.[30] The free flow of such information is fundamental to a free market economy. It warns future purchasers and serves to encourage suppliers to act appropriately. The internet forms a key role in this process. It also affords the means to enable a supplier to respond to such criticism. It is the classic forum for the marketplace of ideas referred to by Lord Steyn.

62. There is equally no reason, in principle, why a victim of misconduct should not threaten to publicise it unless the supplier remedies the wrong.

63. Such conduct is not blackmail in the "technical legal sense"[31] or colloquially. The demand is not unreasonable. It is not improper to publicise misconduct by a supplier.

The general case law on harassment

64. D relies on Toulson LJ's definition of harassment in *R v Smith* [2013] 1 W.L.R. 1399 at [24]:

> "In construing s1 of the 1997, Act it is right to have regard to the type of mischief at which it was aimed. It is also right to have regard to what the ordinary person would understand by harassment. It does not follow that because references to harassing a person include alarming a person or

[30] See, for example, *Joseph & Ors v Spiller & Anor* [2010] EMLR 7 at [37]. The claimants did not challenge this finding in the Supreme Court.

[31] The words used by the Judge at [174]. S.21(1) of the Theft Act 1968 provides: A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—(a) that he has reasonable grounds for making the demand; and (b) that the use of the menaces is a proper means of reinforcing the demand. The Crown bears the burden of negativing the belief. The belief does not have to be reasonable.

causing a person distress (s7(2)), any course of conduct which causes alarm or distress therefore amounts to harassment (*Thomas v News Group Newspapers* [2001] EWCA Civ 1233 at [29]). So to reason would be illogical and would produce perverse results. A person who habitually drives too fast in a built up area may cause alarm to other road users, but conduct of that sort was not what Parliament was invited to consider and would not fall within the ordinary understanding of what is meant by harassment. In *Curtis* [2010] EWCA Crim 123 the court referred to the definition of the word 'harass' in the Concise Oxford Dictionary, 10th edition, as meaning to 'torment by subjecting to constant interference or intimidation.' Stalking is the prime example of such behaviour, but not the only possible form. It may occur, for example, between neighbours or in the workplace (*Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at [18]). Essentially it involves persistent conduct of a seriously oppressive nature, either physically or mentally, targeted at an individual and resulting in fear or distress (*Thomas v News Group Newspapers* at [30])."

65. The nature of the conduct and the context in which it takes place may be highly relevant to whether it can properly be characterised as oppressive and/or harassment.[32]

66. Toulson LJ referred to "seriously oppressive" conduct. There are other statements of high authority which stress the need for the course of conduct to be serious or grave before liability can be imposed.[33]

67. The gravity must relate to the course of conduct as a whole, not necessarily each individual act. However, "the fewer the incidents there are in the course of conduct, the more severe each is likely to have to be for the offence to be made out"[34]. The more disparate in time and nature the more difficult it will be to describe them as a course of conduct.[35]

68. The nature of harassment is that it involves an oppressor and a victim. We are unaware of any case in which liability was upheld, which could remotely be categorised as "6 on one side and half a dozen on the other" (or even 10 and 2), or where the "victim" has been engaging in the same or similar conduct as the "oppressor".[36]

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[32] See, for example, the commonly cited summary of Simon J in *Dowson v Chief Constable of Northumbria* [2010] EWHC 2612 at [142].

[33] See, for example, Lord Sumption in *Hayes v Willoughby* [2013] UKSC 17 [12] referring to Lord Nicholls *Majrowski v Guy's and St. Thomas's NHS Trust* [2007] 1 AC 224 at [30], *Ferguson v British Gas Trading* [2010] 1 W.L.R. 785 at [17] and *R v Curtis* [2010] 1 W.L.R. 2770 at [29].

[34] *Jones v DPP* [2011] 1 W.L.R. 833 at [35].

[35] *R v Hills* [2001] Crim. L.R. 318 CA (Crim Div); *Hipgrave v Jones* [2004] EWHC 2901 (QB *R v Patel* [2004] EWCA Crim 3284 at [40]; *R v Curtis* [2010] 1 W.L.R. 2770

[36] See, for example, *R v Curtis* [2010] 1 W.L.R. 2770 at [32].

The case law in relation to harassment by publication

69. For reasons stated previously, the right to publicise allegations which reflect badly on another person is a fundamental human right that serves a number of objectives. It carries the inherent risk of causing distress. The law of defamation strikes the proper balance between the protection of reputation and free expression. If the publication is on the wrong side of that balance, damages will be recoverable for the distress.

70. Such conduct does not naturally fall within the definition of harassment. It falls within the definition of defamation, which is a concept that has existed from, at least, biblical times.

71. The aim of the 1997 Act was to plug a gap in the law relating to stalking and malicious phone calls. S.7(4) defines conduct as "including speech" in order to avoid the argument that spoken words are not conduct. There is nothing in any of the legislative materials to suggest that Parliament was contemplating that defamatory publications could fall within its ambit.

72. The first publication case that came before the Courts under the Act was *Thomas v News Group Newspapers Ltd* [2002] EMLR 78. Under a section headed "the nature of harassment" Lord Phillips MR noted:

> "29. Section 7 of the 1997 Act does not purport to provide a comprehensive definition of harassment. There are many actions that foreseeably alarm or cause a person distress that could not possibly be described as harassment. It seems to me that section 7 is dealing with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect.
> 30. The Act does not attempt to define the type of conduct that is capable of constituting harassment. "Harassment" is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct."

73. Having referred to the domestic and Strasbourg jurisprudence on freedom of expression Lord Phillips accepted at [35] what was common ground between the parties: "before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve". Such circumstances will be "rare".

74. The case was brought by a black police clerk. It concerned two articles and readers' letters in *The Sun* which identified her place of work and arguably incited racial hatred against her, causing her to receive racist letters, be terrified of attack and scared to go to work. This was held to be potentially sufficiently exceptional to allow the claim to proceed.

75. Applying the previously stated free speech principles, an individual publisher should not be a in worse position than a national newspaper. At the very least, a requirement of "exceptionality" must apply before any publication by an individual is capable of constituting harassment.

76. The context in which an individual publishes will be different to a commercial publisher. In general, there will need to be something exceptionally intrusive in the method of publication, consistent with the ordinary meaning of harassment. It will be insufficient that the gravamen is that the claimant is upset about being defamed.

77. This submission is buttressed by the Article 10 jurisprudence. Imposition of liability for harassment is a restriction on freedom of expression which must therefore satisfy the tests of "necessity" and "proportionality".[37] These are to be determined in the context of other remedies available to a claimant under the domestic law and the particular caution against criminal sanctions arising from the exercise of a right protected by Article 10.[38] Damages for libel afford a sufficient remedy where the distress is caused by being publicly defamed. Where the defamatory publication is defensible under domestic law as sufficiently true and/or honest opinion, the imposition of damages for harassment may be even less justifiable in Article 10 terms.

78. It is also necessary to bear in mind that facing an additional claim in harassment is, in itself, an interference with freedom of expression.[39] It makes the proceedings more costly and carries the risk of stigmatisation.

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[37] See, for example, *Thomas* at [18] – [26].

[38] *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin)

[39] It is established that being sued as result of the exercise of an Article 10 right amounts to an interference with it, irrespective of the outcome. See, for example, *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB) at [33].

79. There has been no appellate harassment case engaging Article 10 since *Thomas.* Some of the first instance cases have arisen from truly exceptional conduct, far removed from the Website. *Howlett v Holding* [2006] EWHC 41 (QB) involved, among a number of other matters, flying banners from an aircraft over the claimant's home for around four years, which accused her of corruption and forced her to live in a state of uncertainty and apprehension. *Law Society v Kordowski* [2011] EWHC 3185 (QB) concerned the Solicitors from Hell website, which was, essentially, a protection racket. Others have involved deranged and repetitive conduct or the disclosure of intimate information, where there was an obvious oppressor and victim. It is not necessary to consider whether all have been properly decided. The present case is plainly distinguishable for reasons which are hopefully apparent by this stage of the skeleton argument. They are particularised below.

Application to the facts

80. Applying the relevant authorities to the facts set out in [8] – [26] above, the publication of the Website is not capable of amounting to conduct which could form part of a course of conduct amounting to harassment. Specifically:

80.1. D was initially the innocent party on the Judge's findings; C made the first threat to publish; D was entitled to publicise C's bad behaviour subject to the usual risks of libel; C published the RSD Website on 10 December; D de-activated the Website on the same day and offered a resolution which C rebuffed; there was nothing intrusive or amounting to an infringement of privacy in the manner of publication of the Website or the nature of the information; it was about C's conduct in his professional capacity; there was a public interest in the subject matter; people who were considering employing C were entitled to know of his bad behaviour; in relation to any element that was unproved there was no finding that D did not believe it to be true or had no proper basis to allege it.

80.2. The Judge's criticisms of D's decision to set up the Website were insufficient, as a matter of law, to permit reliance on its publication as part of a course of conduct amounting to harassment. As Hoffmann LJ recognised, the

fact that a judge regards the exercise of a defendant's free speech right to be unreasonable and very immature is not a sufficient basis for imposing liability except where it falls within the proper ambit of existing torts.

80.3. Any injury to C's feelings consequent on the Website was as a result of being defamed. It is apparent from [208] that the £3,000 damages award related solely to the Visit. Domestic law requires more than one act to generate liability in harassment. To permit reliance on the publication of the Website to enable the award to be made amounts to an unnecessary interference with D's Article 10 right, for reasons previously stated. This applies whether or not the Website is libellous under domestic law, but the infringement is more serious if the Website is defensible under domestic law as sufficiently true and/or honest opinion.

Honest opinion & the claim under the Data Protection Act 1998

81. *GOA[3] - Honest opinion:* Given that this issue appears to have had no impact on the outcome, D does not propose to amplify on GOA[3].

82. *Data Protection:* The finding that both websites gave rise to a claim under the Data Protection Act had no impact on the outcome, other than the grant of an injunction against both parties. Since D has no intention of publishing the Website or anything similar, he has no interest in making a freestanding appeal on this issue, which would be likely to rise to complex arguments, best left to a case in which they would have practical significance.

David Price QC
David Hirst
For the Defendant/Appellant
23 August 2017