CLAIM NO: QB-2017-000045

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
BETWEEN : -

(1) ARNOLD MBALLE SUBE
(2) JEANNE MBALLE SUBE

Claimants

- and –

(1) NEWS GROUP NEWSPAPERS LTD
(2) EXPRESS NEWSPAPERS

Defendants

FIRST DEFENDANT'S SKELETON ARGUMENT FOR TRIAL

Bundle references are by bundle/tab/page. Chronology and dramatis personae are attached.

Reading list: Bundle A (the judgments of Warby J on 27 July 2018 and Steyn J of 23 January 2020) only need to be considered to the extent that they are referred to below); the articles in bundle B and sufficient of the comments as is necessary; the other documents referenced in this skeleton argument; and the passages in the authorities referenced in this skeleton argument
Estimated length of reading time: 1 day, assuming that the Judge has some familiarity with the cases on the PHA 1997.
Estimated length of hearing: 3 days.

Overview

1. Cs' remaining claims for determination at trial are under the Protection from Harassment Act 1997 ("PHA") and Data Protection Act 1998 ("DPA"). In relation to D1, they concern 3 print articles that were reproduced online and 4 online-only articles published between 7 and 11 September 2016 and 30 October to 2 November 2016 and reader comments on the online articles. The articles arise from Cs' dispute with Luton council over their housing. This was first made public as a result of an interview that Cs gave to their local newspaper, the MK Citizen, including a photograph of Cs and their (then) 8 children. The MK Citizen article[1] was published on 6 September 2016, resulting in coverage throughout the national media.

2. Cs' intention to bring a claim in relation to the articles was notified to D1 by letter of Cs' solicitors ("DO") of 17 February 2017.[2] The sole cause of action identified was defamation.

[1] C/H/168-172
[2] E/B/7-12

Numerous factual inaccuracies were alleged which were said to have caused serious harm to Cs' reputation. The claim in defamation was struck out by Warby J on 27 July 2018 (following an earlier judgment on 24 May 2018)[3] on the basis that the articles did not bear a number of the imputations complained of (most notably that Cs had been dishonest or were lazy) and none of them conveyed any imputation that had a tendency to cause serious harm to reputation pursuant to s.1 of the Defamation Act 2013.

3. Consistent with the way that their claim was originally framed, it may be thought that Cs' real concern about the media coverage is the reputational effect of what they see as the unfair portrayal of them as dishonest, ungrateful, lazy and greedy benefit claimants. Claims in defamation were also threatened against MGN Ltd (which settled at the protocol stage) and Associated Newspapers Ltd (which is the subject of a standstill agreement).

4. By letter of 4 August 2017[4] DO stated that counsel had advised Cs that they had a further claim in harassment. This relied heavily on the reader comments on the articles, some of which were, regrettably, racist and/or offensive in content. The reader comments will be described as "Posts" consistent with the terminology in the APOC. They are to be contrasted with posts made on other websites (described by Warby J as "Third Party Posts") which are not complained of.[5]

5. Notwithstanding the importance placed on the Posts and an easy to use reporting facility on D1's website, it is to be noted that neither Cs nor DO (first instructed in September 2016) drew any of them to D1's attention in any manner until the letter of claim of 17 February 2016, which resulted in D1 disabling the reader comment facility. Similarly, it appears that neither Cs nor DO were aware that it had been disabled. A letter under s.10 of the DPA was sent by DO on 20 December 2017[6] requiring D1 to cease processing the Posts, with which Cs continue to allege D1 has refused to comply. This false allegation is the sole basis on which the DPA claim was and remains advanced.

6. The CF was issued on 5 September 2017. The claims were in defamation and harassment. It was amended on 22 December under CPR 17.1, on service of the POC, by including claims in malicious falsehood, the Equalities Act 2010 ("EQA") and the DPA. On 15 January 2018 D1 applied for the amendments to be disallowed under CPR 17.2(1) and, relatedly, applied to strike out on 24 January. On 28 February Cs applied to amend the

[3] The main judgment was on 24 May (A/D/122-163), which left unresolved a technical issue relating to s.1 in respect of which judgment was given on 27 July (A/D/164-177).
[4] E/B/42-47
[5] See the judgment of 24 May at [3] & [63] (A/D/123 & 147)
[6] E/B/59-60. The response is at E/B/68.

POC, including by adding a more detailed DPA claim including allegations of misuse of private information and breach of confidence.

7. On 24 May 2018 Warby J disallowed the amendments made on 22 December and substantially refused the 28 February application to amend.[7] He gave Cs a further opportunity to amend, noting that it might be possible for them to reformulate the DPA claim. APOC were served on 13 August 2018.[8] They are virtually the same as the original POC, other than the deletion of the malicious falsehood and EQA claims.[9]

8. The fact that D1 did not apply to strike out the harassment claim is not a recognition that it has any merit. Harassment claims in relation to media publications are rare and it is a relatively novel area of the law. It is thought preferable for legal arguments in such cases to be determined on the basis of the facts found at trial.[10] This is to be contrasted with defamation where there are established principles of pleading and early determination.

9. The legal principles governing harassment by media publication are addressed in [46]-[87] below. There has been one previous English trial, in *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB), an unsuccessful claim in relation to the content of 65 articles referring to the claimant's sexual orientation, allegedly in disparaging terms and 152 selected reader comments which were said to taunt and lampoon the Claimant for being ugly and attack her in regard to her sexuality. The claimant also relied on the conduct of journalists in gathering information for publication.[11]

10. Cs' harassment claim is based solely on content. This can be contrasted with the more common case of harassment involving publication, where the defendant has an existing animus towards the claimant and there is something threatening in the manner of publication or otherwise in the defendant's conduct.[12]

11. In short, the circumstances of the present case are far from the "exceptional" and "rare" oppressive abuse of media freedom[13] that could give rise to liability. Were the claim to be upheld, it would amount to a significant restriction on the editorial freedom of the media to report and comment on matters of legitimate interest to readers, effectively cast the court as censor and extend the PHA way beyond the intention of its framers.

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[7] [13] (A/D/125-6)
[8] [14] (A/D/126-7)
[9] A/A/4-14
[10] See the White Book notes at 3.4.2.
[11] At [276]
[12] See, for example, *Hourani v Thomson* [2017] EWHC 432 (QB).
[13] See *Thomas v News Group Newspapers Ltd* [2002] EMLR 4 at [35]

12. If the trial is properly delineated by the statements of case (analysed in greater detail in [18]-[41] below), the Court should have no difficulty in resolving the limited factual issues in favour of D1, insofar as it is necessary to do so, and dismissing the claim.

13. D1 did challenge the viability of the DPA claim in the applications before Warby J in 2018 on the basis that they had ceased processing the Posts prior to the s.10 notice. This was unsuccessful on technical grounds, notwithstanding his observation that Cs' approach "may be unhelpful, and ultimately fruitless".[14] The Judge referred to the possibility of D1 subsequently applying for summary judgment, which D1 has chosen not to do. The choice may have been different if the DPA claim was the only claim. A further factor is that D1 does not have documentary proof of the disabling itself, although there are contemporary emails[15] from Victoria Watson, D1's Digital Managing Editor, confirming that she carried it out. In the circumstances, Ms Watson, will be available to be cross-examined by Cs' counsel (if he thinks it professionally appropriate) on her witness statement ("VM1").[16] Cs have no positive evidence to contradict D1's case in relation to the dates of disabling.

14. In this context, it is worth addressing now a minor matter relating to D1's Defence. [4.5][17] correctly states that the reader comment function was disabled in relation to 6 of the 7 online articles complained of in the APOC on 21 February 2017 and in relation to Take Your Pick on 11 October 2017. It also states that "Take Your Pick" was not complained of in the letter of claim. This is not correct. "Take Your Pick" is one of the three print articles reproduced online and the only one where the print and online headline is the same.[18] It was inadvertently omitted from the disabling request of 21 February. It only attracted 7 Posts. The material point remains that the 11 October 2017 disabling date is correct and it precedes the s.10 request.

15. This error in [4.5] was noticed on review of the documents prior to exchange of witness statements and a draft Amended Defence was served on 23 October 2019, with which DO has not engaged.[19]

16. In addition, following the disclosure of emails between C1 and the MK Citizen, it has become clear that C1 approached the newspaper on 25 August 2016, not on or about 6 September as Defence [8] had reasonably assumed. Again, the error is immaterial, yet,

[14] [58]-[61] (A/D/146-7) & [91]-[93] (A/D/155-6)
[15] A/I/252-3
[16] A/I/250-3
[17] A/B/73
[18] The list of articles as set out in the letter of claim is at E/B/7-8
[19] The letter serving the Amended Defence appears to be missing from the bundle but the emails that followed it are at E/B/121-2.

for unknown reasons, C has failed to consent to the proposed amendment to correct it. If consent continues to be withheld, D1 will ask for permission to amend at the start of the trial.

17. Finally, APOC[10][20] pleads four random falsehoods of limited materiality by reference to "statements made of the Claimants in the Articles and Posts". It is disembodied from any cause of action. This was noted by Warby J in his judgment of 24 May. The Judge was unclear of its role, particularly after the striking out of the malicious falsehood claim to which it had been incorporated in [16]. He observed that it "might perhaps form a legitimate part of a reformulated DPA claim", but "if it is to stay on the record for any purpose it will need attention".[21] Contrary to the Judge's instruction, it was retained in its disembodied state in the APOC. The point was made again in the recent judgment of Steyn J on Cs' unsuccessful application for specific disclosure.[22]

The issues in the harassment claim as defined by the statements of case and the evidence relating to them

18. It seems convenient to analyse the statements of case prior to considering the relevant legal principles, as the latter may prove relatively straightforward, once the narrow ambit of the contested issues is properly understood.

19. For present purposes it is sufficient to record the elements of the cause of action in s.1(1) & (2) of the PHA:

> 1 (1) A person must not pursue a course of conduct – (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other…
>
> (2) The person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.

20. Civil litigation is an adversarial process. It is axiomatic that a claimant must set out the facts on which he/she chooses to rely on in the particulars of claim to make good the cause of action to which they relate. The ambit of the claimant's case will be limited to those facts. The disclosure and evidence must be directed solely to them (insofar as they are

[20] A/A/6-7
[21] [14(3)] (A/D/127) & [107] (A/D/159)
[22] A/D/to be inserted when transcript received

denied in the defence) and any positive case alleged in the defence (insofar as it is not admitted). The absence of a reply will mean an automatic joinder of issue with the defence.

21. The benefits of these principles are obvious, in particular, fairness to the defendant and the control of costs and court resources. It is particularly important to hold fast to them where, as in the present case, the claim is novel, involves criminal conduct, has the potential to impact negatively on freedom of expression, and Cs' CFA-funded legal representatives have consistently sought to claim disproportionate costs in circumstances where any ATE cover is now insufficient to cover Ds' costs.

22. It is fair to say that Cs' legal representatives have had a casual attitude to the ordinary disciplines of litigation. Ds' successful challenges to the way in which Cs' various claims were advanced were described by Cs' counsel as "seeking needlessly to drive up the costs of this litigation"[23], when their intent and effect was the opposite. A number of the observations of Warby J in the judgment of 24 May have been ignored in the subsequent prosecution of the claim.

23. The averments in the APOC[24] and Defence[25] are set out in turn below together with the relevant evidence and any comment.

    APOC[20]: The series of Articles and Posts published and/or caused to be published by the Defendants and each of them amount to a course of conduct and harassment of the Claimants contrary to s.1 (1) Protection from Harassment Act 1997 ("the Act").

24. This confirms that the harassment claim is based solely on the content of the Articles and Posts. D1 pleads a bare denial in Defence [7] (as it is entitled).

    APOC[21] The said Articles and Posts were numerous in number in respect of each Defendant and publication took place on each and every subsequent day from the date they were first published on the internet.

    Def [8]: In relation to paragraph 21 of the Amended Particulars of Claim, the frequency and number of the First Defendant's Articles and the Reader Comments on the First Defendant's Articles are evident from paragraphs 3 and 4 above and it is denied that they are capable of constituting or contributing to a course of conduct amounting to harassment of the Claimants by the First Defendant. The First Defendant reported and commented on

[23] [54]
[24] A/A/4-14
[25] A/B/72-76

a developing story of legitimate interest to its readers, made public by the Claimants (as particularised below), in a manner within the wide margin accorded to its editorial judgment. On or about 2 September 2016, following a process of review initiated by the Claimants, Luton Council informed them that it was minded to uphold its decision that the house provided to them and their 8 children was suitable. At this point, the Claimants chose to involve the media in the hope that it would pressure the Council to offer a house that they regarded to be more suitable, which in the event, it did. On or about 6 September 2016 the First Claimant approached the MK Citizen and gave an interview in which he criticised the Council. The Claimants and their family posed for a photograph in their home to accompany the article. This led to widespread coverage in the media including statements made by the Council in response to the Claimants' criticisms and further statements made by the First Claimant.

25. Although D1 pleads a positive case to justify publication of the number of Articles, it will submit that the burden of proof is on Cs to establish oppressive and unreasonable conduct. APOC[20] does not attempt to do so. Merely alleging that there were a number of Articles is insufficient, without any suggestion that any were without any legitimate justification.

26. It is hoped that the facts alleged in Defence [3] & [4] relating to dates of publication and the reader comment facility will not be ultimately be in issue. D1's evidence in this regard is in VW1[26] and the statement of James Manning-Munro ("JMM1")[27], Deputy Head of Audience, at [2]-[7].

27. D1 advances a positive case that it "reported and commented on a developing story of legitimate interest to its readers, made public by the Claimants, in a manner within the wide margin accorded to its editorial judgment". Again, this is without prejudice to the submission that the burden is on Cs to establish that the content of the Articles amounts to harassment. Cs do not allege that there was no legitimate interest in the story.

28. As to the evidence to support D1's positive case, it is entitled to rely on the content of the Articles, taken at face value. Further or alternatively, it relies on a witness statement from Paul Clarkson ("PC1")[28], Managing Editor, in particular at [10]-[12]. If necessary, D1's advocate will go through each Article at trial to make good its case.

[26] A/I/250-3
[27] A/I/254-6
[28] A/I/257-260

29. The evidence relating to Cs' interview with the MK Citizen will be addressed separately in [42]-[43] below.

APOC[22]: The Defendants and each of them knew, or ought to have known, that the publication of the series of Articles and Posts amounted to harassment of the Claimants and each of them. The Claimants will rely upon the Posts of various third parties that contained racially abusive comments directed at the Claimants and each of them. The content of the Posts were entirely known to the Defendants and each of them. The said Articles generated approximately 5,000 Posts made by the general public, the majority of which expressed racist and xenophobic sentiments.

Def[9]: The first sentence of paragraph 22 of the Amended Particulars of Claim is denied in relation to the First Defendant. In relation to the remainder, it is admitted that a small number of the Reader Comments on the First Defendant's Articles were racially abusive. It is denied that the majority were racist or xenophobic or that there were approximately 5,000 on the First Defendant's Articles. It is admitted that some comments were drawn to the attention of a moderator and removed from view but denied that any content was known more widely within the First Defendant until after receipt of the letter of claim dated 17 February 2017.

30. It is to be noted that there are two averments of knowledge in [22]. No individual is identified as having the pleaded knowledge. The averment in the first sentence is that required by 1(1)(b) of the Act. The second sentence states that Cs will rely on the Posts that contained racially abusive comments i.e. to support the averment of knowledge in the first sentence. The third sentence is that the contents of the Posts were "entirely known" to Ds.

31. Cs do not seek to advance a case that D1 ought to have known that the Posts amounted to harassment on the basis that those with responsibility for publishing the Articles ought to have known about the content of the Posts or that the mere fact that the Posts are published on D1's website, which is under its control, is a sufficient basis for imposing liability. There would be a number of objections to such a case, if it had been advanced.

32. Cs' reliance on the Posts in support of the harassment claim fails for the simple reason that the allegation of knowledge in the third sentence of [22] fails. No individual is identified. And the incontrovertible evidence is that, other than moderators viewing some flagged Posts as part of their specific role, nobody was aware of their content until receipt of the letter of claim months after the Articles had been published. See PC1[16]-[18] and JMM1 [8]-[9].

33. It should not therefore be necessary to consider the issue of whether, if the content of the Posts had been "entirely known", it would have, in effect, required D1 to cease publishing further articles and/or make them less critical of Cs, or else face liability in harassment. Suffice to say, that to allow the intention or culpability of a publisher to be determined by the reaction of small minority of its readers would, in practice, be a significant and disproportionate fetter on press freedom (see further at [76]-[82] below). PC1 at [19] is correct to state that an article has to be judged on its merits.

34. It follows that it should also not be necessary to consider how many of the Posts can be categorised as expressing racist and xenophobic sentiments and the extent to which such Posts were flagged. D1 has disclosed the records from its case management system. There were fewer than 500 comments in total on the 7 online articles. JMM1 describes this at [7] as not an unusual number for a series of news stories.

APOC[23] By so doing, to the best of the Defendants knowledge and belief the Defendants intended: (a) dissuade the Claimants from applying for council house accommodation suitable to a family size of that parented by the Claimants, and/or (b) encourage third parties to publish racial attacks upon the Claimants and/or (c) sell their respective newspapers thereby.

Def[10]: Paragraph 23 of the Amended Particulars of Claim is denied in relation to the First Defendant. The First Defendant's motive was to report and comment on a matter of legitimate interest to its readers.

35. There is no evidential basis to support motives (a) and (b). No individual with such motivation is identified. Further, the plea is qualified. Presumably, the introductory words should be "to the best of the Claimants' knowledge and belief", otherwise it makes no sense. Such a qualification is improper. An allegation as to improper motive must be alleged as a fact and the facts on which the party relies to infer the motive must be identified. It is not permissible to plead a bare allegation referable to the party's knowledge or belief.[29]

36. More substantively, as stated in PC1[8], D1 has nothing to gain by motives (a) or (b). Motive (c) cannot be probative of harassment. As stated in PC1[9]: "if *The Sun* does not

[29] See, for example, *Gatley* at [28.6] in relation to pleading malice in defamation. Malice is a dominant improper motive. There is no reason for taking a different approach in other contexts where a party alleges an improper motive.

publish stories that are of interest to readers, it will not exist. The coverage given to this story simply reflects its perceived interest to readers".

APOC[24]: In the premises, the Defendants and each of them well knew and/or ought to have known that their respective courses of conduct amounts to and/or involves harassment.

37. This is repetitive. It is denied by Defence [11], as is APOC[25] below.

APOC[25]: Further, any reasonable person when reading the articles of the Defendants would think the Defendants' respective courses of conduct amounted to harassment of the Claimants.

Particulars

[25.1]: The Articles were written in an indignant tone designed to incite, inter alia, racial and/or xenophobic hatred particularly in light of the decision of the UK electorate in the United Kingdom European Union membership referendum or Brexit referendum. The Claimants did not have to be described by the Defendants as arriving from Cameroon and/or as being French nationals, as migrants, or as jobless.

[11.1] Paragraph 25.1 is denied. It is denied that the tone of the First Defendant's Articles and/or the description of the Claimants are capable of constituting or contributing to a course of conduct amounting to harassment. Without prejudice to the generality of the denial, paragraph 8 above is repeated.

[25.2]: The comments to both the First and Second Defendants' Articles set out in the Posts clearly demonstrated to them and third parties that the Articles had that effect namely to incite racial hatred against the Claimants.

[11.2]: Paragraph 25.2 is denied. Paragraphs 4 and 9 above are repeated. In any event, it is denied that the reaction of a small number of readers to the First Defendant's Articles is probative of the First Defendant having engaged in a course of conduct amounting to harassment in publishing them.

[25.3]: Both Defendants continued to publish further articles and posts following the posting of those Posts upon the pages of their respective websites and Newspapers.

[11.3]: Paragraph 25.3 is not understood. Insofar as it contradicts what is pleaded in paragraphs 3, 4, 8 and 9 above, it is denied.

38. The reference to a "reasonable person" in [25] relates to s.1(2). [25] limits the reasonable person's assessment to that from "reading the articles", which is consistent with [25.1]. However, [25.2] and [25.3], inconsistently, re-introduce the Posts. In any event, that does not assist Cs for the reasons previously stated.

APOC[26]: The Claimants and their family members are entitled to and claim damages for the anxiety caused to them by the said harassment and any financial loss resulting from the harassment contrary to section 3 of the said Act

Particulars

[26.1]: The Claimants became distressed and scared as victims of abuse particularly when travelling to and from their home.

[26.2]: The Claimants have become distressed by the Articles/ Posts and comments on social media platforms concerning the Claimants and their children.

[26.3]: The Claimants were further distressed in respect of their children's health and wellbeing as they were turned into victims of abuse in the street and bullied at their respective schools.

[26.4]: The actions of the Defendants are likely to adversely affect the First Claimant's prospects of future employment.

[26.5]: Since the publication of the articles the Claimants have been humiliated by verbal abuse when appearing in public. The Claimants and their family members have been taunted, insulted, and have suffered anxiety that has caused the Claimants additional hurt, anxiety, and embarrassment.

[13] Paragraph 26 of the Amended Particulars of Claim is denied in relation to the First Defendant. The facts alleged in the sub-paragraphs are not admitted (save that paragraph 26.4 is denied) and it is not admitted that any event alleged to give rise to anxiety is a consequence of the First Defendant's Articles.

39. If Cs cannot establish D1's responsibility for a course of conduct amounting to harassment, no amount of consequent anxiety and distress can make good that deficiency. Without prejudice to this overriding point, it is evident that Cs' evidence[30] goes way beyond what is properly admissible in support of the harassment claim against D1.[31] There are four

[30] A/G
[31] DP put Do on notice of this by letter of 6/11/19 (E/B/124)

main difficulties. First, it goes beyond the case pleaded in [26]. Second, it relates to matters that are not consequential (and not alleged in the APOC to be consequential) on D1's publications or news gathering. For example, there is reference to a journalist interviewing C2's father in Cameroon and the alleged consequences of this.[32] This appears to be a reference to a Mail article.[33] Third, much of it appears to relate to alleged reputational harm arising from alleged falsehood. Fourth, a number of instances of alleged harm are hard to credit. There are ongoing developments in relation to the Facebook post allegedly made by C2's cousin two weeks prior to exchange of witness statements, first raised in JS1 at [12][34] and the subject AS2 & JS2.[35]

40. D1 has no wish to cross-examine Cs for any longer than is necessary. Further, there is no point in time being taken up at trial litigating unpleaded and/or irrelevant factual issues arising from Cs' witness statements.

41. Finally, in [12] D1 advances a substantive defence of reasonable conduct under s.1(3)(c), relying on the same matters in opposition to Cs' case under s.1(1). For the reasons particularised in [53] below, D1's primary case is that the defence under s.1(3)(c) has no practical benefit. It is for a claimant to prove that the defendant's conduct reaches the appropriate level of unreasonableness in order to satisfy s.1(1).

The MK Citizen

42. The only apparent conflict of primary evidence, potentially relevant to liability, relates to the MK Citizen. It is common ground that, as alleged in Def[8], Cs' dispute with Luton Council was made public as a result of them speaking to the MK Citizen newspaper and posing with their family for a photograph. D1 has relied heavily on this in opposition to all of Cs' claims. There are numerous references to it in the correspondence and court documents[36], including the allegation, repeated in [8], that Cs' motivation was to put

[32] WS AS1[29] (A/G/209) & JS1[10] (A/G/214). Reports of the death of Mr Nkwo, less than a year after the media coverage suggest that he never recovered from the loss of a daughter in 2012 (D/B/237-242).
[33] C/H/222-7
[34] A/G/215
[35] A/H
[36] See, for example, DP letter 9/8/17 at E/B/49: "The genesis of this case is that Mr Sube approached the MK Citizen to publicise his complaints. Presumably, he thought that media coverage might encourage the Council to offer accommodation that he regarded to be more suitable. As he ought to have foreseen, his complaints did not receive a sympathetic response from some readers." See, also, the evidence in D1's application notice of 28/1/19 (not in the bundle): "[1].. At this point, the Claimants chose to involve the media, no doubt, in the hope that it would encourage the Council to offer a house that they regarded to be more suitable. On or about 6 September 2016 the First Claimant approached the MK Citizen and gave an interview in which he criticised the Council. The Claimants and their family posed for a photograph in their home to accompany the article."

pressure on the Council to offer a house that they regarded to be more suitable, which in the event, it did.

43. No Reply was served. The allegation was not contradicted by Cs until receipt on 11 July 2018 of a draft case summary for the CCMC which first (obliquely) advanced the account that Cs did not know that they were dealing with a newspaper.[37] This is made explicit in Cs' witness statements.[38]

44. D1's stance in relation to this account is as follows:

    44.1. The content of the Articles proceeds on the basis that Cs have chosen to publicise their dispute with the Council and C1 has chosen to make public criticism of the Council and the accommodation it provided to his family. The APOC does not make a positive case that D1 knew or ought to have known that this was untrue. D1 was entitled to proceed on the basis that this was what Cs had done. If it turns out to be untrue that cannot, as a matter of principle, weigh against D1 in relation to the harassment claim. A cause of action in some form may be available against the publishers of the MK Citizen. Apart from some desultory correspondence, no claim has been threatened.[39]

    44.2. Further or alternatively, it is obvious that Cs knew what they were doing and are now simply seeking to find a way round what D1 has repeatedly stated is a fundamental problem with their case. Further submissions will be made after cross-examination. In the meantime, the Court may wish to consider the following: First, the account in Cs' witness statements is incredible. Second, the witness statement of Beth Pearson ("BP1")[40], the MK Citizen reporter who dealt with C1, records that he told her that "he wanted an article published in the local newspaper so the council would move him and his family into a larger house". This coincides with what C1 told Charles Wade-Palmer, an agency reporter (at the time), giving evidence for D2.[41] Third, the belatedly disclosed email[42] sent by C1 to Ms Pearson immediately on finding out about the publication of the article, merely complains of alleged inaccuracies, not the fact that the article and photograph were published. Fourth, recently disclosed medical records[43] in relation to C2 show that she informed the

[37] E/B/111-2
[38] AS1[12]-[16] (A/G/204-5) & JS1[5] (A/G/213)
[39] E/A
[40] A/I/261
[41] At [9] (A/J/264)
[42] C/B/93 & 96
[43] C/K/444. See also the hearsay notice at A/K/290.

health visitor on 15 March 2017 that that "they had gone to the newspaper to try to get their case heard regarding their need for housing". Fifth, at the time C1 went to the MK Citizen Cs had explored without success thus far a number of avenues to obtain a larger house, including ongoing legal representation from their second firm of solicitors in relation to a s.202 review and assistance from Shelter, an organisation focussed on providing advice, support and legal services on housing issues.[44] He was familiar with how the system worked. There would be no motive for him to seek assistance on 25 August 2016 from a generic organisation which he thought was equivalent to the Citizens Advice Bureau. He has opportunistically seized on the word "Citizen" in the newspaper's name.

44.3. In any event, it is common grounds that C1 did make public statements after the MK Citizen article had been published.[45]

45. There is domestic and Strasbourg authority to the effect that a person who chooses to make public criticism has less grounds to complain about an unfavourable media reaction. For reasons previously stated, D1's primary submission is that it is not necessary for D1 to invoke this jurisprudence in order to succeed in its defence of the claim. However, in case this submission is not accepted, it will be referred to in [57]-[58] below.

The relevant legal principles

Harassment and media publications - general

46. The mischief to which the PHA was directed is stalking.[46] There is nothing in the legislative history or Parliamentary debate to suggest that it was intended to apply to restrict the activities of the media.[47] S.7(4) does provide that ""Conduct" includes speech". But its apparent purpose is to prevent a stalker from claiming that communicating threatening words is not conduct for the purposes of s.1(1).

[44] This is referred to in AS1 and is evident from chronology provided by Luton Council in relation to an Ombudsman complaint brought by Cs (C/B/99-102). Note the problems arising "as a result of the press release" invoked by Cs in the meeting of 20/9/16 (p101).
[45] At a minimum, he spoke to SWNS (AS1[16] A/G/205 & the copy at C/C/103-4), Caters (CWP1[16]-[17] A/J/265-6 & BBC 3 Counties Radio (the transcript of the interview is at D/B/26)
[46] See *Thomas v News Group Newspapers Ltd* [2002] EMLR 4 at [16]
[47] *Thomas* at [13]-[16].

47. In *Thomas v News Group Newspapers Ltd* [2002] EMLR 4, the first case involving a media publication, the Court of Appeal was not greatly assisted by the Act's mischief, given that it was common ground that it could, in an exceptional case, apply to a media publication.[48]

48. D1 respectfully submits that it is relevant that Parliament did not contemplate that the Act could apply to media publications. It makes it all the more important to ensure its application in this area is properly restricted to extraordinary acts of misconduct equivalent in seriousness and oppressive character to stalking.

49. The well-known observations of Hoffmann LJ in *R v Central Independent Television Plc* [1995] 1 FCR 521, set out in the footnote[49], are relevant in this context. Parliament may have indirectly created a further exemption to freedom of expression by passing the PHA, but "well motivated" judges presented with a claimant suffering from "needless pain, distress and damage" against a "commercially motivated" newspaper should not be tempted to extend its reach. Those caused distress by media publications already have a formidable armoury in defamation, misuse of private of information and data protection.

50. The Act does not define the type of conduct that is capable of constituting harassment. The authorities[50] have stressed that the word has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce alarm and distress and which is oppressive and unreasonable. A line is to be drawn between conduct which is unattractive and unreasonable and conduct which has been

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[48] At [16] & [35].

[49] "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. 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. Furthermore, in order to enable us to meet our international obligations under the European Convention on Human Rights, it is necessary that any exceptions should satisfy the tests laid down in Article 10(2). They must be "necessary in a democratic society" and fall within certain permissible categories, namely "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, for maintaining the authority or impartiality of the judiciary." It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under the Convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins."

[50] Hourani v Thomson [2017] EWHC 432 (QB) at [138]-[140] refers to the most commonly cited authorities in relation to the general application of the Act. The six principles outlined by Simon J in *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB) at [142] are set out in *J20 v Facebook Ireland Ltd* [2016] NIQB 98 at [15].

described in various ways: “torment” of the victim “of an order which would sustain criminal liability”.[51]

51. *Thomas* involved a strike out application. As previously stated, it was common ground that it was possible for media publications to amount to harassment. The example was given of an editor who uses his newspaper to conduct a campaign of vilification against a lover with whom he has broken off a relationship.[52] This unusual example involves an individual for whose acts the publisher is vicariously liable with a specific animus against the claimant. It is therefore closer to the ordinary meaning of harassment. It would amount to an abuse of the editor’s position.

52. It was also common ground that in order for media publications to be capable of constituting harassment, they must be attended by some exceptional circumstance amounting to an abuse of media freedom and that such circumstances will be rare.[53] There have been no English judgments against the media under the Act.[54]

53. It is apparent from *Thomas* and the authorities on harassment in other contexts that the burden is on the claimant to establish that the defendant’s course of conduct is unreasonable, as this is a necessary element of the ordinary meaning of harassment. S1(3)(c) provides a defence where “in the particular circumstances the pursuit of the course of conduct was reasonable”. Given that unreasonableness is a necessary element of a course of conduct amounting to harassment, it is difficult to see how the defence can have any practical value. D1 is not aware of it ever having succeeded in any context.

54. Some of the cases relation to harassment by publication, including *Trimingham*, have referred to the need to interpret s.1(3)(c) in the context of a “balancing act” between Articles 8 and 10 ECHR.[55] The concept of a balancing act was formulated to deal with emerging privacy issues. It requires an “intense focus” on the comparative importance of the specific rights being claimed in the individual case, with neither having precedence.

55. In *Flood v Times Newspapers Ltd* [2012] 2 AC 273, a case involving the *Reynolds* defence, Lord Phillips observed at [46], that there is “a need for care when applying to the law of defamation decisions on the tension between article 8 and article 10 in other contexts”. The law, as developed by Parliament and the courts, already sought to strike a balance

[51] *Dowson* at [142] referred to above.
[52] At [36]
[53] At [35]
[54] There is the Irish case of *King v Sunday Newspaper Ltd* [2011] NICA 8 cited in *J20 v Facebook Ireland Ltd* [2016] NIQB 98 at [15] and [30] – [33].
[55] See *Trimingham* at [55], cited in *Hourani v Thomson* [2017] EWHC 432 (QB) at [185].

between freedom of expression and the protection of reputation and in some circumstances, for example, where the defence of privilege applies, it confers a presumptive priority on freedom of expression.

56. In cases of harassment by media publication, the obligation is on the claimant to satisfy the requirements of the statutory tort. References to the balancing act do not assist. As was stated by HHJ Moloney in *Lisle-Mainwaring v Associated Newspapers Ltd* unreported, 21 July 2017, a strike out application, at [10.4]: "*Thomas* and *Majrowski* have already struck the balance between Articles 8 and 10 sufficiently for present purposes. Unless the conduct complained of is oppressive and unacceptable, unless it is exceptional in terms of journalistic misbehaviour, C will not be able to establish the necessity and proportionality in a democratic society of displacing Article 10 in her favour".

57. The Judge went on to say (at [10.5]) that "the starting point, in consideration of whether D's conduct is capable of constituting journalistic harassment, is the undoubted fact that C made the first move when she decided to paint her building in this striking manner. As she must have realised when she did it, this was a public gesture which would probably attract wide attention to her planning dispute and herself. This is not a case in which a private person becomes caught up in a story not of their making."

58. The principle that a person who makes public criticism of another or otherwise courts attention has less right to complain about a critical reaction reflects common sense and fairness and is reflected in domestic and Strasbourg authority.[56]

Harassment based on discrimination

59. In *Thomas* the claimant was a black police clerk who had reported two police sergeants for making racist jokes about a Somali woman. The story was covered in two articles which were critical of the claimant and in a number of readers' letters. These referred to her being black, which the judge had held was irrelevant and suggested that she only complained because she was black. It was also alleged that there was a deliberate omission of the fact that a white officer also gave evidence against the two officers. The claimant's work address was published which led to her receiving hate mail and having to change her place of work. The newspaper set up a fighting fund to help one of the officers pay off the disciplinary fine. The author of the articles was a defendant and the particulars of claim alleged that they were approved by the editor.[57] The pleading was defective in

[56] See, for example, *Jerusalem v Austria* [2003] 37 EHRR 25, cited in *J20 v Facebook Ireland Ltd* [2016] NIQB 98 at [24] and *Keays v Guardian Newspapers Ltd* [2003] EWHC 1565 (QB) at [46] (see also [50]).
[57] See [11(6)]

that it did not allege that they knew or ought to have known that their conduct amounted to harassment, but the Court held that this was capable of amendment.[58]

60. The claimant's case was that the series of publications were intended to provoke hostility to the claimant on grounds of her race. The Court of Appeal held that this was arguably so and that this was capable of amounting to harassment.[59]

61. The findings on the claimant's case in *Thomas* were provisional, reflecting that it was a strike out application. Issues were left unanswered. If the trial judge was of the view that the criticism of the claimants was racist, would it necessarily follow that the harassment claim would succeed? Would it be necessary to show that the author and/or editor knew that the articles were racist and have actively intended to provoke hostility? Would it necessarily follow from the finding that the articles were racist that the author and/or editor ought to have known that their publication amounted to harassment?

62. It is not necessary for these issues to be addressed in the present case because the Articles are not racist and Cs cannot establish their pleaded case, such as it is, on motivation and knowledge.

Discriminatory language

63. It is apparent that the APOC in the present case borrows wording from *Thomas.* However, there are a number of material distinctions:

    63.1. There is no reference in the articles to Cs being black and the context is not related to it. Cs are not being criticised because they are black.

    63.2. APOC[25.1] uses the same wording as *Thomas*: "The Claimant did not have to be described as", but instead the words "being black", it states "arriving from Cameroon and/or as being French nationals, as migrants, or as jobless". These descriptions, which appear in some but not all of the Articles, do not even engage clause 12 of the IPSO Editors' Code relating to discrimination, which does not encompass nationality or origin.[60]

    63.3. In any event, these descriptions are, in the words of clause 12(ii), "relevant to the story" of how Cs and his 8 children came to be living in the UK and receiving substantial state benefits. The story illustrates how the EU in general and the specific

[58] At [39]
[59] At [37] & [49]
[60] See, for example, *Miller v Mail Online* IPSO 11533-16 at [14]-[19]

NHS nurse training scheme can result in migration to the UK of large families with origins outside Europe entitling them to take advantage of the UK's limited welfare and health resources, which will generally be more attractive than those provided in their countries of origin. C1 himself invokes his "sub-Saharan African culture" and its "higher mortality rate" to explain his family size.[61] But the sub-Sahara does not have the equivalent publicly funded welfare and health systems. The larger a family the greater its potential demands on the available resources, as the coverage of Cs' dispute with the Council illustrates. More generally, the extent to which the world's population can take advantage of the benefits of living in the UK is a matter of legitimate public debate, on which people are entitled to take different views. Cs' story was a contribution to that debate.

63.4. Cs made their story and race public through the MK Citizen interview and photograph.

63.5. Publication of readers' letters is a conscious act, compared with online reader comments which are not subject to prior editorial control.

64. The words "did not have to be described as" suggest that the issue in relation to language is whether the defendant was compelled to use the language that it did. This fails to reflect the burden on a harassment claimant relying on the content of a publication. The language used can only be probative of harassment if it is so obviously irrelevant and prejudiced as to amount to an abuse of media freedom. This is consistent with the general principle that the courts will rarely seek to sanction a defendant for the way in which ideas and information are expressed.[62] As Tugendhat J noted in *Trimingham* at [85]: "The consequence of these cases is that a court should be slow to draw inferences from the court's view of what is or is not relevant in an article published in a newspaper".

65. There are obvious dangers in the Court, in practice, micro-managing the editorial process, via a harassment claim. If the Court thought the wording of an article was irrelevant and prejudiced would it, in effect, rewrite the online version for the purposes of granting an injunction? If the issue was that there were too many articles, how would the Court determine when the harassment liability line was crossed and relatedly how many articles could be permitted to remain online? How would an injunction be framed?

[61] AS1[4] A/G/202
[62] See the cases cited in *Trimingham* at [81]-[84]

66. The claimant in *Trimingham* sought the following injunction[63]: "The Defendant shall also refrain from further publication that makes direct or indirect reference to the Claimant's sexual orientation, unless such reference is relevant beyond the mere fact of her current relationship with Mr Huhne and her separation from her former partner". As Tugendhat J correctly observed[64]: "There appear to me to be difficulties about the form of the injunction sought, since injunctions have to have the clarity required of a provision which may be enforced by proceedings for contempt of court."

67. Tugendhat J found that the references to the claimant's sexual orientation were factual and were not being used pejoratively and were not offensive or insulting. The hostility in the articles was directed to her conduct, not her sexuality.[65] The Judge added that even if he was wrong in his assessment of the use of "bisexual" and "lesbian", it would make no difference to the outcome.[66]

Clause 12 of the Editors' Code

68. Discrimination on grounds of sexual orientation was prohibited by clause 12 of the PCC Editors' Code (which is in the same terms as clause 12 of the IPSO Editors' Code). The claimant submitted that the Code was a relevant privacy code for the purposes of s.12(4)(b) of the Human Rights Act 1998. The Judge's view at [75] was:

    "… s.12(4)(b) does not create a statutory wrong of non-compliance with the Editors' Code. Nor does clause 12 of the Editors' Code provide any sort of short cut for a claimant seeking to prove that journalists knew or ought to have known that what they were publishing amounted to harassment of the claimant. At most it provides some evidence of what a reasonable journalist ought to know."

69. The position may be different where a defendant invokes the Code and asserts that its conduct is compliant. It is difficult to see how a defendant who complies with recognised and established ethical standards governing journalism could, nevertheless, be stigmatised as having abused media freedom sufficiently badly so as to justify a finding of harassment.

[63] See [11]
[64] At [15]
[65] See [255]-[257]
[66] At [257]

70. The Code does have a specific provision in relation to harassment which is directed to the method of information gathering.[67]

The importance of pluralism

71. The *Trimingham* judgment emphasises the role of pluralism as one of the essential ingredients of democracy.[68] Pluralism requires members of society, at least, to tolerate, if not "defend to the death",[69] the dissemination of information and views which they believe to be false and wrong. As Tugendhat observed, people become so "convinced of the rightness of their views that they believe that any different view can only be the result of prejudice".

72. The media is often accused of underlying racial prejudice in its coverage of contemporary stories or issues, such as Brexit or Meghan Markle. It is often said that a person is being criticised or being criticised more strongly or unfairly because they are black, gay, Muslim or Jewish. Discrimination on grounds of race, sexuality and religion is a serious problem. But expanding the tort of harassment is not the solution.

73. The fact that the claimant falls within one of the protected categories outlined in IPSO Clause 12 is not material which is capable of being relied on in support of a harassment claim, unless it is obvious from the article or extraneous evidence as to motive that the defendant is criticising the claimant because of his or her race, orientation or religion. Absent direct evidence, the inference should not be drawn lightly.

74. The submission set out above flows from the ordinary meaning of the word harassment. It is buttressed by the statements of principle in relation to freedom of expression cited in *Trimingham* & *Thomas*. The observations of Lord Steyn in *Reg v Home Secretary, Ex p Simms* [2000] AC 115, 126 cited in *Thomas* at [23] are of particular resonance:

"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

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[67] 3. Harassment
i) Journalists must not engage in intimidation, harassment or persistent pursuit.
ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent.
iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

[68] At [265]

[69] "I disapprove of what you say, but I will defend to the death your right to say it", attributed to Voltaire.

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. The free flow of information and ideas informs political debate. It is a safety valve; people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."

75. It might be thought that the “safety-valve” factor is of particular contemporary relevance. In *DPP v Ziegler* [2019] 2 WLR 1451 at [49(4)] it was expressed in this way:

“It [freedom of expression] helps to maintain social peace by permitting people a 'safety valve' to let off steam. In this way it is hoped that peaceful and orderly change will take place in a democratic society, thus eliminating, or at least reducing, the risk of violence and disorder.”

Reader comments

76. D1’s primary submission is that is not necessary to consider the legal position in relation to reader comments. As previously stated, Cs’ pleaded case is that the D1’s motivation was to “encourage racial attacks”, the reader comments were “entirely known” to D1 and it continued to publish them notwithstanding the s.10 notice. This case fails on the facts. However, should it be necessary to consider further the position in relation to reader comments, D1’s submissions are set out below.

77. It is an inevitable consequence of the plural society referred to above that a section of newspaper readers will react in an unreasonable manner to an article. In the modern era they have the opportunity to express their views online whether in the reader comment section of the newspaper in question or elsewhere. As was stated in *Trimingham,* “a defendant cannot be sanctioned because of the unreasonable behaviour of those who hear or read the defendant's words, unless the defendant unreasonably provokes that behaviour”.[70] Sanctions are available against unreasonable readers who make racially abusive and/or threatening statements in consequence of a media publication.[71]

[70] At [256]
[71] See *Trimingham* at [64]-[69]

78. “Provoking” in the context of a media harassment claim must mean intending the unreasonable reaction of the readers. If liability could be imposed on the basis that the unreasonable reaction of some readers was a foreseeable consequence of publication, it would be impossible to publish any media articles on any issue of controversy or involving criticism of anyone from a racial or religious minority.

79. The approach of IPSO is that user-generated material, such as readers’ comments, falls within IPSO’s remit only when it has been reviewed or moderated and there is no requirement of pre-moderation.[72] C has no evidence to contradict D1’s case in Defence [4] as to how the reader comment facility operates and that the process of flagging is a common means of identifying offensive comments.

80. The IPSO approach is consistent with the wording of the PHA. For conduct to be part of the pursuance of a course of conduct capable of amounting to harassment, it must involve a conscious act.[73] Until a publisher’s attention is drawn to a reader comment it cannot be said to be intentionally publishing it.[74]

81. S1(1)(b) provides for liability where a person ought to know that his pursuance of the course of conduct amounts to harassment. But the question is what the person ought to know about the nature of his course of conduct and its impact on the claimant, not whether he ought to know about the distressing and oppressive act of a third party of which he is unaware, but which he could prevent. This is supported by s.1(2) which determines what the defendant “ought to know” about his course of conduct is determined by the position of a reasonable person “in possession of the same information”.

82. Looking at the matter in the round, there is no basis to find that D1’s system in relation to reader comments or its conduct in relation to the reader comments in the present case amounts to exceptionally unreasonable and oppressive conduct and/or an abuse of media freedom such as to justify the imposition of liability for harassment.

Corporate liability

83. The final possible legal issue relates to making findings of motivation, intention or knowledge against a corporation without it being alleged that any individual employee,

[72] See, for example, *Miller v Mail Online* IPSO 11533-16 at [21]
[73] See the Northern Irish case of See *J20 v Facebook Ireland Ltd* [2016] NIQB 98 which related to a series of postings on three web pages hosted by Facebook. Colton J held at [17] that: “If the defendant has engaged in a "course of conduct" in this case then it must arise from its decision not to remove the postings when they were drawn to its attention”.
[74] See above.

agent or officer possessed the relevant mental state. D1's primary case is that it is not necessary to resolve the issue because, for the reasons previously stated, there is no evidential basis for the limited imputations made in this regard in the APOC.

84. The issue arose in *Trimingham.* In the light of the other findings of Tugendhat J, it was not necessary for him to determine it.[75]

85. It is long established in defamation and malicious falsehood that allegations of knowledge of falsity and improper motive against a corporation require identification of an individual with the requisite knowledge or motivation. It is not permissible to aggregate the knowledge of a number of employees. The authorities are cited in the judgment of Warby J of 24 May 2018.[76] There seems no reason in principle, why they should not apply in a harassment claim based on publication, where the claimant relies on an allegation of knowledge or motivation as part of the claim. The free speech considerations that underlie the restrictions on alleging malice in defamation apply, arguably with greater force, in relation to harassment.

86. It may also be said that harassment is a quintessentially human act. Pursuing a course of conduct amounting to harassment requires an animus. In contrast, responsibility for the publication of defamatory material can arise without any knowledge of it.

87. The practical difficulties of finding an individual with an improper motive in a media harassment claim are no greater than in defamation. Articles have bylines identifying the author and the editor's name is not a secret. In contrast, the practical difficulties arising from the claimant merely seeking to impute the improper motive to the corporate defendant are evident from the present case. The defendant is pushed into seeking to prove a general negative, instead of rebutting a specific allegation made against an individual employee or officer, available to give evidence and deny it.

88. When Tugendhat J considered the issue in *Trimingham* he referred to *Ferguson v British Gas Trading Ltd* [2010] 1 WLR 785. The Court of Appeal declined to strike out an allegation of harassment against British Gas based on threatening computer-generated demands sent by letter where the claimant did not identify any individual whose state of mind she relied on.

89. *Ferguson* was a strike out application and the legal issues were not determined. The context was different to the present case. None of the cases in a defamation context

[75] At [97]
[76] At [64] to [75]

appear to have been cited. D1 could take issue, if necessary, with some of the principles mooted in *Ferguson* or their application to a media publication case.

David Price QC
For the First Defendant
30 January 2020