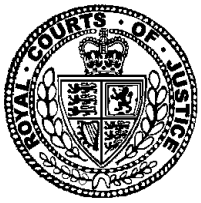

Claim No: QB-2020-003558

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

BETWEEN

JOHN ALEXANDER MELVIN HEMMING	*Claimant*
and	
SONIA VANESSA POULTON	*Defendant*
and	
SAMUEL COLLINGWOOD SMITH	*Third Party*
and	
DARREN LAVERTY	*Fourth Party*

Before:

Deputy Master Bard

- -

Mr. Matthew Hodson (instructed by direct public access) for the Claimant

Mr. Richard Munden (instructed by direct public access) for the Defendant

Hearing date: 30th April 2021 - remotely, by Microsoft Teams

Judgment handed down 11 June 2021

Revised (as to a short point in paragraph 8) on 15 June 2021

- -

Deputy Master Bard:

1. On 30 April 2021, I heard (by way of a remote hearing) the Claimant's application for summary judgment and/or a striking out of all or some of the Defence and Counterclaim. The Counterclaim/part 20 claim (to which for convenience I shall refer as the Counterclaim), made against the Claimant and additionally against the Third and Fourth Parties, alleges harassment of the Defendant. I also heard an application by the Defendant for permission to amend her Defence and Counterclaim, which I dealt with at the commencement of the hearing by
   (a) permitting the requested amendments to the Counterclaim, with the consent of the Claimant (subject of course to his application) and of the Third Party and the Fourth Party (both of whom participated briefly, representing themselves) - in the case of the latter two, on terms as to payment of their costs, which were agreed (in the case of the Third Party) and summarily assessed (in the case of the Fourth Party); and
   (b) deciding to consider the requested amendments to the Defence in the course of the Claimant's application. That way, it would be possible to consider the merits of both applications in the light of the case that the Defendant wishes to put forward.

   At that point, the Third Party left the hearing, as he was not party to the Claimant's application, and had indicated in advance that he did not wish to participate, or to stay and observe, once the matters directly concerning him had been dealt with. (The Fourth Party remained as a nom-participating observer.)

2. The hearing lasted all day. The Claimant and the Defendant were both represented by counsel (acting on direct public access, although apparently the Defendant has more recently instructed solicitors), and I was provided with a hearing bundle and an addendum bundle, which between them contained the statements of case and application notices, and also witness statements from the Claimant, the Defendant (two - one in relation to the Claimant's application, and one more directed towards her application to amend), the Third Party (in relation to the amendment) and a solicitor, Mr Blake O'Donnell. They also included some correspondence and other documents.

Both counsel provided detailed and helpful skeleton arguments, and a number of authorities. At the conclusion of the hearing, judgment was reserved. Since then, counsel for the defendant has drawn my attention to some further case law, about which both counsel have supplied written submissions.

3. The statements of case, and the witness statements, of the Claimant and the Defendant were extensive, and a good deal of material has been exhibited. It is not necessary for me to refer to all of it, although I have considered it, and refer to it where relevant. Indeed, this judgment is already longer than I would have wished it to be, but there are a number of important issues, and there has been extensive citation of legal authority in support of counsels' submissions.

4. Page references below are (save where otherwise appears) to the main hearing bundle; page references preceded by "AB" are to the subsequently-produced addendum bundle.

Background - the Parties and the Claim

5. The Claim is for damages (including aggravated damages) and an injunction, the causes of action being libel, and breach of the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (GDPR). The Counterclaim, brought against the Claimant, the Third Party and the Fourth Party, is for damages for harassment and injunctive relief, pursuant to the Protection from Harassment Act 1997 (PHA).

6. The Claimant was, from 2005 to 2015, Member of Parliament for Birmingham Yardly, as a member of the Liberal Democrat party. I was also informed by counsel (although I do not think that all of this was in evidence) that he was a councillor for some 18 years, and is married with five children, two of school age.

7. The Defendant works as a journalist, and is particularly concerned with cases of sexual abuse of girls and young women. She said in the interview the subject-matter of the Claim that she has two YouTube channels, one for her mainstream media work and one for her independent work. Between 2015 and 2018 she made a documentary programme called *Paedophiles in Parliament* (sometimes shortened to PIP, as I shall do), which was released in 2018, and was (and may still be) available on YouTube. Because the Claimant takes issue with the Defendant's description of herself as a

journalist, I should perhaps observe here that journalism has evolved, over the last few years, beyond merely involving newspapers, magazines, television and radio, and can now be said to encompass some blogs, videocasts and podcasts.

8. The Third Party engages in webcasting on the internet, sometimes under the name "*Matthew Hopkins, Witchfinder General*" (a historical character whose name he selected following the example of the political blogger Guidsteo Fawkes). As I understand it, he devotes some of his time and energy to challenging those who make, or who publicise, allegations of abuse and paedophilia which he considers to be false. He explains that he has a Master's degree in law and LPC qualification, but has not sought to proceed towards practice as a solicitor. He has been involved in litigation, both on his own behalf and helping others as a McKenzie friend. He has brought a separate claim against the Defendant, together with a Mr Muhammad Naeem Butt and Mr Butt's company My Media World Limited, which operates a website which features material by the Defendant.

9. The Fourth Party is known to the Third Party, and more recently to the Claimant. The Defendant pleads that he has a history of publishing tweets about her (she refers in particular to some 308 of these between 31 January 2015 and 15 March 2016, which she says led to a police investigation), and to other allegations of harassment again him.

10. It is apparent that, at any rate in recent years, the Claimant and the Third and Fourth Parties have been in some communication with one another, and have to some extent supported and assisted one another in various activities, not least litigation.

11. It is also apparent that the two sets of parties exercise their right to free speech - predominantly on the internet, by way of a number of platforms - in different ways. The Defendant considers it important to investigate and report sexual abuse (including paedophilia), and indeed allegations of sexual abuse which she considers may be of substance, so as to ensure that the voices of victims are not silenced, and particularly so where she perceives an issue of holding the powerful to account. The Third and Fourth Parties vigorously express concern about the promotion of widespread allegations of abuse, many of which they consider to be false or fabricated, and the effect which

those allegations can have upon the lives, careers and mental well-being of those against whom they are made; and they do not hold back in expressing their criticism and indeed disdain for those (including the Defendant) who make and/or publish such allegations. The position of the Claimant is not altogether aligned with that of the Third and Fourth Parties: he has in his time (and in the course of his parliamentary career) spoken out publicly against such abuse and those who perpetrate it, although so far as I can tell he is a little less given to making frequent public observations on social media. More recently, however, he has found some common cause with the Third and Fourth Parties as a result of allegations made against him by a Ms Esther Baker.

12. Some time around 2014 or 2015, Ms Baker claimed that when she had been a young girl, she had been raped and sexually assaulted by an MP, in Cannock Chase. She reported this to the police, and they investigated the matter, interviewing the Claimant, and took no further action. She publicised her allegations, appearing on television news, and although she did not identify the Claimant by name, he contends that in her various statements she gave enough background information (such as the age and party affiliation of her assailant, and the location of the assaults, which is in the vicinity of his former constituency) to allow those who wished to investigate further to arrive at a "jigsaw identification" of the Claimant.

13. Following the police dropping their investigation, the Claimant on 5 September 2017 issued a statement on his Web Log entitled "**Statement re false allegations from Esther Baker**" (p 301), the first paragraph of which read:

> "I am pleased that the Police have now made it clear that there has been a concerted effort to promote false criminal allegations against me and that the allegations had no substance whatsoever".

It went on to describe what had happened to him as a "dreadful experience", involving a "concerted campaign involving your political opponents and many others in public", to refer to the creation of "an environment in which it is reasonable to be concerned about ill founded vigilante attacks on your family and yourself", and to mention a lobby supportive of him "which included many people who were themselves real survivors of abuse, which has helped". I infer that this was the first formal public identification of the Claimant as the object of Ms Baker's allegations, although he says that some people had put two and two together, and named him in internet postings.

14. On subsequent occasions, there were reports of statements by or interviews of the Claimant about the allegations of abuse which had been made against him (which he consistently maintained were false), suggesting in one of them that he was suing the Staffordshire Police. These include reports on the Mailonline website (6 September 2017 - see p 303), with Ms Baker there described as a "fantasist rape accuser"; two other reports in the Daily Mail on 19 January 2018 and 22 June 2018 (according to paragraphs 8 and 6 of the Judgment in *Baker v Hemming* referred to below - see p 89; and one more on the Mailonline website (bearing the date 10 November 2019, although this may have been the date of the screenshot - p 305).

15. These reports led to litigation brought by Ms Baker against the Claimant on 13 September 2018, in which she accused him of libelling her by alleging that she had made false allegations that he had raped her - in other words, alleging that she was a liar. She relied on the Claimant's Web Log statement and on (at least some of) the Daily Mail and Mail Online publications referred to above. He counterclaimed against Ms Baker, contending that a tweet of hers alleged (among other things) that he had raped and sexually assaulted her, then stalked and defamed her to cover it up.

16. The matter came before Mrs Justice Steyn DBE on applications by each party for summary judgment and/or a strike-out of the other's claim. The hearing was on 17 October 2019, and judgment was handed down on 5 November 2019, with consequential matters being decided on 19 November 2019 (see pp 87 - 124). The Judge dismissed Ms Baker's application, but granted summary judgment to the Claimant (who was of course the defendant in that action) on the greater part of his counterclaim, in particular judgment for damages to be assessed on the allegation that he had raped and sexually assaulted Ms Baker, then stalked and defamed her to cover it up, together with an injunction restraining her from repeating that allegation "or words to the same or similar effect", and awarded him 90% of the costs of his counterclaim. (He had pleaded a further, innuendo, meaning and had chosen - on grounds described by the Judge as "pragmatic" - to withdraw it: see p 119.)

17. In the meanwhile, the Defendant's programme PIP had become available for viewing. I do not know what reference(s) it made to the Claimant, or in what terms, but he took

exception to it. An email string (pp 235-237) exhibited by the Claimant shows that on 2 August 2018 (all emails bear this date):

(a) the Claimant emailed the Defendant saying that he had been told that she had "*put up a video in which you republish Esther Baker's false allegations about me*", adding that he had already sued a Mr Graham Wilmer for "promoting" those allegations, and that Mr Wilmer had submitted a Defence (which the Claimant attached) which did not claim that those allegations were true, and further suggesting that she might wish to edit her video to remove those false allegations;

(b) later the same day, the Defendant responded that (this is not the entire email):

> "In the film, I have made clear that you fought long and hard for vulnerable people but, equally, in such a report looking at parliamentary allegations it would be entirely remiss to ignore the mainstream media-reported situation involving yourself and Esther Baker. The stories and footage are still online and still being viewed.
>
> Esther's story is in the public domain because she put it there - and your identity, regarding her accusations, is in the public domain because you put it there. It's all perfectly legitimate journalism to report on what happened. I don't make any claims about what has been said I simply report what s already in the public domain.
>
> It sounds like you are trying to censor legitimate reporting and I find that unacceptable."

(c) the Claimant sent the Defendant a link to Channel 4's Producer's Handbook, and the Defendant responded that she had nothing to do with Channel 4, adding that "this is starting to sound like threat and I don't appreciate it";

(d) the Claimant suggested that he could approach the matter more formally, although he had not yet threatened legal action, but said that "I have had death threats on the back of the false allegations hence I do not appreciate their repetition";

(e) the Defendant invited the Claimant to be interviewed by her, adding "It's legitimate reporting and I stand by it";

(f) the Claimant said he would have to get an analysis of the video done, that he needed to protect his family from "this harassment campaign", and that he had already issued one set of proceedings for defamation and would "need to work out whether to add your case to that set of proceedings or to issue a separate set of proceedings";

(g) the Defendant's response was in the following terms:

> "Do what you will.

I don't appreciate your threats.
I see them as an attempt to intimidate legitimate journalism and I will respond strongly if pushed.
This will all be made public for my own protection.
I will not censor an important topic like this and I find your approach somewhat alarming."

It is a matter of record that the Claimant did not, in the event, issue any claim against the Defendant arising out of PIP.

18. A few significant points emerge from this:
    (i) it illustrates the important differences in approach of the Claimant, who wished to protect himself and his family from the continuing serious and unpleasant effects (whether actual or prospective) of these matters being placed in public domain yet again, and of the Defendant, who regarded her activity as legitimate and important journalism. These differences are carried forward to the instant proceedings;
    (ii) the Defendant recognised that the Claimant has himself "fought long and hard for vulnerable people";
    (iii) the Claimant relies upon this to illustrate that the Defendant knew, as early as August 2018, both that he took exception to this matter being publicised again, and that he had already sued Mr Wilmer, who had not chosen to assert the truth of Ms Baker's allegations;
    (iv) this email chain does contain a threat of legal action against the Defendant which was not carried into effect. Whilst it is true that at this point, the Claimant had not seen PIP or been informed of the precise words used in it (it may be that, upon scrutiny, they did not cross any line which might have made them actionable), I suspect that this set of communications informed the Defendant's observation in the video podcast referred to below about the Claimant's previous threat of legal action.

19. On a date which the Defendant says was 3 November 2019 - and I see no reason to believe otherwise - she participated in the recording of a video podcast ("the Video"), presented by a Mr Shaun Attwood for the purposes of his YouTube channel. It was entitled "*Prince Andrew, Epstein, Savile and McCann Part 1: Sonia Poulton - True*

Crimes Video 59", and consisted of Mr Attwood interviewing the Defendant, apparently for some two and a half hours. The Claimant has appended a complete transcript of the Video to the Particulars of Claim (pp 23 - 84): I am treating it as an accurate transcript, and although the Defendant maintains that she has not had recent access to the original recording (which Mr Attwood subsequently took down, as appears below), she has not criticised any part of the transcript as inaccurate[1]. It went online on 19 November 2019 (Particulars of Claim paragraph 7, at p 10).

20. The Claimant was not a primary subject of the Video, and reference to him played only a very small part in it. Mr Attwood introduced her at the commencement, and roughly half-way through the transcript, reference was made to the Claimant. (He is also referred to in passing at one additional point, at pp 73-74, but not in a manner to which he takes exception.) The two following sets of words appear, reproduced at paragraph 7 of the Particulars of Claim (SA is Mr Attwood, and SP is the Defendant):

> Page 23
>
> SA: Today we have Sonia Poulton on the Video. This Video is gonna go over everything from Jimmy Saville to more contemporary big story in that category Epstein. We've a whole slew of political names that are gonna come up and I have watched Sonia's documentary three times now. It's just absolutely blown my mind the level of research she has done into this and whereas you see some people putting videos out really sensationalising and getting into the most extreme claims, what I like about Sonia is that she draws the line at an appropriate place and it enhances the reliability of what she's about to tell us. But before we go to that dark realm, how are you qualified to speak on this subject?
>
> SP: Well um apart from the fact that I was actually abused as a child so I do understand that, um but that isn't really my entrance. My entrance was meeting people who had been extensively abused as children, finding an empathy with them, understanding them, where they were coming from, seeing that their biggest problems were actually dealing with the system and challenging the system that had enabled them to be abused.
>
> …
>
> Pages 54 - 56
>
> SA: So, going back to "Paedophiles in Parliament" then Esther Baker and Hemming, we've not discussed them yet, have we? […]"
>
> SP: What I can say to you is, Esther Baker came out several years ago, I think her first interview was, was Sky News. I know Esther, I've talked to Esther several times. And she came out and she was saying that she had been abused as a child in – at Cannock Chase and she said it was an MP -

[1] At about 5:30 am on the morning of the hearing, the Claimant emailed all participants in the hearing, including me, with a "We Transfer" link to the original Video, which he said had been uploaded and provided by the Third Party. I have not checked it, and since the hearing there has been no comment addressed to me from any party suggesting any errors in the transcript.

and she never named the MP, she never said the M… - it was actually John Hemming who outed himself, on his own blog…"

John Hemming was the first person to threaten me with legal action for when I released "Paedophiles in Parliament" and said he needed it to be removed that day otherwise, and he's very au fait with legalese, I think he has a legal background. Erm, and I think, that, to me, I'm not making any accusations about John Hemming but it is quite clear that Esther Baker, feels that she has a case that needs to be examined - appropriately examined - and what I have seen with Esther is Esther has been savaged by some of the most awful trolls online. Now there, some of them, cross over with my stalkers, some of them are my stalkers. Same people, who stalk me and in fact, Esther and I had a case against the same
stalker at the same time and it was thrown out, so if you can imagine how she felt as someone is, I'm saying alleging, alleging that she is a victim of child abuse at the hands of a politician. So, imagine how she felt to be told not only is the case not going through for your stalker but he's given a core participant role on the Child Abuse Inquiry. Pretty awful stuff really, so I don't know the truth of the story, what I do is that John Hemming is extremely pro-active at any suggestion to do with anything to do with reputation and I don't have a problem with that either, coz I'm extremely pro-active about my reputation because my reputation is important to me. So I don't have a problem with that. What I had a problem with was the way that he approached me and was basically insisting that I remove it, like there and then, as if I'm just going to do it at your behest, you've got to be crazy mate. So I didn't, and I withstood the pressure, and the … err ...threats of what would happen and nothing has happened since. So yeah…

SA: So did he actually take any court action to you or did he try and get you to do like a strike against those documentaries?

SP: Well, I don't know if he tried to get a strike. I don't know that. But he approached me directly and said that what I had said was wrong, it was damning and he was going to take legal action unless I removed it there and then. I was like, nah, nah, I'm not. Coz I'm not accusing him of anything in it, I'm telling the story, we are allowed to tell stories, I'm a journalist, my job is to report what other people are saying, it isn't to furnish opinion - that's when I have an opinion role. But my job as a journalist is to report the story, and he had a problem with me just reporting the story, which I thought was quite interesting given that he had outed himself. She never outed him - he'd outed himself.

SA: Did you have any other legal action from any other quarters?

SP: I have threats, almost on a regular basis. Erm, I have been, oh now let me see, I've been, fallen foul of the McCanns several times, as everybody does, everybody who speaks out and err I've… their spokesman, Clarence Mitchell, went into a newspaper and called me a conspiracy theorist which was absolutely designed to just say ignore her, you know, as soon as you start that person dabbles in conspiracies, we know what it's about. It's the… might as well have just said, you know, she's got mental health problems, it would've had the same impact. So, I've had that kind of stuff where people use their establishment contacts to demonise me, to smear me, to try and make me lose work, but I'm still around.

SA: Just adds more credibility to you as far as I'm concerned.

SP: Well the thing is, honestly, you know and I said this to you two earlier[2] is my attitude very much is: we're all gonna die, so I'd rather go down in a hail of bullets than on my knees. [SA laughs]. That's really the bottom line. Right, because I'm not going to submit to anybody, right but if that's the way it has to be then that's the way it has to be.

SA: You're the personification of a Spitfire.

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[2] the Claimant's transcript asserts that at this point the Defendant was "pointing at the production team"

21. The first section is introductory, to establish the Defendant's background and to make clear that the interview was to be published generally; and the second section, said to have been in the 78th minute of a two and a half hour interview, contains the matter to which the Claimant objects. The meanings alleged by the Claimant in para 8 of the Particulars of Claim (p 12) are:

    Meaning 1 - that the Claimant is a paedophile who raped Esther Baker when she was a child; and

    Meaning 2 - that the Claimant has used baseless legal threats to attempt to hide his sexual misdeeds with children.

22. The DPA/GDPR claim contends that in speaking as she did in this same part of the Video, the Defendant breached the Claimant's rights to data protection. There is a sense in which this perhaps adds little of substance to the libel claim, and to some extent covers the same terrain. I deal with this in detail below.

23. The Counterclaim alleges a course of harassment by each of the Claimant and the Third and Fourth Parties, sometimes acting individually, and sometimes acting in concert (whether two or three of them). Some 23 particulars are now identified (pp AB20-27): so far as I can see, eleven of them refer only to the Fourth Party, but the others involve the Claimant, the Third Party, or both (and sometimes also the Fourth Party).

24. The Claim Form was issued on 9 October 2020, and I believe the Particulars of Claim were served together with it. The Defence and Counterclaim was dated 14 January 2021. The Claimant's Reply and Defence to Counterclaim is dated 21 January 2021, and the Defences of the Third and Fourth Parties were both dated 27 January 2021. The Claimant's application was issued on 26 February 2021, and on 27 April 2021 the Defendant issued her application to amend, which I directed should be heard together with the Claimant's application.

Law and Procedure

25. The applicable procedural and statutory provisions are these (I deal separately with the DPA/GDPR provisions in the relevant section):

CPR

Rule 3.4 - Power to strike out a statement of case

3.4

(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out a statement of case if it appears to the court—

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.

Rule 24.2 - Grounds for summary judgment

24.2

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—

(a) it considers that—

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

I refer below where necessary to CPR part 53 (Media and Communications Claims) and its Practice Direction B.

Defamation Act 2013

Section1 Serious harm

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

Section 2 Truth

(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.

(2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.

(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

Section 3 Honest opinion

(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

(b) anything asserted to be a fact in a privileged statement published before the statement complained of. ...

Section 4 Publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that—

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

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion. ...

Protection from Harassment Act 1997 (PHA)

Section 1 - Prohibition of harassment

(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) For the purposes of this section ... 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 harassment of the other.

(3) Subsection (1) ... does not apply to a course of conduct if the person who pursued it shows—

(a)that it was pursued for the purpose of preventing or detecting crime,

(b)that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c)that in the particular circumstances the pursuit of the course of conduct was reasonable.

Section 3 provides a civil remedy (damages and injunction) for a breach of section 1.

The Issues

26. Counsel have both addressed me in relation to eight discrete issues, six of them relating to the individual lines of defence to the libel claim, one relating to the GDPR claim, and one relating to the counterclaim in harassment, as follows:
    (a) meaning;
    (b) responsibility for extent of publication;
    (c) "serious harm";
    (d) truth;
    (e) opinion;
    (f) public interest;
    (g) DPA/GDPR; and
    (h) the harassment Counterclaim.

    I deal with these in turn, always bearing in mind that for the purposes of summary judgment I must in particular
    - consider whether the defendant has a realistic, as opposed to a fanciful, prospect of success;
    - avoid conducting a “mini-trial” without the benefit of disclosure and oral evidence, and likewise avoid being drawn into an attempt to record conflicts of fact which are normally resolved by a trial process;
    - take into account not only the evidence actually placed before me on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial; and
    - determine any point of law, as long as I am satisfied that all the evidence necessary for the proper determination of the question is before me;

    see e.g. *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 163, *per* Hamblen LJ.

27. Mr Hodson, for the Claimant, realistically accepts that the strike-out points are substantially congruent with the summary judgment points, so that unless I consider that a particular issue is susceptible to summary judgment, then a strike-out is unlikely to be ordered. Some technical failings are raised (in the Reply and Defence to Counterclaim, and in the Claimant's witness statement) in addition to those substantive ones, but they would - putting it at its highest - involve minor corrections. I deal with them towards the end of this judgment. I should also mention that I do not for the

most part refer below to the Reply and Defence to Counterclaim, but I do so where its content is material to the issues that I have to determine.

(a) Meaning

28. As mentioned in paragraph 21 above, the Claimant alleges the following natural and ordinary meanings of the words used (paragraph 8, Particulars of Claim):

Meaning 1 - that the Claimant is a paedophile who raped Esther Baker when she was a child;

Meaning 2 - that the Claimant has used baseless legal threats to attempt to hide his sexual misdeeds with children.

The Claimant relies (Particulars of Claim paragraph 9) on the annexed transcript of the Video.

29. Although the Claimant must allege the natural and ordinary meaning, the Defendant is not obliged to do so. The White Book 2021 (note 53BPD.14) explains that:

> "The traditional rule is that the defendant may not say what he says the words mean. The rule was questioned over 30 years ago by Mustill LJ in Viscount de L'Isle v Times Newspapers Ltd [1988] 1 W.L.R. 49, 58C–D:
>
> > "… it is submitted that this rule needs re-examination; in many cases one of the crucial issues at trial is the meaning of the words and it would be clearly convenient if the precise issue between the parties was placed on the record in the pleadings before the hearing."
>
> The reasons for defendants' reluctance to state their position had to do with jury trial, and make little sense now that trial by jury is a dead letter. See Nicklin J's characteristically fresh and lively discussion of the issue in Bokova v Associated Newspapers Ltd [2018] EWHC 2032 (QB); [2019] Q.B. 861; [2019] E.M.L.R. 6 at [7]–[10]."

30. I remind myself that this is not an application for the determination of the meaning of the Defendant's words (as provided for by paragraph 6.1 of Practice Direction B to CPR part 53). The test here is that of whether the Defendant has a real prospect of showing that the words do not bear the defamatory meanings alleged by the Claimant.

Meaning 1

31. The Claimant emphasises the "repetition rule", i.e. that it is no defence simply to say that a defendant is merely repeating what someone else has said. He adds that part of the context is that the Defendant is someone who is lauded by Mr Attwood during the Video as having "enhanced reliability" and is qualified to speak on such matters, and

submits that the Defendant does not merely repeat Ms Baker's claim but provides an element of support for it.

32. The original Defence pleads (para 11) the natural and ordinary meaning that

> " i. The Defendant is aware of, but does not know the truth of, Ms Baker's allegation that she was abused as a child by the Claimant, which the Claimant denies;
>
> ii. Like the Defendant, Ms Baker has been subjected to trolling and stalking, although both their allegations against the stalker were thrown out of Court and it later transpired he was offered a role on the Child Abuse Inquiry, which must have been very difficult for Ms Baker if she is a victim of child abuse as she alleges;"

33. The proposed Amended Defence abandons this wording, merely contending that

> "Paragraph 8 is denied. The reasonable viewer of the video would not have understood the words complained of to bear such serious meanings. The Claimant's first meaning is based on an overly simplistic and mechanistic approach to the repetition rule."

As mentioned in paragraph 29 above, the omission at this point of any pleaded case as to meaning does not preclude the Defendant from disputing the meaning alleged by the Claimant. (It is different if truth is to be alleged - see paragraph 4.3 of Part 53 Practice Direction B, considered further below.)

34. In relation to the repetition rule, Mr Munden refers me to the well-known observations of Nicklin J in *Brown v Bower* [2017[4 WLR 197 at [28-30]

> "28 The repetition rule clearly applies when the court is considering the meaning of words, but it takes its place alongside all the other matters to which the court must have regard when determining meaning. The task is to determine what the ordinary reasonable reader would understand the words to mean. The repetition rule cannot be applied mechanistically to the determination of meaning. If Ms Page's strict application of the repetition rule were correct, then it would make no difference to meaning whether the words complained of were: "X proved/alleged/suggested/ hinted that Y was a thief". Although each of those four verbs is apt to convey a subtly different meaning, because each is a repetition of X's charge against Y, Ms Page's contention would mean that it would make no difference; applying the repetition rule, the resulting meaning would always be guilt.
>
> 29 It seems to me that, as is nearly always the case in determining meaning, context is everything. It is easy to imagine cases where a publication refers to an allegation because the author wants to establish the fact that the allegation was made rather than any suggestion on her part that the allegation is true. Borrowing from Lord Devlin's analogy, it may be difficult to repeat the allegations of others without suggesting to the reader that the allegations are true, but it can be done. "One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that" (the final important sentence from the quotation in para 22 above).
>
> 30 In my judgment, to produce a *Chase* level 1 meaning, the *effect* of the publication (taken as a whole) has to be the adoption or endorsing of the allegation. That adoption or endorsement may come from "bald" repetition (as May LJ observed in *Shah*) or it may come from other context

> which signals to the reader that the allegation is being adopted when it is repeated. The converse is also true. The context may signal to the reader that the allegation is not being adopted or endorsed. Sometimes allegations are repeated to criticise the person who made them. When doing so, prudent publishers often expressly state that the allegations were "baseless", but whilst no doubt sufficient (in most cases) to prevent the publisher being found to have adopted the allegation by repetition it is not necessary in all cases for this to be stated expressly. It all depends upon the context. As the New South Wales Court of Appeal put it, succinctly, in *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43, 49–50: "There can be little doubt that the nature and quality of the defamatory publication may vary, dependent upon whether it is a report of what another has said and whether it is adopted, repudiated or discounted." In *John Fairfax Publications Pty Ltd v Obeid* [2005] NSWCA 60; 64 NSWLR 485 McColl JA analysed the authorities (paras 98–102) before concluding at para 119:
>
> > "This review of the authorities demonstrates that: (a) Republication of defamatory hearsay constitutes adoption of the defamatory statement —using 'adoption' in the primary sense; (b) As a general rule the republisher is liable in defamation as if the author of the defamatory hearsay; (c) To determine what, if any, defamatory imputations are conveyed by the publication in which the defamatory hearsay appears, the matter complained of must be viewed as a whole. Relevant indicia will include whether the defamatory hearsay is approved, reaffirmed and/or endorsed (adopted in the secondary sense), repudiated or discounted and the purpose of the republication.""

35. I have read the entire transcript of the interview. Two particular points strike me as noteworthy when considering the context in which the words complained of were spoken:

    (i) the Defendant expresses herself forthrightly and with considerable confidence when dealing with the people whose names appear in the title, and with some of the other individuals who form the subject of discussion. I do not comment here on the nature or likely accuracy of all the claims that she makes: suffice it so that many of them would be widely regarded as highly controversial. But by contrast, her words when dealing with the Claimant (p 54) are rather more guarded: she states that "I'm not making any allegations about [the Claimant]", and invites Mr Attwood to "imagine how [Ms Baker] felt as somebody who is, I'm saying alleging, alleging that that she is a victim of child abuse at the hands of a - of a politician" (the following reference to a "stalker" is not a reference to the Claimant); and

    (ii) the Claimant is not a named as a subject in the title of the interview, and it appears that the Defendant was not particularly expecting questioning about him to come up (she has said so in evidence). Her response "OK, alright" (p 54) when the subject of Ms Baker and the Claimant was put to her supports this. The passage dealing with Meaning 1 takes up a little more than half a page of a transcript of a 61 or so pages.

36. To obtain a summary judgment on meaning, the Claimant has to establish that the *effect* of the publication (taken as a whole) is the "adoption or endorsing" of the

allegation in its pleaded Meaning 1, and that the Defendant has no real prospect of showing the contrary.

37. Here, there are indications in both directions. On the one hand, the Defendant did show some support and sympathy for Ms Baker personally, and suggested that Ms Baker felt that "she has a case that needs to be examined, appropriately examined"; and she used the expression that the Claimant had "outed himself" in circumstances where his name had not been formally published, but he wished to scotch rumours (and "jigsaw" identifications) by making it clear that the police were not investigating him further or taking any action. This expression, although in one sense accurate, might be seen as bearing some kind of implication that the "outing" was of something which was true, and also potentially shameful.

38. On the other hand, the Defendant also stated that she was "not making any accusations about [the Claimant]" - and she did so in a context where she was plainly content to make extensive unqualified "accusations" about a large number of people. The way she put it (in relation to the Claimant's complaints about PIP) was:

> "I'm not accusing him of anything in it, I'm telling the story, we are allowed to tell stories, I'm a journalist, my job is to report what other people are saying, it isn't to furnish opinion, that's when I have an opinion role. But my job as a journalist is to report the story, and he had a problem with me just reporting the story, which I thought was quite interesting given that he had outed himself. She never outed him, he'd outed himself."

39. I repeat Lord Sumption's adoption of the *John Fairfax* observation set out in paragraph 34 above:

> "To determine what, if any, defamatory imputations are conveyed by the publication in which the defamatory hearsay appears, the matter complained of must be viewed as a whole. Relevant indicia will include whether the defamatory hearsay is approved, reaffirmed and/or endorsed (adopted in the secondary sense), repudiated or discounted and the purpose of the republication."

I conclude that the Defendant has a real prospect of showing that the words used, taken "*as a whole*"[3], show that the Defendant was "reporting the story" in a journalistic context, but without actually adopting or endorsing the accusations, and

[3] the test which was applied by Warby J in the initial trial of meaning in *Spicer v Commissioner of Police for the Metropolis*, as cited by Knowles J in the later trial of the full action - see [2021] EWHC 1099 (QB), at paragraph [18] and paragraph 60 below

indeed with an express disclaimer of any adoption of Ms Baker's allegations. As I have indicated, this was in the context of a long interview in which the Defendant does seem to have set out and adopted (and not disclaimed endorsement of) a large number of other allegations against different people.

40. As far as the pleading is concerned, I do not consider that there is anything objectionable about the way in which the Defendant now wishes to plead her case in relation to meaning. A defendant may choose to assert an alternative meaning explicitly, but is not required to do so. I give permission to amend.

Meaning 2

41. The original Defence pleaded a natural and ordinary meaning that "the Claimant has threatened the Defendant with legal action to protect his reputation over her refusal to remove her documentary, PIP from online".

42. The proposed Amended Defence merely continues (after the words set out in paragraph 33 above) "Nor did the words allege that any legal threats were baseless".

43. This is rather more straightforward. In a passage which (again) took up less than a page, the Defendant did observe that the Claimant "is extremely pro-active at any suggestion of anything to do with reputation and I don't have a problem with that". She expresses the view that (as set out in paragraph 38 above) she is merely a journalist reporting the story without passing opinion about it.

44. The reasonable viewer of the Video may be taken as being aware that a person may threaten legal action, with a genuine belief in their entitlement to do so and in the justice of their cause, and indeed in the hope that the threat alone may bring about a satisfactory outcome, but may nevertheless decide not to proceed for perfectly sensible reasons, such as the cost, the additional publicity, the stress, or the substantial consumption of time and energy which such a course may involve. Furthermore, a person may wish to do so regardless of whether they have, in fact, committed "*sexual misdeeds with children*" which they wish to "*hide*": None of these involves, or necessarily or even impliedly involves, either the original threat being "baseless", or the guilt of the person making the threat of legal action.

45. The words used are plainly capable of bearing more than one possible meaning, and not all such meanings are that the Claimant used baseless legal threats at all, let alone to attempt to hide sexual misdeeds with children. I consider that the Defendant has a real prospect of defeating the claim that the words used bore Meaning 2, which is not so obvious that summary judgment is appropriate. Again, on the footing that the proposed amended version puts forward the case upon which the Defendant wishes to contest this part of the claim, I allow permission to amend.

(b) Responsibility for extent of publication

46. The Particulars of Claim assert in paragraphs 10 and 11 that

> "10. The Defendant was a contributor and journalist for the Publication and had editorial control of the Publication. She herself spoke (into video recording equipment for later publication) most of the words of which the Claimant complains in the Publication, but the words of the host (Mr Shaun Attwood) in the Publication are also relied upon for context in relation to meaning.
>
> 11. Mr Attwood has accepted liability for his publication of the Publication, removed it from his Youtube channel and published an apology entitled, "***Shaun Attwood's Legal Correction***" at the URL https://www.youtube.com/watch?v=Q2Om8g2Mcc4. The Claimant nevertheless holds the Defendant joint and severally liable for the damages caused by the video whilst it remained online and relies on the two separate publications of the Publication, one of which remains online."

47. The Defence responds (no amendments being sought):

> "13. As to paragraph 10, save that it is admitted that the Defendant was a contributor to Mr Attwood's programme by speaking the words complained of whilst she was being interviewed by him as a journalist, it is denied that the Defendant had any control, editorial or otherwise, over Mr Attwood's recording containing the words complained of. He stored the recording. He transmitted the recording to viewers and/or listeners on his chosen platform(s). Mr Attwood managed the content. The Defendant had no control over way in which the video was uploaded, including the manner, timing and forum of its communication. Paragraph 9 above is repeated.
>
> 14. The first sentence of paragraph 11 is admitted. The Defendant understands that Mr Attwood published his apology and correction on 21 September 2020. As to the second sentence, paragraphs 9 and 13 above are repeated."

48. The evidence indicates that the Defendant was a guest on Mr Attwood's channel, but does not show that she had any input into the way in which he deployed the material, or which sections he might choose to cut or edit, or indeed where it was to be published. Accordingly, whilst the Defendant was plainly a "contributor and journalist", which she does not challenge, the contention that she had editorial control of the Video is one which is, and in my judgment is legitimately, challenged on the

evidence - at least so as to demonstrate a real prospect of success for her on the issue. This point goes equally to the allegation in paragraph 7 of the Particulars of Claim that the Defendant "published and/or was responsible for publication of [the Video]".

49. The underlying substance of the Claimant's complaint, of course, is that the Defendant spoke as she did with the knowledge and intention that her interview would be published on Mr Attwood's YouTube Channel (the concluding passage, in which viewers of the Video are invited to send questions and comments, to the Defendant by Twitter or email, and to Mr Attwood in his "comments box", seems to make this reasonably clear). Mr Hodson reminds me of the four ways in which a person may be liable for the republication of a defamatory statement, as itemised in *Speight v Gosnay* (1891) 60 LJQB 231, and recently adopted by Nicklin J in *Turley v Unite the Union* [2019] EWHC 3547, at paragraph 85, namely

    (i) where a defendant has authorised its republication;

    (ii) where a defendant has intended such republication;

    (iii) where republication was the "*natural consequence*" of the original publication; and

    (iv) where there was a moral obligation to republish the statement.

    He contends that each of the first three of these applies here. But that is not the same as what is actually pleaded, which is - whatever may be the strength of his submission about the underlying facts - actual editorial control. I have identified no strong evidence, let alone conclusive evidence, that the Defendant exercised - or was entitled to exercise - control over what Mr Attwood was airing on his YouTube channel. (Mr Munden persuasively compared the Defendant's position with that of a guest on a television chat show, who would attend and have their say, but have no further involvement with either the editorial or the broadcasting process.)

50. There is a difference between actually being responsible for (and controlling) the publication of an allegation, and the knowledge, intention or authorisation of such publication. The Claimant has pleaded the first, but not the second. For the purposes of summary judgment (and indeed strike-out), it is the former, pleaded, meaning which I have to consider as the basis of the claim of responsibility for the republication; Mr Munden points to passages in *Gatley on Libel and Slander* (13th Edn) paragraph 26.8, *Bullen & Leake & Jacob's Precedents of Pleadings* (19th Edn) paragraph 37-11, and *Atkins' Court Forms* (2ns edn, 2019 Issue) Vol 16(1), paragraph 22, to this effect..

51. I consider that the Defendant has responded in her Defence to the pleaded allegations in the Particulars of Claim, and that she has a real prospect of success in this part of her Defence.

52. The supplemental allegation, that Mr Attwood has apologised and removed the Video from his channel, adds little if anything to this part of the claim. Mr Attwood may simply not have wished to become involved in legal proceedings such as this; but whatever his motives, this cannot (for the purposes of summary judgment or striking out) prejudice the Defendant's position. Furthermore, it may be thought that if he so arranged his channel that viewers might watch his videos via other platforms (Spotify and Stitcher are here pleaded), that was not something which was within the Defendant's control. (I do not know whether the removal of the Video from Mr Attwood's channel effectively precludes its being accessed from any other sources - but again, this is not within the Defendant's control.)

53. There was some discussion about whether the Defendant might have asked, or required, or even demanded, that Mr Attwood should take down the Video, or (I suppose) re-edit it so as to omit the passages to which the Claimant objected. It is possible that, if asked by the Defendant, he might have done so. But he may have not wished to do so, or had the right not to do so. I do not know what were the contractual arrangements (if any) between the Defendant and Mr Attwood. I cannot make a finding - certainly not for summary judgment purposes - that any failure by the Defendant to make such a request, once she realised that the Claimant was complaining about the Video, enhanced her responsibility for the extent of the publication of the Video.

(c) Serious Harm

54. The Particulars of Claim deal with this extensively:

> **Serious Harm**
> 14. The allegations outlined above in the Publication ('the Allegations') are defamatory at common law and have caused and were likely to cause serious harm to the reputation of the Claimant pursuant to section 1 of the Defamation Act 2013 ('the Act').
>
> 15. The Allegations include some of the most serious allegations which could be made about anyone, including systemic rape and sexual abuse of children. Such allegations are so vilifying that they have a tendency to incite members of the public into acts of violence against the subject. Indeed, as the as

the Defendant said herself in the Publication: *"being accused of being a child abuser or a paedophile is a horrendous thing and it makes your life dangerous";* and *"nobody who isn't a paedophile approves of them. Everybody wants to see them dead or on an island or just away from me."* It is therefore safe to infer that the Allegations caused and were likely to cause serious harm to the Claimant's reputation pursuant to section 1 of the Act.

16. The Allegations made by Esther Baker against the Claimant previously led to his receiving death threats and a man named Declan Canning to being convicted for making threats to kill him (this conviction before the Publication). Therefore, the Claimant believes that their repetition in the Publication is likely to inspire others to wish him harm and put his life at risk.

17. The court is bound to interpret the law, as far as possible, in a manner consistent with the European Convention on Human Rights per s3 Human Rights Act 1998. The nature of the allegations made and their prominence engages the Claimant's Article 2, 3 and 8 rights under the European Convention on Human Rights and the Human Rights Act 1998. It is trite law that Article 8 encompasses both work and relationships.

18. Further or alternatively, the Allegations have caused, were and are likely to cause serious harm to the Claimant's reputation in actual fact. The Claimant will rely, *inter alia* on the following facts and matters:

PARTICULARS OF SERIOUS HARM

18.1. The extent of publication of the Publication, as to which paragraphs 12 and 13, above, are repeated;
18.2. The interference with his ability to start up new businesses;
18.3. Comments on the YouTube videos by YouTube users which demonstrate that the Publication has seriously harmed the Claimant's reputation (as to which the Claimant will rely on screenshots of those comments in Annex 3);
18.4. Repeated references in the Publication to how credible the Defendant is and how well-researched her allegations are; and
18.5. The undermining by the Defendant of the vindicatory effect of the previous defamation proceedings and in particular the ***Baker v Hemming*** Judgment.

55. The Defence to these allegations was as follows (displaying the proposed amendments as underlining or strikethrough):

17. Paragraphs 14 and 15 are denied. The Defendant denies that the words complained of, in the meanings contended for by the Defendant, bore any meaning defamatory of the Claimant:

PARTICULARS OF DENIAL OF SERIOUS HARM

i. It is denied that the mere mention by the Defendant in answer to a question during the long interview of the fact that Ms Baker had made an allegation that she was abused as a child by the Claimant (albeit a very serious allegation), in circumstances when the Defendant made it clear that the Claimant denied the allegation, when the Claimant's denial of the allegation was extremely widely known, and the Defendant stated that she did not know the truth of the allegation and was not seeking to make any allegation herself;, is sufficient to ~~have a tendency to cause harm or~~ satisfy the statutory threshold of ~~seriousness pursuant to~~ s.1 of the Defamation Act 2013;

ia. S.1 must be interpreted in accordance with Article 10 of the European Convention on Human Rights. This requires, inter alia, that politicians must show a greater degree of tolerance as to any potential damage to their reputation than private citizens, especially in respect of reports of allegations made by third parties: see, eg, *Olafsson v Iceland*, ECHR case no. 58493/13, (2018) 67 E.H.R.R. 19.

ii. Paragraphs 8, 9, 10, 11, 13, 14 and 16 above are repeated;

iii. The Defendant published the words complained of to 3 people whilst the interview took place on 3 November 2019: Mr Attwood, his cameraman and an audio engineer;

iv. The imputation contended for by the Defendant falls short of asserting that the Claimant has behaved in such a way as to bring suspicion on himself or to provoke the need for an investigation;

v. All of the matters referred to in the words complained of were already in the public domain, including having been published in far more disparaging terms and on websites with far greater prominence, such that anyone with any interest in or importance to the Claimant already knew of them. Paragraphs 19(i) (ii), (iii), (v), (vii) and (viii) below are ~~is~~ repeated; each of those matters were widely reported in the media. The Claimant also spoke to the media about these matters on several occasions, emphasising his innocence, for example in an interview with the Daily Mail and MailOnline (the world's most popular news website) published on 22 June 2018. The Claimant is put to strict proof of the precise alleged harm resulting from the words complained of published to 3 people, given, in particular, the above matters already known to anyone with any interest in or significance to the Claimant, and that the Defendant was not suggesting she had any new information about the truth of the allegations. ~~rather than from any other publications;.~~

vi. Conveying information about threats of legal action, whether to protect reputation or otherwise, is highly unlikely to cause people to think less of the Claimant;

vii. The Claimant is put to proof that he had a good reputation, particularly insofar as his sex life was concerned;

viii. Paragraphs 16 and 17 are not admitted;

ix. Paragraph 18 is not admitted. Further:

a. As to paragraph 18.1, paragraphs 9, 13, 16 and 17(iii) above are repeated;
b. Paragraph 18.2 is embarrassing for want of particularity;
c. As to paragraph 18.3, it is unclear which comments the Claimant is referring to. In any event, responsibility for the publication is denied, paragraphs 9, 13, 16 and 17(iii) above are repeated;
d. Paragraph 18.4 is denied. References to credibility were given by Mr Attwood and, properly understood in the context they were made, were not referring to the allegations made by Ms Baker so as to reinforce the truth of them;
e. Paragraph 18.5 is denied. The words complained of were spoken prior to the judgment in *Baker v Hemming* [2019] EWHC 2950 QB.

18. For the avoidance of doubt, if the Court rules in favour of the Claimant's pleaded meanings, it is admitted that the meanings contended for by the Claimant both have a tendency to cause harm and satisfy the statutory threshold of seriousness pursuant to s.1 of the Defamation Act 2013, subject to the defences pleaded herein. The extent of any alleged harm and the cause of it is not admitted.

56. The effect of paragraph 18 of the Defence is that if the Claimant succeeds in establishing either Meaning 1 or Meaning 2 in full, then "serious harm" is not an issue (at least, in relation to that meaning), although paragraph 17 of the Defence still goes to quantification of damage.

57. If, of course, the Claimant does not establish either meaning in full, then the question of whether there may be some lesser - but still potentially defamatory - meaning (such as a *Chase* level *2* or a *Chase* level 3 meaning) may be considered by the trial judge.

58. But in any event, I consider that the Defendant is entitled to point to the circumstances of the publication in support of her contention that the statutory threshold has not been crossed.

59. Lord Sumption, in *Lachaux v Independent Print Ltd* [2019] 3 WLR 18, considered the implications of s 1 of the Defamation Act 2013. After observing in paragraph 13 that it clearly set a new threshold of harm which had not previously existed, he went on:

> 14. Secondly, section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it "has caused or is likely to cause" harm which is "serious". The reference to a situation where the statement "has caused" serious harm is to the consequences of the publication, and not the publication itself. It points to some historic harm, which is shown to have actually occurred. This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated. The same must be true of the reference to harm which is "likely" to be caused. In this context, the phrase naturally refers to probable future harm.

and he continued

> 16. Finally, if serious harm can be demonstrated only by reference to the inherent tendency of the words, it is difficult to see that any substantial change to the law of defamation has been achieved by what was evidently intended as a significant amendment. The main reason why harm which was less than "serious" had given rise to liability before the Act was that damage to reputation was presumed from the words alone and might therefore be very different from any damage which could be established in fact. If, as Ms Page submits, the presumption still works in that way, then this anomaly has been carried through into the Act. Suppose that the words amount to a grave allegation against the claimant, but they are published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed. The law's traditional answer is that these matters may mitigate damages but do not affect the defamatory character of the words. Yet it is plain that section 1 was intended to make them part of the test of the defamatory character of the statement.

60. These extracts clearly suggest the role of the factual circumstances in consideration of whether a publication "has caused or is likely to cause serious harm" to a claimant's reputation. The points made in paragraph 17 of the Defence (both as originally pleaded and as proposed to be amended) take a number of legal and factual points which are legitimately made - for example:

(a) that people in public life must show a greater degree of tolerance as to potential damage to their reputation (see Article 10 of the European Convention of Human Rights, and *Olafsson v Iceland* ECHR case no. 58493/13, (2018) 67 EHRR 19);

(b) that all of the matters referred to in the words complained of were already in the public domain, and in any event would have been familiar to people with an

interest in such matters (perhaps themselves the only likely viewers of the Video) - see the observations of Warby J (as he then was) in both *Economou v de Freitas* [2017] EMLR 4 at paragraph [77, 83-85, 90-91] and in *Alexander-Theodotou v Kounis* [2019] EWHC 956 at paragraphs [67 - 68]; and more recently, with explicit reference to causation of "serious harm", by Knowles J in *Spicer v Commissioner of Police for the Metropolis* [2021] EWHC 1099 (QB), at paragraph [361] (to which Mr Munden has drawn my attention since the hearing, and in respect of which both counsel have provided written submissions);

(c) that at the time of the interview on 3 November 2019, the decision in *Baker v Hemming* dated 5 November 2019 had not yet been handed down (the Defendant says that she did not in fact learn of it until February 2020).

I accept Mr Munden's submission that such matters are proper to be taken into account when considering serious harm. Whilst I recognise Mr Hodson's observation that these cases are not authority for the proposition that no inference of serious harm can be drawn, the question of whether or not such an inference should be drawn here is one for the trial judge, not least because it will depend upon the exact meaning of the words, as determined at trial. (The Defendant acknowledges that if - but only if - the Claimant succeeds on either meaning in full, then "serious harm" follows.)

61. The Claimant has also appended to paragraph 18 of the Particulars of Claim a number of online comments from viewers of Mr Attwood's channel (pp 127-137), to seek to demonstrate serious harm. Whilst these do indeed show that a number of people have viewed the Video, I note that although numerous comments are made about those who are its ostensible subject-matter and named in its title, and indeed about some others, I did not identify there a single express reference to either the Claimant or Ms Baker. It may be that this reflects the passing nature, and comparatively guarded language, of the Defendant's references to the Claimant in the Video.

62. Taking the matter in the round, I am not persuaded either that the Defendant has no real prospect of successfully relying on the matters to which she refers in order to counter the Claimant's case on "serious harm", or that these paragraphs should be struck out. I give permission to the Defendant to amend paragraph 17 of the Defence as sought.

(d) Truth

63. Paragraph 19 of the proposed Amended Defence reads as follows:

> 19. Further or alternatively, if and insofar as the words conveyed the natural and ordinary meaning that:
>
> i. Like the Defendant, Ms Baker has been subjected to trolling and stalking, although both their allegations against the stalker were thrown out of Court and it later transpired he was offered a role on the Child Abuse Inquiry, which must have been very difficult for Ms Baker if she is a victim of child abuse as she alleges; and
>
> ii. The Claimant has threatened the Defendant with legal action to protect his reputation over her refusal to remove her documentary, PIP, from online;
>
> then the Defendant has a defence ~~in the meaning contended for by the Defendant as set out above~~, pursuant to s.2 of the Defamation Act 2013, as the words are substantially true. If necessary, the Defendant will rely on s.2(3) of the Defamation Act 2013.
>
> **PARTICULARS OF TRUTH**
>
> i. In or around May 2015, Ms Baker made allegations that she had been raped and sexually abused as a child by a Member of Parliament. She initially made her allegations on Sky News, which was reported by other major news channels soon afterwards (including the BBC and the Guardian). The Herald referred to her as a *"victim"* who was *"speaking out"* about a *"VIP paedophile ring"*, an article which remains online to date: https://www.heraldscotland.com/news/13499895.victimspeaks-out-about-britains-vip-paedophile-ring-the-rich-and-powerful-knew-i-wasbeing-abused/;
>
> ii. During her interview, Ms Baker told Sky News of how police officers would stand guard for the perpetrators and on some occasions even joined in the abuse in woodland on Cannock Chase in Staffordshire. From the age of six, Ms Baker said she was taken to be abused by different men on Cannock Chase, at various properties around Staffordshire and beyond;
>
> iii. She told Sky News that she was taking part in the interview with them in the hope of finding other victims or the police officers who were involved;
>
> iv. At the time, Ms Baker received ongoing support from the Lantern Project in Merseyside, who work with survivors of sexual abuse;
>
> v. In or around 2015, Ms Baker gave the name of one politician to the police and a detailed account of the years of abuse she said she had suffered;
>
> vi. The police investigated Ms Baker's allegations. They interviewed the Claimant. No charges were brought against the Claimant;
>
> vii. In or around 5 September 2017, the Claimant published a statement online declaring that he was the Member of Parliament that Ms Baker was referring to in her allegations to the media, but that he denied those allegations;
>
> viii. On 14 September 2017, an application was made by Ms Baker for core participant status in the Independent Inquiry into Child Sexual Abuse ("IICSA"). On 16 January 2018, Professor Alexis Jay OBE, Chair of the Inquiry, concluded that Ms Baker should be designated as a core participant. During this Inquiry, Ms Baker expressed that she felt that her allegations had not been taken seriously or properly examined by the police. At around the same time, Ms Baker's friends also conveyed this information to the Defendant. In around November 2019, the IICSA published that many of Ms Baker's allegations about institutional failings since 2015 involve allegations that the Claimant had interfered with the proper investigation of her claims;
>
> ix. In or around 2013, the Defendant began researching for a documentary that she would later title PIP. She published PIP on 2 August 2018. Her intention was to create a publication that would

reflect allegations and investigations of child abuse in Parliamentary and Establishment circles over the past four decades. Given the extensive media interest in Ms Baker's allegations, her involvement in the IICSA and the fact that the Claimant had put his identity in the public domain as the accused, the Defendant included details of both Ms Baker's and the Claimant's version of events in the PIP documentary;

x. Following its publication, on 2 August 2018, the Claimant wrote to the Defendant, threatening her with legal action if she did not remove PIP from online. The Defendant responded the same day by stating that it represented a fair piece of journalism. The Defendant offered the Claimant the opportunity to take part in a follow-on interview to be published alongside PIP. He declined. The Defendant declined to remove PIP from online. In or around December 2020, PIP was removed from online;

xi. In May 2016, the Defendant, during the course of a police investigation into her stalking allegations, was asked by the police to provide a witness statement. In it, she detailed the extensive online and offline attacks she had endured from approximately 2012 to 2016. It started following the Jimmy Saville revelations in 2012, after she began interviewing former care home children on issues of abuse;

xii. The Defendant was the victim of 'gang stalking' by internet trolls including Mr Darren Laverty. Their attacks totalled thousands of tweets/blogs/social media posts about her, many of which contained abuse, threats and harassment. The police detective investigating on behalf of the Defendant advised prosecuting the worst offender, who was, at the time, Mr Laverty. In or around December 2016, he was also charged with harassing Ms Baker in a similar manner. During this period, the Defendant and Ms Baker shared their experiences of being stalked and harassed;

xiii. The CPS dropped the charges against Mr Laverty. The Defendant was advised by the CPS that there was insufficient evidence to secure a prosecution. He had failed to provide his twitter login details and twitter had failed to provide them on his behalf;

xiv. In or around May 2017, Mr Laverty claimed that he had been given core participant status in the IICSA. In 2017 or 2018, Mr Laverty gave evidence to the IICSA;

xv. The entirety of the Counterclaim pleaded below is repeated and relied upon.

I read this as addressing introductory sub-paragraph (i) to Meaning 1, and introductory sub-paragraph (ii) to Meaning 2. I deal with these separately.

64. As far as Meaning 1 is concerned, I do not consider that the potential meaning pleaded in introductory sub-paragraph (i) addresses its substance at all. Indeed, I do not discern in that potential meaning any allegation which is potentially defamatory of the Claimant, so as to allow for the invocation of the substantial truth defence under s 2 of the Defamation Act 2013.

65. Furthermore, the Particulars, whilst providing details of the background (including matters relating to the Independent Inquiry into Child Sexual Abuse, and the stalking and trolling of the Defendant and Ms Baker) as well as the Claimant's earlier legal threats, do not address any part of Meaning 1. They provide a full narrative of Ms

Baker's allegations and of the Claimant publicly contesting them, which are clearly important matters in the overall context of this claim, but do not suggest that the substance of Meaning 1 was true; on the contrary, she maintains that she did not and does not know, and did not assert or seek to assert, that it was true, and that she sought to make this clear when being interviewed for the Video.

66. I do not consider that introductory sub-paragraph (i) forms or comprises a necessary or appropriate part of any defence of substantial truth; nor does the conditional formulation "if and insofar as" rescue it from the flaw of irrelevance to the truth of Meaning 1 as alleged by the Claimant, or indeed to the truth of any similar meaning defamatory of the Claimant. It is an immaterial allegation, and I do not consider that - in a case where many facts may be in dispute - the distraction of seeking to prove (or indeed contest) the truth of the meaning put forward in introductory sub-paragraph (i) should play any part. I therefore refuse permission to amend so far as the inclusion of introductory sub-paragraph (i) is concerned.

67. The position in relation to Meaning 2 is different. As I think Mr Hodson realistically accepts, it is open to the Defendant to contend that Meaning 2, if and insofar as it is taken as meaning merely that "the Claimant has threatened the Defendant with legal action to protect his reputation over her refusal to remove her documentary, PIP, from online", is substantially true. (Indeed, I have described above the email exchange that would appear to provide some support for this.) I grant permission for that part of the amendment, and refused both summary judgment and strike-out in relation to this sub-paragraph. However, the Defendant does not need more than the narrative in sub-paragraphs (i) to (x) of the Particulars of Truth to support this averment. Those may remain as Particulars of Truth, and sub-paragraphs (xi) to (xv) - which deal with the "stalking and trolling" allegations in the now disallowed sub-paragraph (i) - may not remain as part of the Particulars of Truth, and so fall to be struck out.

68. The matter does not end there, because paragraph 19 (and the Particulars thereunder) are repeated and incorporated by reference elsewhere in the Defence and Counterclaim, such as paragraphs 21 and 22, and in part in paragraph 30). I consider that if those Particulars in sub-paragraphs (xi) to (xv) are relevant to any other material averment, the Defendant should be entitled to include them, if necessary by

reproducing them elsewhere and/or by a modest reconfiguration of the Defence and Counterclaim as part of the amendment process.

(e) Honest Opinion

69. The Defendant deals with this in paragraphs 20 and 21 of the proposed Amended Defence (it is made clear on behalf of the Claimant that the amendment in para 20(i), consisting of the removal of its words. can be agreed), in these terms:

> 20. Further or alternatively, in so far as the said words made or contained the following comment or expression of opinion:
>
> ~~i. The Defendant is aware of, but does not know the truth of, Ms Baker's allegation of sexual abuse against the Claimant;~~
>
> ii. After the Defendant's and Ms Baker's stalking case was unsuccessful at Court and the person they had accused was given a role in the IICSA, it must have been very difficult for Ms Baker, if she is a victim of child abuse as she alleges.
>
> 21. The Defendant contends that, pursuant to s.3 of the Defamation Act 2013, the words were a statement of opinion.
>
> **PARTICULARS OF OPINION**
>
> i. The bases of the opinions were made clear because:
>
> a. Paragraph 19 in its entirety is repeated;
>
> b. The Defendant made it clear what Ms Baker had alleged against the Claimant, that he had denied those allegations and that she was unaware of the truth or falsity of them, stating that:
>
> - she was not making any accusations about the Claimant (stated twice);
> - Ms Baker had made "allegations" (rather than proven assertions);
> - she did not know the truth of the allegations;
> - the Claimant was very discontent about those allegations;
> - the Defendant was merely reporting the allegations.
>
> c. The Defendant made clear:
>
> - at beginning of the interview, that she was a victim of sexual abuse as a child;
> - that she had been stalked and trolled as a result of reporting on the sexual abuse of other alleged victims;
> - that she and Ms Baker brought a case before the Court concerning their stalking allegations, but they were unsuccessful in this action;
> - that the person they had accused of stalking was given a role in the IICSA.
>
> ii. The opinions were honestly held by the Defendant. In particular:
>
> a. The Defendant is a journalist, used to researching and reporting both sides of the story. She takes her job seriously. At all material times, she was aware of and abided by the Independent Press Standards Organisation's Code of Practice;
> b. The Defendant had been deeply distressed by the trolling, harassment and abuse that she had endured by Mr Laverty and others, as her police victim impact statement from 2016 makes plain;
> c. The Defendant still endures harassment. The entirety of the Counterclaim pleaded below is repeated and relied upon.

70. It is to be noted that nothing pleaded here directly, apart from the incorporation by reference of paragraph 19, which deals with Meaning 2 (the Claimant's making of legal threats). I infer that this principally concerns the matters set out in Meaning 1.

71. I am assuming that these two paragraphs are not to be read together, although it is possible that they may (paragraph 20 does not contain an operative verb). On that basis, paragraph 20 does not seem to me to address any part of the substance of either Meaning 1 or Meaning 2. If the meaning of the words extracted from the Video and relied on by the Claimant is merely that set out in paragraph 20, and no more, then the Claimant will have failed on defamatory meaning, and any question of opinion becomes immaterial. If the meaning is that alleged by the Claimant (or anything similar), then the matters pleaded in paragraph 20 are irrelevant to it and will not assist the Defendant, as they are directed towards a wholly different point. There is no intermediate point at which a defamatory meaning alleged by the Claimant can be effectively met with any opinion set out in paragraph 20.

72. Paragraph 4.4 of Practice Direction B to CPR Part 53 requires that:

> 4.4 Where a defendant relies on the defence under section 3 of the Defamation Act 2013 that the statement complained of was a statement of honest opinion, they must—
>
> (1) specify the imputation they seek to defend as honest opinion; and
>
> (2) set out the facts and matters relied on in support of their case that—
>
> (a) the statement complained of indicated, in general or specific terms, the basis of the opinion; and
> (b) an honest person could have held that opinion on the basis of any fact which existed at the time it was published or anything asserted to be a fact in a privileged statement published before the statement complained of.

73. What is conspicuously missing from paragraph 21, taken on its own, is any specification of an imputation which the Defendant is seeking to defend as honest opinion. If the imputation is merely that set out in paragraph 20, then it does not suffice, as I have explained.

74. I note that it is really only sub-sub-paragraphs (i)(b) and (ii)(a) under the Particulars of Opinion which are potentially directed to the substance of Meaning 1. However, the Defendant has now abandoned the potential alternative meaning of what the Claimant

asserts as Meaning 1 which she had originally put forward in sub-paragraph 20(i). This means that there is no pleaded imputation which she seeks to defend as honest opinion.

75. Given the absence of any specification of an opinion which the Defendant seeks to defend as honest opinion, it seems to me that both paragraphs 20 and 21 fall to be struck out.

76. As for the other averments in the Particulars of Opinion, I cannot see that anything in sub-sub-paragraphs (i)(a) and (c) (which respectively repeat paragraph 19, and deal with matters to which the Defendant had been subject which are not connected with the Claimant or Meaning 1) should remain; and the same applies to sub-sub-paragraphs (ii)(b) and (c) (which deal with the harassment of the Defendant and her resulting distress). I should add that the fact that the Claimant is also being sued by Counterclaim for part of that harassment does not affect this conclusion, as it has nothing to do with any opinion held by the Defendant in early November 2019, the time of her interview for the Video.

77. I therefore strike out what remains of paragraph 20 (paragraph 20(i) having already been withdrawn by amendment), and the entirety of paragraph 21. Again, if any of the matters set out in the Particulars of Opinion under paragraph 21 have been relied upon elsewhere (by reference or incorporation), they may be added to those sections of the pleading at the appropriate parts (in similar fashion to that referred to in paragraph 68 above).

(f) Public Interest

78. This is dealt with in paragraph 22 (the amendments to which are accepted by the Claimant):

> 22. Further or alternatively, the words complained of were or formed part of, statements on a matter of public interest ~~and/or were protected by an occasion of qualified privilege~~.
>
> **PARTICULARS OF PUBLIC INTEREST**
>
> i. The interview and, in particular, the words complained of, were about matters of public and general concern and interest. In particular, but without prejudice to the generality of the foregoing:

a. The Claimant is a former Member of Parliament. At all material times, the Defendant understood that he planned to campaign to be re-elected;

b. The Defendant's extensive research undertaken for the PIP documentary, undertaken over a five year period, had shown a historical pattern of power imbalance in allegations of abuse made against people in authority, whereby the accused are deemed respectable and worthy of being listened to but the accuser is not;

c. The Claimant had a chequered history in his brief stint in Parliament, resulting in calls for his resignation arising from breaching a super injunction and abusing parliamentary privilege;

d. The Defendant was, at all material times, aware, through her attempted prosecution of Mr Laverty, that the Claimant associated with Mr Laverty and others who had caused a great deal of distress by way of online harassment to survivors of child abuse, including the Defendant and Ms Baker;

e. Mr Laverty was given a role in the IICSA;

f. The Defendant will aver that all of the above demonstrated a potential power imbalance, which the public had an interest in knowing about, particularly in light of the Claimant's comment in 2013, on Channel 4 News, that "It's far too easy for powerful people to get away with wrongdoing and nothing be done about it";

g. Further, there was a public interest in victims of abuse feeling empowered to come forward as witnesses.

ii. It was justifiable to include the words complained of in the article because growing concern of a parliamentary and Establishment cover up regarding child abuse was highly topical at the time, both in the mainstream media and on the parliamentary agenda itself. This was the very reason the IICSA was launched;

iii. The information obtained by the Defendant was of a high quality. The Defendant began investigating allegations of historic child abuse in the British Establishment following the Jimmy Savile revelations in 2012. She was very well researched. She had the first-hand experience of being 'trolled' as a result of it. The Defendant worked as much as possible with original sources, including interviews with police, politicians, parliamentary assistants, judges, intelligence agents, survivors of child abuse and their families;

iv. The words complained of therefore were a matter of public interest. Paragraph 19 and 21 above are repeated;

v. In the circumstances, the tone of the Defendant was measured and responsible. The words complained of were spoken pursuant to s.4 of the Defamation Act 2013 ~~and/or the Defendant had a moral/social duty to convey them and the public at large had a corresponding legitimate interest in receiving the information~~.

79. The Claimant does not challenge the contention that this is a statement on a matter of public interest for the purposes of section 4(1)(a) of the Defamation Act 2013, and does not at present pursue his point that sub-paragraph (i)(c) of the Particulars "offends the principles of Parliamentary Privilege and is impermissible in accordance with Article IX of the Bill of Rights Act 1688" (as set out in paragraph 61 of Mr Hodson's skeleton argument). He does however criticise the absence of distinction between Meaning 1 and Meaning 2, and also the failure to set out matters relied upon in support of the necessary contention that "the defendant reasonably believed that publishing the

statement complained of was in the public interest" as set out in section 4(1)(b). In paragraphs 71 to 74 of the Reply he avers that the Defendant did not have such a reasonable belief, citing the Supreme Court's adoption in *Serafin v Malkiewicz* [2020] UKSC 23, at paragraph 67, of Warby J's observation that

> "I would consider a belief to be reasonable for the purposes of section 4 only if it is one arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case"

He goes on in paragraph 73 to raise a number of points which he contends shows that she cannot have had a reasonable belief that this was in the public interest, because of the many exculpatory and qualifying points which she failed to raise.

80. I do not agree. The points made by the Claimant may be deployed at trial in cross-examination, with a view to undermining the Defendant on this point, although some of them may have more force than others. But I cannot resolve these conflicts on this summary judgment application. The Particulars provided are in my judgment capable of going to both the assertion that the words concerned a matter of public interest, and the belief - and its reasonableness - that publishing them was in the public interest. Most of them, self-evidently, go to the substance of Meaning 1; but the observations about power imbalance and the Claimant's status as a former MP (although he has in the course of this application denied the Defendant's suggestion that he plans to run for Parliament again) are also capable of application to Meaning 2.

81. I accept Mr Munden's submission that these are fact-sensitive matters, which will depend on all the circumstances of each case, as explained by Sharp L.J. in *Economou v de Freitas* [2017] EMLR 4, at paragraph [110] (on appeal from the decision of Warby J (*supra*)):

> Section 4 requires the court to have regard to all the circumstances of the case when determining the all-important question arising under s.4(1)(b): it says the court must have regard to all the circumstances of the case in determining whether the defendant has shown that he or she reasonably believed that publishing the statement complained of was in the public interest. In my judgment, all the circumstances of the case must include the sort of factors carefully identified by the judge, including, importantly, the particular role of the defendant in question. The statute could have made reference to the *Reynolds* factors in this connection, but it did not do so. That is not to say however, that the matters identified in the non-exhaustive checklist may not be relevant to the outcome of a public interest defence, or that, on the facts of the individual case, the failure to comply with one or some of the factors, may not tell decisively against a defendant. However, even under the *Reynolds* regime, as Lord Nicholls made clear, the weight to be given to those factors, and any other relevant factors, would vary from case to case. As with *Reynolds* therefore, with its emphasis on practicality and flexibility, all will depend on the facts.

I do not consider either that the Defendant has no real prospect of successfully relying on this line of defence, or that it falls to be struck out.

(g) DPA/GDPR

82. The applicable provisions of the DPA and the GDPR are largely congruent; I do not recite both where the purpose of describing those provisions is satisfied by only referring to one of them. Although the skeleton arguments, and indeed the oral submissions, dealt comparatively shortly with this issue, this part of the claim is pleaded extensively, by the Claimant at paragraphs 19 to 30 of the Particulars of Claim:

> 19. Further or alternatively, the Defendant has breached the Claimant's right to data protection as set out in Article 8 of the EU Charter of Fundamental Rights ('the Charter'); General Data Protection Regulation (EU) 2016/679 ('GDPR'); and the Data Protection Act 2018 ('the DPA').
>
> 20. Paragraphs 3 to 18 and subparagraphs thereof, above, are repeated. The Publication constituted the Claimant's personal data pursuant to Article 4(1) of the GDPR ('the Personal Data'), which by publishing those publications the Defendant processed unlawfully.
>
> 21. The following sets of operations (together 'the Processing') constituted processing of the Personal Data within the meaning of Article 4(2) of the GDPR:
>
> 21.1. The creation of and contribution towards the Publication insofar as the information created and provided pertained to the Claimant and his conduct;
> 21.2. The retention of the Personal Data on the Defendant's computer systems (including smartphone(s)); and/or
> 21.3. Any other use of the Personal Data by the Defendant.
>
> 22. At all material times the Defendant was the data controller within the meaning of Article 4(7) GDPR in respect of each of these processing operations. Further or alternatively she was the data processor.
>
> 23. To the extent that the Allegations relate to (alleged) criminal offences, the Personal Data constitute special category data as per section 10 of the Data Protection Act 2018 and Article 10 GDPR, for which the Defendant had no exemption under any of Parts 1, 2 or 3 of Schedule 1 Data Protection Act 2018.
>
> 24. By the Processing of the Personal Data the Defendant acted in breach of Article 8(2) of the Charter as well as her statutory duty pursuant to Articles 5 and 10 of the GDPR to process the Personal Data in accordance with the data protection principles, and in particular:
>
> 24.1. in breach of Article 5(1)(a) of the GDPR, the Defendant's processing was unlawful and unfair;
> 24.2. in breach of Article 5(1)(d) of the GDPR, the Defendant's processing was inaccurate;
> 24.3. in breach of Article 5(1)(b) of the GDPR, the Personal Data were not collected for specified, explicit and legitimate purposes;
> 24.4. in breach of Article 10 of the GDPR, the Personal Data (to the extent that they related to (alleged) criminal offences) were not processed only under the control of official authority or in circumstances where the processing was authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects; and
> 24.5. In breach of Article 17(1) of the GDPR the Defendant failed to erase the

Claimant's personal data without undue delay despite being on notice that the Claimant did not consent to the Processing and in fact objected to it and that the data were being unlawfully processed.

PARTICULARS

25. The Claimant did not consent to any of the Processing. Had the Claimant's consent been sought, he would have refused to provide it.

26. There was no other lawful basis for the Processing under Article 6 of the GDPR.

27. The Processing was manifestly unfair. At no stage prior to or during the Processing was the Claimant informed as to the Processing which would be taking place in respect of the Personal Data.

28. The Defendant failed to correct or supplement the inaccurate data *"without delay"* as required by article 5(1) of the GDPR or indeed, at all.

29. The Defendant failed to cease processing the Claimant's personal data, even after being put on notice by the Claimant's letter before action dated 19 August 2020 that the Processing was unlawful and that he did not consent to it and objected to it.

83. The Defence (to which no amendment is sought) responds to this allegation is as follows:

23. The generic assertion at paragraph 19 is embarrassing for want of particularity.

24. As to paragraph 20, it is admitted that the words spoken constituted the Claimant's personal data. It is denied that the Defendant was a 'processor' pursuant to Article 4(2) of the General Data Protection Regulation (EU) 2016/679 ("GDPR"). Paragraphs 8, 9 and 13 above are repeated.

25. As to paragraph 21, it is denied that the Defendant was a processor. As a matter of law, her actions as already pleaded fell squarely outside of the Article 4(2) GDPR definition. In particular, but without prejudice to the generality of the foregoing:

i. As to paragraph 21.1, there was no such thing as the 'creation' of information for the interview. The Claimant was asked questions by Mr Attwood about her documentary, PIP, and she answered those questions;
ii. Paragraph 21.2 and 21.3 are embarrassing for want of particularity. The Claimant fails to plead which information and which device he is referring to. The Defendant cannot plead back to this. The Defendant did not record the interview containing the words complained of; she has no access to it as she never stored it in a digital form.

26. Paragraph 22 is denied. The Defendant did not determine the purposes and means of any processing, contrary to the Article 4(7) GDPR. Paragraphs 8, 9, 13 and 24 above are repeated. The Claimant fails to plead which 'processing operations' he is referring to.

27. Paragraph 23 is denied. The Claimant has failed to plead which of the words complained of related to allegations of criminal offences and therefore allegedly constituted special category data pursuant to s.10 of the Data Protection Act 2018 ("the 2018 Act").

28. Alternatively, if (which is denied) the Defendant is found to have been a processor and/or controller (of special category data or otherwise), it is denied that the Defendant has acted in breach of statutory duty, whether as alleged in paragraph 23 or at all.

29. The Defendant will rely on the exemption arising from Article 85(2) GDPR (for reasons of freedom of expression and information) implemented into paragraph 26, Schedule 2 of the 2018 Act. The Defendant's actions fell within the 'special purpose' of journalism pursuant to exemption

26(1)(a) and were accordingly exempt from Article 10 GDPR because the criteria in exemption 26(2)(a) and (b), 26(3), 26(4) and 26(9) applied. Paragraph 22 above is repeated.

30. In the further alternative, any such processing met the requirement in Article 10 GDPR because conditions contained within Parts 2 and 3 of Schedule 1 of the 2018 Act apply:

i. It fell within the special interest paragraph 13 of Schedule 1 of the 2018 Act;
ii. It related to personal data which had already been manifestly made public by the Claimant, the data subject, pursuant to Article 9(2)(e) of GDPR and/or paragraph 32 of Schedule 1 of the 2018 Act. Paragraph 19(vii) above is repeated.

31. For the reasons pleaded at paragraphs 23 to 30 above, paragraph 24 to 29 are denied in their entirety. Because the Claimant has failed to specify what the act(s) of processing and controlling are alleged to be, the pleading is embarrassing for want of particularity. In any event, pursuant to paragraph 26, Schedule 2 of the 2018 Act, the Defendant has at all material times been exempt from the provisions of the GDPR relied upon by the Claimant. In the circumstances, even had the Defendant been the processor and/or controller at the (unspecified) time(s), the application of Articles 5 and 10 of the GDPR would have been incompatible with the Defendant's special purpose.

PARTICULARS OF EXEMPTION

i. The Defendant was at all material times acting in a professional capacity in her occupation as a journalist;
ii. The Defendant was being interviewed about her work involving people associated with Parliament or the establishment generally, such as Prince Andrew, Jeffrey Epstein and Jimmy Savile, and allegations of inappropriate behaviour, including sexual abuse, made against them. During the interview, the Defendant emphasised the importance of alleged victims feeling they could come forward with their allegations;
iii. The Defendant was asked about the allegations made by Ms Baker against the Claimant. The Defendant explained that allegations of sexual abuse had been made against the Claimant which were, in fact, disputed by the Claimant, and that she was not passing judgment as to the truth or falsity of those allegations;
iv. The Defendant explained that Ms Baker had been subjected to stalking and trolling since making her allegations. She likened it to threats and harassment she had also been subjected to for reporting about such issues;
v. All of the above matters were already in the public domain;
vi. In the premises:
a. At all material times, the Defendant reasonably believed that her answers to the questions she was asked would be in the public interest;
b. The Defendant complied with Article 5(1)(a) of the GDPR in that processing was lawful under Article 6(1)(e) and/or (f), being necessary for the legitimate interests of the Defendant as a journalist acting in the public interest which were not overridden by the fundamental rights or freedoms of the Claimant as a data subject; and
c. The Defendant's conduct as set out above was compliant with Clause 1 of the Independent Press Standards Organisation's Code of Practice, and, further, Clause 2, qualified as that clause is by the clause permitting publication of private (or in this case, public) matters in the public interest.

32. Further, as to paragraph 29, it is denied that the Claimant's Letter Before Action dated 19 August 2020 alleged unlawful processing. The Claimant chose not to pursue any allegation in data protection law in his Letter Before Action dated 19 August 2020.

84. The Reply responds to this at length, and I refer to it where necessary. Upon scrutiny, a number of substantive points emerge here. It is only if the Claimant succeeds on all of them, by showing that the Defendant has no real prospect of success, that summary judgment will lie. If the Claimant cannot do this, but shows that the line of defence put forward on any of them is hopeless as a matter of law, then that line of defence may be

struck out (or summary judgment given) discretely. The issues appear to me to be the following:

(a) is paragraph 23 of the Defence correct in contending that paragraph 19 of the Particulars of Claim is "embarrassing for want of particularity"?

(b) was the Defendant a "controller" and/or a "processor" of the Claimant's personal data within Articles 4(7) and 4(2) respectively of the GDPR, by creating and contributing towards the Video in relation to the Claimant and/or by retaining his personal data on her computer systems (including smartphone(s)) and/or by "other personal use of the Personal Data" by her?

(c) if so, of what precise personal data was the Defendant a processor?

(d) to what extent (if any) did the Defendant refer to (alleged) criminal offences, so as to render the Personal Data special category data for the purposes of section 10 of the DPA and Article 10 of the GDPR and accordingly excluded from exemption under any of parts 1, 2 and 3 of Schedule 1 to the DPA?

(e) does the Defendant's case that she is entitled to rely on exemptions in Schedule 1 to the DPA (which is attached to section 10 of the DPA, which in effect provides for exemption, or "authorisation", if certain conditions spelled out in Schedule 1 are met) have a real prospect of success?

I consider each of these points in turn.

85. (a) is paragraph 19 of the Particulars of Claim "embarrassing? I see this as a general introductory averment (described in paragraph 75 of the Reply as a "preamble"), which does not fall to be considered in isolation, but rather together with the following paragraphs. But - particularly given that this point is made in relation to specific pleadings - I do not see it as appropriate to strike out paragraph 23 of the Defence.

86. (b) was the Defendant a "controller" and/or a "processor" of the Claimant's personal data? These have regulatory definitions in Article 4 of the GDPR, namely:

> (1) 'personal data' means any information relating to an identified or identifiable natural person ...
>
> (2) processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;
>
> ....
>
> (7) 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data;

> where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;
>
> (8) 'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;

The definitions of these words in the material part of the DPA are to the same effect.

87. The first sub-issue here is whether the acts of the Defendant amounted to "processing" of the Claimant's personal data. One would ordinarily understand the concept of "any operation or set of operations" as involving doing something with the data. The qualifying clause "*whether or not by automated means, such as ...*" is arguably to be seen as (non-exhaustively) descriptive of the sort of ways in which such an operation may be carried out. It is necessary to consider the question of whether simply speaking about someone, and in doing so disclosing their personal data, qualifies as "processing" - and if mere speaking does not, then is speaking for recording and/or broadcast to be regarded any differently?

88. Since the hearing, Mr Munden has also drawn my attention to the decision of Saini J in *Scott v LGBT Foundation Ltd* [2020] 4 WLR 62. In that case, the Claimant complained that the charity to which he had reported his mental wellbeing issues, in the hope of obtaining support, passed on the personal information which he had disclosed to his GP. Saini J gave summary judgment dismissing the DPA claim (and the other ones). It is important to bear in mind that this claim was brought under the earlier DPA 1998, which had a different and more restrictive definition of "data" (see para 57 of the judgment) as

> "information which— (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose, (b) is recorded with the intention that it should be processed by means of such equipment, (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; …".

The previous Council Directive (which the DPA 1998 implemented) provided that

> "This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system."

Thus, the framework and definitions being considered in *Scott* were not identical to those which now apply.

89. But Saini J concluded that the disclosure did not concern the processing of personal data within that framework. He went on to comment at paragraphs [61-63] that

> **61** I agree with the LGBT Foundation's submission that a verbal disclosure does not constitute the processing of personal data, and thus cannot give rise to a claim under the DPA.
>
> **62** In response to the LGBT Foundation's submissions, and as I understood his argument, Mr Scott sought to argue that the material was, in effect, "stored" in Ms Lambe's mind with a view or intention to it being put into an automated record/filing system in due course, and therefore it was "data" as defined in the DPA. I reject that submission. It does not fit within the DPA scheme.
>
> **63** I should also add that I can quite see the force of Mr Scott's point (made in his written arguments and orally) that it may seem unfair that oral onward disclosure of the private information which he first orally provided to the LGBT Foundation is not prohibited. But that is not what the DPA is concerned with: it is a very specific scheme based around records and processing.

90. It seems to me that even though the old Act has been repealed, and the definitions amended, it is at the very least arguable (for summary judgment purposes) that
    (a) the underlying principle that data protection is "based around records and processing" continues to hold, and that the reference to "operations" supports that analysis, and
    (b) the list of activities in Article 4(2) indicates ways in which "operations" may be carried out, but does not in itself stipulate that doing one of those activities is necessarily or inherently an "operation" so as to constitute "processing".

    I do not consider that the contention that any conversational disclosure of "personal data", whether recorded or not, and whether broadcast or not, amounts to an "operation" is one which is so obviously correct - particularly in a developing area of law - that it can attract a summary judgment (or for that matter a strike-out of its denial).

91. The next sub-issue is that of whether the Defendant was a "controller", who (alone or jointly with others) determined the purposes and means of the processing of personal data for the purposes of the Video. Again, I consider that her argument, that all she did was participate in an interview in respect of which she did not determine "the purposes and means of the processing of personal data", stands a real prospect of success at trial. The fact that Mr Attwood did subsequently agree to comply with a request of the Defendant in respect of the Video does not justify the inference which the Claimant seeks to draw (paragraph 92 of Mr Hodson's skeleton argument) that he was obliged to do so, and that she exercised control or dominion over the extent of the publication of

the Video: indeed, the reference upon which this point relies (at p 373) comprised an email request by the Defendant to Mr Attwood to "*request that you remove everything with my name from your channel. Of course, it is entirely down to you whether you do that or not*". The fact that was couched not as a demand, but merely as a request which acknowledged Mr Attwood's autonomy, goes some considerable way towards weakening the Claimant's submission on this point.

92. (c) if so, of what precise personal data was the Defendant a processor? The Claimant does not particularise the personal data, beyond referring generally to the words in the Video of which he complains (i.e. those set out in paragraph 7 of the Particulars of Claim). There is something in the Defendant's point that this wants particularity. For these purposes, however, I am prepared to take it as referring to the allegation of Ms Baker (reported by the defendant in the Video) that the Claimant had abused her when she was a child. I would be less impressed by any suggestion (not made explicitly by the Claimant) that the email correspondence in which the Claimant made threats of legal action would amount to personal data for these purposes.

93. (d) to what extent (if any) did the Defendant refer to (alleged) criminal offences? This is relevant because section 10(4) of the DPA imposes special provisions about the processing of personal data "*referring to criminal convictions or offences*". Plainly, there was no conviction here. Nevertheless, I recognise the force of the submission that Ms Baker's allegation that she had been abused as a child, which the Defendant reported in the video, cannot be seen as other than referring to the commission of a criminal offence. (Whether or not the Defendant was "processing" such personal data does, of course, remain in issue - see paragraph 90 above - but it is only if she was that this point falls to be considered at all.)

94. The effect of this, under section 10(5) of the DPA, would be that any processing of that data would only be authorised if "it meets a condition in Part 1, 2 or 3 of Schedule 1", so as to allow the Defendant to rely on what is effectively an exemption. Part 1 relates to "employment, health and research etc", Part 2 to "substantial public interest conditions", and Part 3 to "additional conditions relating to criminal convictions etc". The Defendant relies on three exemptions, namely the "special purpose" of journalism (paragraph 26 of Part 2),

95. (e) - exemptions provided for by the DPA The Defendant refers to three specific provisions in Schedules 1 and 2 to the DPA, which are

(i) the special purpose" of journalism so as to be entitled to the exemption set out in Article 85(2) of the GDPR (paragraph 26 of Schedule 2 to the DPA),

(ii) the special interest provision of journalism "in connection with unlawful acts and dishonesty etc" (paragraph 13 of Schedule1); and,

(iii) paragraph 32 of Schedule 1, concerning "Additional conditions relating to criminal convictions etc", which provides that "this condition is met if the processing relates to personal data which is manifestly made public by the data subject".

Schedule 1, annexed by section 10, deals with exemptions in relation to (alleged) criminal acts; and schedule 2, annexed by section 5, contains general exemptions.

96. **Paragraph 26 of Schedule 2:** This provides for general exemptions from the GDPR. The relevant parts of paragraph 26 upon which the Defendant relies are:

> 26(1) In this paragraph, "the special purposes" means one or more of the following—
> (a) the purposes of journalism; ...
>
> (2) Sub-paragraph (3) applies to the processing of personal data carried out for the special purposes if—
> (a) the processing is being carried out with a view to the publication by a person of journalistic, academic, artistic or literary material, and
> (b) the controller reasonably believes that the publication of the material would be in the public interest.
>
> (3) The listed GDPR provisions do not apply to the extent that the controller reasonably believes that the application of those provisions would be incompatible with the special purposes.
>
> (4) In determining whether publication would be in the public interest the controller must take into account the special importance of the public interest in the freedom of expression and information.

She also relies on paragraph 26(9), the effect of which is to confirm the exemption from provisions as to processing when any of the "special purposes" applies.

97. For the purposes of this judgment, I do not accept that the Defendant has no real prospect of success of maintaining that:

(a) the purpose of the interview was a journalistic one (and although in his Reply the Claimant merely acknowledges in paragraph 6 that the Defendant "purports

to be a journalist", and sets out in paragraph 73 detailed criticisms of her professional practices, I cannot definitively conclude on a summary judgment application that she was not one);

(b) this interview was being carried out with a view to publication of journalistic material - effectively, one journalist interviewing another; or

(c) the Defendant believed that the publication of the material would be in the public interest. Again, the Claimant contends that any such belief was not a reasonable one, and relies in paragraph 80 of his Reply on the matters set out in paragraphs 62 - 74. I have dealt with this contention in paragraphs 81 and 82 above.

But on this last point, it must be noted that the reasonable belief must be that of the "controller": here, the Claimant alleges that the Defendant was the "controller" (or "joint data controller with Mr Attwood" (para 92 of Mr Hodson's skeleton argument), although the Defendant denies this. But to get this far, the Claimant needs to have shown that the Defendant was at least a processor, and possibly a controller. (It may be that if it was Mr Attwood alone who was the "controller" for these purposes, then it would have to be his belief as to public interest that was reasonably held in relation to the publication of the Video.)

98. These are not straightforward points. There are proper grounds for the contention that publication of the Video generally, and in particular insofar as it concerned the Claimant, was "in the public interest", and was believed by both the Defendant and Mr Attwood at the time to be so. Whether those were in fact the case, and whether that belief was reasonably held, are matters for trial, not for summary judgment.

99. I should add that the Claimant also points to sub-paragraphs 26(5) to (8), which require the controller, in determining whether it is reasonable to believe that publication is in the public interest, to have regard to any of the listed codes of practice or guidelines which are applicable to the publication in question, these being BBC Editorial Guidelines, Ofcom Broadcasting Guide, and Editors' Code of Practice. The parties disagree (Defence, Particulars under paragraph 31(vi)(b) and (c) (pp 153-154); Reply paragraphs (3 and 94 (p 178)) as to whether or not the Defendant was in compliance with the IPSO Code. If this Code was applicable to

this publication of the Video, it is not possible to conclude for summary judgment purposes that the Claimant has established that the Defendant failed to have regard to it.

100. I should point out that there is an argument that this provision does not apply at all, at least not when the processing is of personal data "relating to criminal convictions and offences or related security measures that is not carried out under the control of official authority...". The reason for this is that whereas section 15 of the DPA (which annexes Schedule 2) is of general application, section 10 - and in particular subsections 10(4) and (5) - which imports Schedule 1, deals with special categories and seems to me capable of involving a derogation from the generality of section 15 and Schedule 2. This is an argument which was not put to me, and there is room for debate here as to whether any personal data which the Defendant may be shown to have processed (or controlled) did actually "relate to criminal convictions or offences", as opposed to the mere reporting of an allegation. However, I do not see this argument as strong enough to allow for summary judgment or strike-out in relation to this line of defence.

101. **Paragraph 13 of Schedule 1:** this sets out the special interest provision of journalism "in connection with unlawful acts and dishonesty etc", which provides for present purposes (and I summarise) that there is an exemption to the general prohibition if processing of data in relation to the alleged unlawful (or other seriously improper) act of a person is

(A) carried out for the purposes of journalism;

(B) carried out with a view to the publication of that data; and

(C) necessary for reasons of substantial public interest, in circumstances where the controller reasonably believes that publication of the personal data would be in the public interest.

102. The Reply complains (paragraph 82) that the facts relied on by the Defendant are not pleaded, and that the criteria in paragraph 13 are not made out..

103. The Defendant's difficulty is that even if the particulars have to be pleaded in detail for this to provision to be properly put in issue (and I would not want any of these

extensive Statements of Case to be longer than they already are), any necessary reference to the criteria do emerge, not least in the Particulars of Exemption under paragraph 31. The Defendant has repeatedly put forward her case that this interview and its publication were for the purposes of journalism, and she acknowledges that the Video was to be published, she explains the substantial public interest (such as giving a voice to those who have been abused, and holding the powerful to account) which made it necessary for her to speak out on these matters. She has a real prospect of success on all of these. As for reasonable belief, the points are congruent with those with which I have dealt in paragraphs 97 and 98 above, and I do not need to repeat my conclusions.

104. **Paragraph 32 of Schedule 1:** this is in Part 3 of Schedule 1, which is headed "Additional conditions relating to criminal convictions etc", and it provides that "this condition is met if the processing relates to personal data which is manifestly made public by the data subject".

105. Here, the Defendant relies on the Claimant's statement and newspaper (both paper edition and online) interviews referred to in paragraphs 13 and 14 above - see Defence paragraph 30(ii). The Claimant's riposte appears in paragraphs 83 to 85 of his Reply:

> 83. As to paragraph 30 of the Defence, as to (ii) it is denied. The personal data was not manifestly put into the public domain by the Claimant, who did not 'out' himself. It was put into the public domain by others and the Claimant was forced to respond.
>
> 84. The Claimant had not named himself to the public at large before 5 September 2017. The police had kept him nominally anonymous, but there had been considerable stress and jigsaw identification, for example by the journalist David Hencke referring to the anonymous accused (the Claimant) as being a Liberal Democrat MP, aged 55, a Birmingham politician and musician. In a television piece on Welt Spiegel on broadcast on 16 August 2016 the Claimant was identified as a Birmingham politician by the broadcaster. The Claimant had been subject to harassment and death threats as a result of the allegations, for example by Declan Canning who was later convicted.
>
> 85. As a result, by the time the Claimant commented his identity was already in the public domain, on the internet and in the death threats he received.

106. These assertions may be correct. The fact remains that the Claimant did choose to publicise these allegations, albeit for the purpose of rejecting them, and thereby made them public (I am not sure that the word "manifestly" adds anything in this particular context). It is not so obvious that paragraph 13 is incapable of application here that a strike-out or summary judgment can lie, so as to remove it altogether from contention.

107. It follows from the above that the Claimant is not entitled to summary judgment, or to a striking out, in respect of any part of the GDPR/DPA part of the Defence.

(h) The Counterclaim - Harassment

108. The Claimant (and he is the only defendant to the Counterclaim who applies for summary judgment or strike-out) makes a number of criticisms of both the substance of the harassment claim, and of the way that it is pleaded. A number of amendments to this Counterclaim have been made, and accepted (subject to this application) by the Claimant. I therefore consider the amended Statement of Case.

109. Both counsel have referred me to case law, Mr Hodson with a view to showing that alleged harassment worse than that alleged here does not amount to a proper claim, and Mr Munden in order to demonstrate that alleged harassment which is not as severe as that alleged here can amount to a proper claim. With respect to both of these sets of submissions, I am left concluding that the matter is fact-sensitive, and that it is necessary to consider whether the allegations pleaded in relation to the Claimant (whether jointly or severally) may amount to a course of conduct where he may be taken to know that it did so, or ought to have known this in the sense that a reasonable person in his position would think the course of conduct amounted to harassment of the Defendant - section 1 PHA.

110. Furthermore, Mr Hodson reminds me of the "*oppressive and unreasonable*" (or "*oppressive and unacceptable*") test, as summarised in cases such as *Conn v Sunderland City Council* [2007] EWCA Civ 1492.

111. I do not consider it a flaw that some allegations are made against one (or two) of the defendants to the Counterclaim, but not against all three. The Defendant identifies, in respect of each allegation, which of the defendants to the Counterclaim is or are said to be responsible for it. It must be open to a party to complain that all three have harassed her, but not always together: a trial judge can separate out the extent (if any) to which each party is liable for any individual act, decide whether and to what extent each party is therefore responsible for a course of conduct, and award different levels of damage reflecting the harassment for which each party is found to be responsible.

112. In relation to the Claimant, the allegations in the Particulars of Harassment under paragraph 43 of the Amended Defence and Counterclaim are (in summary) that he:

(a) was party to the publication of a podcast on 15 October 2020 by the Third Party (under the name "Matthew Hopkins, Witchfinder General") entitled "Episode 8 - Brand New Tube's Data Protection Breaches, Muhammad Butt and Sonia Poulton " ("the Episode 8 Video"). The Claimant admits this (Reply and Defence to Counterclaim paragraph 134). She complains that the podcast refers to the Claimant's libel action against the Defendant, asserts that the Defendant had "*been making extreme statements about people for years. Whilst we are committed, of course, to only using legal means to deal with her...it may be that others will be less law-abiding*", and contained other threatening material - sub-paragraph (viii);

(b) re-tweeted the Episode 8 Video to the Defendant on 16 October 2020, so as to re-publish it to a far greater audience - sub-paragraph (x);

(c) sent an email to the Defendant on 20 October 2020, telling her that she was under police investigation for many offences, including malicious communications over her "apparent attempt to procure the murder of a law graduate who is assisting as my lay advisor" (meaning the Third Party) and suggested she remove certain tweets and retweets about him, adding that the Third Party had also "opened up legal correspondence with YouTube's legal team about the existence of your two channels". The Defendant regarded this as showing that the Claimant and the Third Party were working together (which she had not known) and were seeking to threaten her "wellbeing, livelihood and liberty" - sub-paragraph (xiii);

(d) acted in concert with the Third Party and the Fourth Party to "*vex and harass the Defendant under the guise of "legal correspondence" or "news articles" about the vast amounts of litigation they each generate. They blur the line between litigation and acts which by themselves constitute harassment. They create rather than report news. They pass information amongst themselves in relation to these proceedings and their respective legal proceedings, primarily to Mr Smith to publicise online. He will then publish the updates in a menacing manner, to pressurise and bully the Defendant into submission to each of the spurious allegations currently being litigated by each of them*". A number of examples are given, but the one that is particularly striking is in an email of 5 November 2020

from the Claimant to the Defendant's then solicitor Mr O'Donnell, referred to in sub-sub-paragraphs (xiv) e. and f.:

> "*You should also not assume that Mr Smith is to be taken lightly… Mr Smith is also a Conservative Party member and has some influence with various senior MPs. Mr Smith restored Mr Shapps career by having him exonerated of smearing cabinet colleague on YouTube. I believe your behaviour is making him concerned about your suitability as a candidate – I know you have Parliamentary ambitions so best not to be too closely associated with maniacal anti-Semites and conspiracy theorists*"

and suggesting that if the Defendant's solicitor was acting on a reduced rate or pro bono "*the court is likely to conclude you are an interested funder and liable for the costs."* - sub-paragraph (xiv);

(e) wrote on 17 January 2021, on behalf of himself and the Third and Fourth Parties jointly, to threaten wasted costs orders against the Defendant's solicitor and barrister (who was pregnant, and is said to have withdrawn within three hours - although there is evidence that this was rather for personal reasons, on medical advice); and subsequently made clear to Mr O'Donnell that he would not pursue his threatened wasted costs order if Mr O'Donnell completely ceased to act for the Defendant (which he did). The Defendant draws an inference that the intention of the Claimant, Mr Smith and Mr Laverty was not in reality to seek wasted costs, but rather to ensure that the Defendant lost her legal representatives - sub-paragraph (xviii);

(f) on 7 April 2021, posted on Twitter of the Defendant: "*The fact is that she promotes false allegations. Inciting violence against innocent people is not the act of someone committed to truth." In response to a comment by a third party that "She doesn't incite violence. Show me one instance where she has done that", the Claimant responded: "Promoting false allegations of child abuse incites violence. She [the Defendant] promotes false allegations of child abuse*." - sub-paragraph (xx).

Some of these are said to have contained additional threatening components.

113. Thus, the complaint is of six incidents (although that in (d) above is sub-divided into a number of items), the first four of them within one three-week period. Mr Hodson submits that it is misconceived and audacious to suggest that dealings with legal

advisors can amount to harassment. I do not see why this should be so as a matter of principle: if unpleasantness and pressure are filtered through an agent before reaching the principal, that does not inherently diminish their impact; and when that unpleasantness and pressure is directed personally at the agent, with a personal threat that he should cease to represent that principal for own benefit or advantage, that seems to me to be perfectly capable of constituting harassment of the principal (regardless of whether it might also be harassment of the agent).

114. Mr Hodson points out that there was "*a back and forth between the parties about the numerous issues between them*" (paragraph 102 of his skeleton argument). That may be correct. But that fact alone does not inherently preclude the possibility of one party overstepping the boundary into the terrain of harassment; and it may be that one item, viewed on its own, may be seen as harmless, but when viewed in context as part of a course of conduct, it is capable of acquiring additional weight which, again, may take it into that terrain.

115. I regard it as at least properly arguable that the matters alleged against the Claimant, taken together, are capable of amounting to a course of conduct of harassment by him, intended (at least in part) to pressure the Defendant into silencing herself, which involved a mixture of threats (in relation to legal proceedings and otherwise), criticisms, and pressure on her legal representatives - and, for the avoidance of doubt, this latter is capable of constituting harassment regardless of whether or not the legal representatives do withdraw. I add that I would not find it hard to attach the label "*oppressive and unreasonable*" or "*oppressive and unacceptable*" to the email of 5 November 2020 sent by the Claimant to the Defendant's solicitor, warning about his personal parliamentary aspirations (p AB43). Mr Hodson makes the point that the witness statement of Mr O'Donnell (the Defendant's former solicitor) does not confirm that he withdrew because of this threat, or even that he observed that it caused distress to the Defendant; but I do not see these points as material for the purposes of summary judgment or strike-out.

116. I agree with Mr Munden (paragraph 72 of his skeleton argument) that the Claimant's factual responses on these issues are "*plainly not appropriate for summary*

determination". I do not consider that the Defendant has no real prospect of succeeding against the Claimant in her harassment claim.

117. The Claimant's application in relation to the (Amended) Counterclaim does not succeed.

Discrete points raised for strike-out purposes

118. The Claimant in paragraphs 7 to 11 of his witness statement of 23 January 2021 raises some additional procedural points about the Defence and Counterclaim with which I should deal:

(a) he complains that the Defence and Counterclaim is over 25 pages but was not accompanied by "an appropriate short summary" as required by CPR 16PD paragraph 1.4. Whilst this is correct, it is not of great consequence, and I have not considered it necessary to direct the filing and preparation of such an additional document. More generally, I have noted that the statements of case generally have been longer and fuller, and containing more comment, than is desirable. I would remind all parties of the requirement, set out in practice direction B to CPR Part 53 (which deals with media and defamation cases) that

> 2.1 Statements of case should be confined to the information necessary to inform the other party of the nature of the case they have to meet. Such information should be set out concisely and in a manner proportionate to the subject matter of the claim.

It may at some future point be necessary to require the parties to compile a structured List of Issues so as to assist in the exercise of control over these proceedings;

(b) he suggests that the Defence and Counterclaim did not contain a properly worded Statement of Truth, as the wording used was for that of a legal representative rather than a self-representing party. I do not see this as more than a slight confusion whereby the Defendant refers to herself as "the Defendant" instead of simply "I". This was of negligible consequence, and in any event has now been remedied in the amended version (p AB35);

(c) he criticised what he calls a "heavy reliance on referential pleadings". Use of these can be a convenient way of avoiding repetition and prolixity (of which he also accuses the Defence and Counterclaim), and I note that the Claimant

himself has used these himself in his Reply and Defence to Counterclaim. Indeed, use of these is sometimes necessary if the length of the statement of case is to be kept to manageable size (ideally, under 25 pages). I do not consider that there is anything here which assists the Claimant.

119. In any event, none of these - whether taken individually or together - would justify a strike-out in this case.

Conclusion

120. The effect of the above is that:

(a) the Claimant's application for summary judgment is refused;

(b) the Claimant's application for strike-out of the Defence and Counterclaim is refused, save to the limited extent of striking out

(i) sub-paragraphs (xi) to (xv) of the Particulars of Truth under paragraph 19 of the Defence, and

(ii) paragraphs 20 and 21 (the honest opinion plea);

but in each case, subject to there being permission for the Defendant to deploy those averments elsewhere in the Amended Defence where they were previously incorporated by reference, if they are relevant;

(c) the Defendant's application to amend is successful, save that the proposed new introductory sub-paragraph (i) of paragraph 19 is disallowed.

Deputy Master Bard

11 June 2021 (revised 15 June 2021)