Neutral Citation Number: [2023] EWHC 2626 (KB)

Case No: QB-2020-004248

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2023

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

SIOBHAIN CROSBIE	**Claimant/Part 20 Defendant**
- and –	
CAROLINE LEY	**Defendant/Part 20 Claimant**

- -
- -

Janaka Siriwardena (instructed via **Direct Access**) for the **Claimant**
Gervase de Wilde (instructed by **Brett Wilson LLP**) for the **Defendant**

Hearing dates: **21-22 March 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. In this action the Claimant, Siobhain Crosbie, sues the Defendant, Caroline Ley, for passing off. The Defendant counterclaims under CPR Part 20 against the Claimant for defamation, harassment and under the GDPR (Regulation (EU) 2016/679). Mr de Wilde for the Defendant accepts that if I find for her on defamation/harassment then I need not decide the GDPR claim.

2. The amount pleaded in the Particulars of Claim (PoC) by way of loss and damage is £1,422,418.80, plus interest under s 35A of the Senior Courts Act 1981 of £456,109.31 and continuing at a daily rate of £311.76.

3. The background is as follows.

The Claimant's claim

4. The Claimant and the Defendant are both therapists/counsellors. The Claimant qualified in 2003. She founded and runs a psychotherapy/counselling practice called APS Psychotherapy and Counselling (APS) which operates from premises in The Shrubberies, South Woodford, E18 1BG (the Premises). It has been in business for some years. The Premises has treatment rooms which – at least at one time - the Claimant rented and which were used by other self-employed therapists (and who paid the Claimant). She used one of the rooms for her own practice.

5. The Claimant and the Defendant were formerly friends. They met on holiday in 2005 and stayed in touch. The Defendant decided to retrain as a therapist/counsellor. She did part of her training with the Claimant. In about 2010/11 the Defendant worked from the Premises before moving out to work elsewhere in early 2012.

6. The Defendant now has a therapy practice, Cherry Tree Therapy Centre, based in Buckhurst Hill, Essex. Prior to that she traded under the style Buckhurst Hill Counselling and Psychotherapy (BHCP). She registered the domain name buckhursthillcounselling.co.uk in May 2010, shortly before she qualified. She also had another website and trading style (Transitional Therapy/www.transitionaltherapy.co.uk) at some stage. She was also listed on APS website after she qualified.

7. The Claimant alleges that the Defendant passed off BHCP as the Claimant's business by creating a listing on 'Google Places' for BHCP (this service has since been rebranded by Google, becoming known as Google+ Local (2011), Google My Business (2014) and more recently, Google Business Profiles (2021)), but also using the Claimant's trading style and web-address for APS, and the postcode of the Premises, with a 'Call' button which when clicked or 'pressed' would bring up the Defendant's phone number.

8. The Claimant also alleges that the Defendant created an entry in an online directory called www.psychotherapyexperts.co.uk (Psychotherapy Experts) using the Claimant's trading style but with the Defendant's telephone number.

9. The Claimant's case is that these two things harmed her business and caused her financial loss. She says that because of what the Defendant did, potential clients of APS who were looking for it (or her) online on Google were diverted to the Defendant's practice instead.

10. Paragraph 13-17, of the PoC aver:

> "13. On 26 March 2016, the Claimant discovered a listing in the name of APS in the Psychotherapy Experts directory (www.psychotherapyexperts.co.uk). This listing had been created by the Defendant without the consent, permission or knowledge of the Claimant. The Defendant, when making the entry, had stated her direct telephone number instead of the Claimant's contact details. It is averred that, if this entry was created before the Defendant's departure from APS, she failed to take any steps to amend the contact details associated with this entry after leaving APS.
>
> 14. Following this discovery, again in late March 2016, the Claimant found a Google directory entry in the name of APS. Whilst it contained the address of the Premises and the web address for APS, it listed the Defendant's direct dial as the main contact number.
>
> 15. Following discussions with Google, the Claimant eventually found out on 13 October 2016 that the Google entry had been created in 2011 using the email address info@transitionaltherapy.co.uk (a domain name associated with the Defendant's business).
>
> 16. It is averred that the Google directory entry (and the inclusion of the Defendant's telephone number) had been created by the Defendant without the consent, permission or knowledge of the Claimant.
>
> 17. These directory entries unwittingly redirected prospective clients seeking to contact APS. It is averred that these entries, after the Defendant's departure from APS, misrepresented her association with the Claimant's business to prospective clients and / or members of the public.
>
> 18. The Defendant sought to pass of her practice as APS in that:

PARTICULARS OF PASSING OFF

> a. the Defendant knowingly misrepresented to prospective clients / members of the public her association with APS hen creating the entries in the Google and Psychotherapy Experts directories with her own contact details and/or failing to amend the same upon her departure from APS; the Defendant knowingly misrepresented to prospective clients/ members of the public her association with APS."

11. The Defendant denies ever having created either entry (and thus also that she culpably failed to amend them). She says the best she has been able to discover is that somehow Google's software 'merged' her BHCP listing with that of the Claimant's APS listing as the result of a 'bug' or glitch, to produce a merged business listing showing details of both of the other listings. This merged listing was then later automatically incorporated into the www.psychotherapyexperts.co.uk website when it began to operate at some point after February 2016 (which is when that domain name was registered).

12. The Defendant says she was unaware of either matter until the Claimant contacted her towards the end of March 2016, and that (having tried to amend the merged listing) she simply deleted it. After being made aware of the problem in 2016, and then subsequently threatened with these proceedings, the Defendant obtained evidence to show that merged business listings was a known problem on Google.

13. Paragraphs 18(b)(i) and (ii) of her Defence and Counterclaim aver:

> "(i) As to Google, the Defendant did not create a listing that represented herself as APS or part of APS. The only relevant listing she created referred to her working at the address of the Premises. Any merger of her listing with the Claimant's trading name or website was not created by her. The Defendant does not, for the avoidance of doubt, suggest it was likely to have been created by the Claimant. Any such merged listing appears to have been the result of an erroneous automated process by Google which affects some businesses which have shared the same address, this being a known problem with Google's processes.
>
> (ii) As to Psychotherapy Experts, the averment that the Defendant created the listing is false. Incorrect information was copied from the Google listing by the website publishers after they launched the website in 2016. The listing on psychotherapyexperts.co.uk did not exist until 25 February 2016 at the earliest."

14. Hence, put simply, the Defendant says what happened with the listings was nothing to do with her, and she denies passing off. She also disputes the goodwill and damage elements of the tort, which I will come to later.

The Defendant's counterclaim

15. The Defendant's counterclaim relates to social media posts on Facebook and Twitter made by the Claimant from 2016 onwards in which she alleged, among other things, that the Defendant had committed fraud by passing her business off as that of the Claimant, and that she was dishonest and a risk to the public. The posts included threats of violence to the Defendant.

16. In respect of defamation, the four publications complained of are the following: numbers 41 (23B); 42 and 43 (23C(i) and (ii)); and 45 (23E), on the Schedule prepared by Mr de Wilde. They are as follows.

17. *No 41/23B*: on 24 May 2020, the Claimant published a page headed 'Protection of the public' on the gofundme.com website at the URL https://www.gofundme.com/f/protection-of-the-public?stop=1 (the GoFundMe page) which displayed the Defendant's mobile telephone number and stated (Core B/p917):

> "In 2016 I discovered a psychotherapist had committed cyber fraud on my organisation. The metropolitan police completed a full investigation under the rules of cyber fraud yet despite an admission under caution, they do not have the funds to prosecute so suggested a civil action. Due to the amount of police estimation of losses a civil hearing cost £10,000. If you believe justice ought to be done and the protection of the public imperative I ask you to support me in raising the funds to take her to court. The photo beneath is the google listing reflecting her telephone number and my website taken from the drop down menu on Google. Google since took over the listing and amended it. She needs to be prosecuted for cyberfraud and I would like the public protected."

18. On the same day she published the following on Twitter to a user 'Colour Purple Therapy' who had forwarded or liked the GoFundMe page (Core B/p930):

> "Thank you. This needs resolving and bacp refuse to do anything until the legal matter has ended. Caroline Ley of cherry tree therapy in Buckhurst Hill. She admitted under caution her actions Liz. Still practicing and many therapists rent from her!
>
> #Google do not cooperate unless the #MLAT treaty is implemented. #metpolice do not have the funds to implement it despite her admittance under police caution by

the cyber crime squad. :(I've contacted @CressidaDick sends me straight back to CybercrimeCID."

19. *No 42 (23C(i))*: on 24 May 2020 the Claimant published a post on the APA Ayanay public Facebook page stating (Core B/p936) (the Claimant is founder and director and CEO of APA):

> "Frances Geis long time to come to terms with, but I have nothing left to lose. I lost what I was building. And clients are not safe with any therapist that commits the level of fraud she did. Caroline ley of Cherry Tree Therapy in Buckhurst Hill. I spent 2017 investigating her alongside the cyber crime squad. Cancer took over. She needs stopping."

20. *No 43 (23C(ii))*: on 24 May 2020 the Claimant published the following post on the APA Ayanay public Facebook page (Core B/p942):

> "Mandi Martin thank you. I am never comfortable exposing anyone to the degree I have decided to do here. I literally have no choice other than to attempt to raise £10,000 to submit the case to a civil court Mandi. The protection of clients is my greatest concern. In 2016/17 I spent months working with the cyber crime squad only to be informed they did not have the funds to proceed. I spent a lot of money on a private solicitor which resulted in caroline ley somehow printing off 42 sheets of comments made by therapists in a fb group as well as no real defence. Objective make my solicitor charge a fortune to peruse over 100 a4 sheets. This is my last attempt to get her into court and it recognised that she has committed the criminal act of fraud and over a period of 5 years. Cancer took over and so did APA, but I'm back onto this as clients need to be fully aware of the danger. She cannot be allowed to commit a criminal act to the tune of £1.8 million pound over 5 years and get away with it. The link to my pp is above and the gofundpage is there. I would appreciate it being shared by everyone. We all have a duty to protect clients."

21. Mandi Martin had written (Core B/p941):

> "This is awful to read Siobhain. Shocking! I'm so sorry that this happened to you and - as many have stated above - feel concerned that the culprit is possibly at large with clients?"

22. *No 45 (23E)*: on 25 May 2020, the Claimant published or caused to be published a Google review of the Defendant's business, the Cherry Tree Therapy Centre, in the name of APA (Core B/p1005):

> "The cherry tree therapy centre was set up by Caroline Ley who as a newly qualified therapist in 2010 had a placement in my organisation, she proceeded to set up a Google listing without my knowledge or consent and break Googles own protocols by placing her own mobile number underneath the Google CALL button. To all intent and purpose any member of the public pressing the call button would have assumed they were ringing my organisation as it was my website. Yet they were redirected to herself. She has been interviewed by the cyber crime squad and admitted to advertising herself this way, therefore committing the criminal act of Fraud. The police do not have the funds to prosecute her and I am taking her to a civil court. She did not inform her membership organisation she was under investigation by the cyber crime squad as ethically required to do so and for the sake of transparency. Crime ref 4406354/16 She takes no responsibility for this act and she cannot prosecute me for defamation of character as the evidence is [clear] combined with a statement under caution admitting she was advertising herself! If she wishes to settle out of court this has also been offered yet she refuses to accept responsibility and is unwilling to negotiate a settlement. Please be aware of seeing any therapist that has committed a criminal act of Fraud and Misrepresentation to the Public. Utilising another therapists organisation and over riding the main telephone line to the company is wholly unethical and illegal. Furthermore she directed clients via Google maps from my company directly to Cherry Tree Therapy. The evidence is available to anyone that requires it. I had hoped I Would not have to do this , but in the circumstances I feel the need to protect all clients and all therapists who choose to associate themselves with this organisation."

23. The single alleged defamatory meaning pleaded is that the Defendant is a criminal fraudster. She is guilty of an offence of dishonesty. Despite having admitted to the police under caution that she is guilty of fraud, she has, deceitfully and unethically, withheld this information from professional bodies. She is so dangerous and deceitful that her vulnerable clients need protection from being exploited by her.

24. I will need to return to the question of meaning later.

25. The Defendant's claim in harassment is based upon these publications and also those set out in an Appendix to her Defence and Counterclaim. The alleged harassment lasted over four years. There were a number of posts, and so I will not set them all out. However, their flavour is given by the following:

> "I did, looking forward to the lying deceitful response, but I aired my thoughts lol I'd hate to get a pissed off very eloquently written email from myself. The underlying message is I slit your throat the next time you try to slit my therapists wallets lol. But I'm more professional than threatening death I have to be lol" (14 March 2016)
>
> "Fingers crossed for me. Otherwise, it's other avenues like a hitman lol. And yes it's taken it's toll, my patience ran out tonight… I break her legs lol" (19 January 2017)
>
> "Lol Anne, the temptation to punch her in the face was def there" (13 May 2017)
>
> "Karma sure is a bitch when it comes back to bite you in the ass, by the time. I'm done (sic) there won't even be an ass to bite ! Some things just have to be done it will be" (30 March 2016)"
>
> "He! He! (sic) Justice is beginning to loom 😊 … A message to the devil is on its way finally" (11 May 2017)

26. Paragraph 31 of the Defence and Counterclaim avers that:

> "The nature of the allegations and the manner of, and persistence of their publication were calculated to cause alarm, fear and/or distress and were offensive and oppressive. The Claimant knew, or ought to have known, that they would have the effect, inter alia, of causing the Defendant unjustifiable alarm and distress. In addition to the Claimant's harassing and threatening conduct, she encouraged others in the Defendant's professional field to make abusive statements about her, greatly increasing the Defendant's alarm and distress."

27. The Defendant's data protection claim is pleaded at [37] et seq:

> "37. By publishing and continuing to publish the statements set out in the Appendix from 2016, the Claimant, as data controller, processed and continued to process the personal data of the Defendant in breach of the Claimant's statutory duty under section 4(4) of the Data Protection Act (DPA) 1998 because the personal data about the Defendant was inaccurate and the processing of it unfair and/or unlawful, in contravention of the First and Fourth Data Protection Principles."

28. In response, the Claimant (now) admits publication of the words complained of. She advances the following defences to the Defendant's counterclaim (at [14] et seq of the Amended Reply and Defence to Counterclaim).

29. In respect of the defamation claim, the Claimant appears to be relying on the defence of truth in s 2 of the Defamation Act 2013 (whilst not expressly pleaded as such; the reference to s 2 was deleted by amendment). The copy of the Amended Defence to the Counterclaim in my papers is undated, however according to the Defendant's Chronology, this was filed and served on or about 7 July 2021.

30. Paragraphs 15 and 16 aver (as in the original):

> "15. It is admitted that the Claimant published the statements pleaded in paragraphs 23 (a) to 23 (c) and 23 (f) Paragraph 23 (d) is denied. The post therein pleaded was not published by the Claimant. The Defendant is required to prove paragraph 23 (e). However, the Claimant admits ~~makes no admissions in respect of~~ paragraph 24 ~~and the Defendant is required to prove that the statements were defamatory.~~
>
> 16. By way of context, the Claimant believed in the statements admitted to be published in paragraph 15 of this Reply and Defence to the Counterclaim as: ~~Moreover, the Claimant relies on section 2 of the Defamation Act 2013 and avers that the statements are substantially true as:~~
>
> a. the Claimant received text messages from the Defendant in or around March 2016 (when the Claimant discovered the Google listing) stating:
>
>> "[It] still has my old business details, which links to the Shrubberies. I can't log in as I don't have my log in details as its 7 years old. I'll do my best to delete it as I really don't need it there. Buckhurst Hill Counselling doesn't even exist anymore. Honestly though if anyone phoned for your company I'd send them your way. I don't need to steal your business."; and
>>
>> "I've deleted my account. Hopefully that will sort your problem out."
>
> ~~a.~~b. the Defendant was investigated by the Police for dishonesty offences (including fraud) arising out of the aforementioned directory entries. The Claimant relies on crime reference number 4406354/16;
>
> ~~b.~~c. the Investigating Officer interviewed the Defendant as part of the criminal investigation. This interview was conducted during July 2016;

~~c.~~d. the Defendant admitted during that interview that she had created the listing in the Google directory;

~~d.~~e. the criminal investigation was closed by the Police due to insufficient evidence and an inability to obtain the necessary documentation from Google. The matter was also considered to be more suited for a civil action based on the documentation available. This was confirmed to the Claimant by the Investigating Officer; and

~~e.~~f. the Defendant did not report the criminal investigation to the British Association for Counselling and Psychotherapy, the Defendant's professional body.

~~17. Further or in the alternative, the Claimant relies on section 4 of the Defamation Act 2013. The Claimant reasonably believed that the publication of the statements was in the public interest in that:~~

~~a. the Defendant was a practising psychotherapist on or around the alleged date of publication;~~

~~b. the statements related to the Defendant's practice as a regulated psychotherapist;~~

~~c. honesty and integrity are core ethical duties of practising psychotherapists; and~~

~~d. the public and prospective clients should not be misled by the Defendant.~~

~~18.~~ 17. Paragraphs 25 to 29 are not admitted.The Defendant is required to prove all that is alleged. Within paragraph 27, it is denied that the Claimant has 'falsely' claimed that the Police had obtained a confession from the Defendant. The Claimant repeats paragraphs 16 (b~~a~~) to 16 (d~~e~~) of this Reply and Defence to the Counterclaim."

31. Hence, in this pleading the Claimant expressly abandoned her reliance on the public interest defence in s 4 of the DA 2013. However, in her written Closing Submissions post-trial (which she drafted herself) the Claimant sought to rely on s 4.

32. In respect of the harassment claim, the Claimant pleads as follows (at [18] et seq): she admits making the statements complained of; the Defendant is required to prove harassment; the Claimant relies on s 1(3) of the Protection from Harassment Act 1997 (PHA 1997) in that any course of conduct was pursued for the purpose of preventing the Defendant from committing any

potential offences connected with the directory entry; and it is also denied that any allegations were false.

33. In response to the data protection claim, the Claimant avers (at [19] et seq): that the allegations were not false; and that processing was exempt from the First Data Protection principle as it was for the purpose of preventing and detecting crime in accordance with s 29 (1) of the DPA 1998. Loss and damage is also denied.

Legal principles

Passing off

34. The elements of the tort of law of passing off were set out in *Reckitt & Colman Products Ltd v Borden Inc (No 3)* [1990] 1 WLR 491, p499E-H (Lord Oliver):

> "The law of passing off can be summarised in one short general proposition — no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, as long as they are identified with a particular source which is in fact the plaintiff. For example, if the public is accustomed to rely upon a particular brand name in purchasing goods of a particular description, it matters not at all that there is little or no public awareness of the identity of the proprietor of the brand name. Thirdly, he must demonstrate that he suffers or, in a *quia timet* action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff."

35. Hence, there are three elements which a claimant must establish in order prove a defendant is liable for passing off: (a) goodwill; (b) a misrepresentation for which the defendant is responsible; (c) damage.

36. The nature of 'goodwill' in this context is often explained by reference to Lord Macnaghten's judgment in *Inland Revenue Commissioners v Mullers & Co's Margarine* [1901] AC 217, pp223-224:

> "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates."

37. As to misrepresentation, in *National Guild of Removers and Storers Ltd v Bee Moved Ltd* [2018] EWCA Civ 1302, the Court of Appeal considered an appeal against the conclusion that a removal and storage business was not responsible for the misrepresentation on a house moving website that it was a member of a particular trade association.

38. The Court (Asplin LJ) at [26] identified 'the real question' as being 'whether the misrepresentation on the directory page can be said to have been 'made' by BM or, to put it another way, whether BM was responsible for it'.

39. Dismissing the appeal, the Court held at [27]:

> "I agree with the Judge that on the facts of this case, the proposition that BM made the misrepresentation must be based upon agency, authorisation or some kind of procuration, none of which were pleaded: see the judgment at paragraph [34(iii)]. At the very least, it would be necessary to imply BM's consent to the use to which Really Moving might put the information in order to render it liable. That was not pleaded either. In any event, it seems to me that consent cannot be implied from merely having uploaded information which might become inaccurate to pages on a website which could be and were altered, without knowledge that the information has been placed on pages which were inaccessible and could not be altered. In such circumstances, the misrepresentation is made by an independent third party."

40. In relation to damage, *Wadlow on the Law of Passing Off,* (Sixth Edn), says:

> "4-1 The action for passing-off protects the claimant's right of property in his business or goodwill.1 It is therefore essential that the defendant's misrepresentation should be such as to be really likely to cause substantial damage to that property. If there is no damage or prospect of damage to the claimant's business or goodwill then there can be no cause of action for passing-off. The original reason for this may lie deep in the history of the tort, but the importance of damage has been confirmed in the modern definitions of passing-off given by the House of Lords in both the *Advocaat* and *Jif Lemon* cases [ie. *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731] and *Reckitt & Colman Products Ltd*]. The fourth and fifth of Lord Diplock's heads in *Advocaat* [at p742], are as follows:
>
> > "(4) Which [misrepresentation] is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so."
>
> 4-2 The importance of damage was emphasised even more clearly by Lord Fraser who said that the claimant must show [at p742]:
>
> > 'That he has suffered, or is really likely to suffer, substantial damage to his property in the goodwill.'"

41. *Wadlow* explains at [4-29] under the heading 'Confusion, deception and damage' that:

> "The existence of confusion, especially in the popular sense of the public sometimes failing to distinguish the goods or businesses of the claimant and defendant, does not mean that there is actionable passing-off. 'There must be deception, either intentional or unintentional. If there is no deception, mere confusion or likelihood of confusion is not sufficient to give a cause of action' [*Barnsley Brewery Co Ltd v RBNB* [1997] FSR 462 per Robert Walker LJ]."

42. At [4-30], *Wadlow* refers to the judgment of the Court of Appeal in *Premier Luggage and Bags v Premier Co* [2002] EWCA Civ 387, [37], where Chadwick LJ said:

> "The relevant question, in the context of an action for passing off, is not whether there is a risk of confusion because the defendant's name is similar to the plaintiff's name; the relevant question is whether the defendant's use

> of his name in connection with his goods or his business will be taken as a representation that his goods or business are, or have some connection with, the goods or business of the plaintiff - so giving rise to harm, or the risk of harm, to the goodwill and reputation which the plaintiff is entitled to protect. A risk of confusion is not enough."

Defamation

(i) Defamatory meaning

43. The common law test of what is defamatory is not controversial: see eg, *Millett v Corbyn* [2021] EMLR 19**,** [9]:

> "At common law, a meaning is defamatory and therefore actionable if it satisfies two requirements. The first, known as 'the consensus requirement', is that the meaning must be one that 'tends to lower the claimant in the estimation of right-thinking people generally.' The Judge has to determine 'whether the behaviour or views that the offending statement attributes to a claimant are contrary to common, shared values of our society': *Monroe v Hopkins* [2017] 4 WLR 68 [51]. The second requirement is known as the 'threshold of seriousness'. To be defamatory, the imputation must be one that would tend to have a 'substantially adverse effect' on the way that people would treat the claimant: *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985 [98] ..."

44. In relation to meaning, the Court's function is to identify 'what is the natural and ordinary meaning of the [words], as it relates to the claimant': *Allen v Times Newspapers* [2019] EWHC 1235 (QB), [39]., [39]. The principles to be applied are conveniently collected in the judgment of Nicklin J in *Koutsogiannis v The Random House Group Limited* [2020] 4 WLR 25, [11-13]:

> "11. The court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways: *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 173d–e, per Lord Diplock.
>
> 12. The following key principles can be distilled from the authorities: see eg *Slim v Daily Telegraph Ltd*, at p 175f, *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 70; *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263 at [7], *Charman v Orion Publishing Co Ltd* [2005] EWHC 2187 (QB) at [8]–[13], *Jeynes v News*

Magazines Ltd [2008] EWCA Civ 130 at [14], *Doyle v Smith* [2018] EWHC 2935 (QB) at [54]–[56], *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB) at [66], *Simpson v MGN Ltd* [2016] EWCA Civ 772; [2016] EMLR 26, para 15, *Bukovsky v Crown Prosecution Service* [2017] EWCA 1529; [2018] 4 WLR 13, *Brown v Bower* [2017] EWHC 2637 (QB); [2017] 4 WLR 197, paras 10–16 and *Sube v News Group Newspapers Ltd* [2018] EWHC 1234 (QB) at [20]:

(i) The governing principle is reasonableness.

(ii) The intention of the publisher is irrelevant.

(iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.

(iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

(v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.

(vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.

(vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

(viii) The publication must be read as a whole, and any ‘bane and antidote’ taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic “rogues’ gallery” case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would

bear if they were read in isolation (eg bane and antidote cases).

(ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.

(x) No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.

(xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

(xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

(xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning).

13. As to the *Chase* levels of meaning, see *Brown v Bower* at para 17:

> 'They come from the decision of Brooke LJ in *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772; [2003] EMLR 11, para 45 in which he identified three types of defamatory allegation: broadly, (1) the claimant is guilty of the act; (2) reasonable grounds to suspect that the claimant is guilty of the act; and (3) grounds to investigate whether the claimant has committed the act. In the lexicon of defamation, these have come to be known as the *Chase* levels. Reflecting the almost infinite capacity for subtle differences in meaning, they are not a straitjacket forcing the court to select one of these prescribed levels of meaning, but they are a helpful shorthand. In *Charman v Orion Publishing Group Ltd* [2005] EWHC 2187 (QB), for example, Gray J found a meaning of "cogent grounds to suspect" at para 58).'"

(ii) Defence of truth

45. Section 2 of the DA 2013 provides:

> "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.
>
> (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed."

46. Minor inaccuracies in a publication will not deprive him of the benefit of the defence in relation to it: *Turcu v News Group Newspapers Ltd* [2005] EWHC 799 (QB), [105]; *Clarke v Taylor* (1836) 3 Scott 95.

(iii) Standard of proof

47. The burden of proving the defence of truth lies on the Defendant. The standard of proof is the civil standard, ie, the balance of probabilities.

48. The proper approach to the standard of proof for allegations involving criminal conduct was set out by Nicol J in *Depp II v News Group Newspapers Ltd* [2020] EWHC 2911 (QB), [40]-[44]:

> "40. As Defamation Act 2013 s.2(1) makes clear, it is for a defendant to prove that the libel was substantially true. The burden of proof therefore rests on the defendant. That was also the case when the common law defence of justification existed.
>
> 41. As for the standard of proof, the starting point is that these are civil proceedings and in civil proceedings the standard of proof is the balance of probabilities i.e. is it more probable than not that the article was substantially true in the meaning that it bore? In this case, is it more

likely than not that the claimant did what the articles alleged? The common law knows only two standards of proof: beyond reasonable doubt (or, as it is now put, so that the decision maker is sure) which applies in criminal cases and certain other immaterial situations and the balance of probabilities (which applies in civil cases) – see *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586. The 'balance of probabilities' simply means, as Lord Nichols said in *Re H,* that, 'a court is satisfied an event occurred if the court considers, on the evidence, the occurrence of the event was more likely than not.'

42. Although there is a single and unvarying standard of proof in civil proceedings, the evidence which is required to satisfy it may vary according to the circumstances. *In Re D* [2008] 1 WLR 1499 at [27] Lord Carswell approved what had been said by Richards LJ in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468 at [62] who had said,

> 'Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.' [emphasis in the original]

43. Simon J. also quoted the same comments by Richards LJ when considering the defence of justification in the course of his judgment on a libel claim – see *Hunt v Times Newspapers Ltd.* [2013] EWHC 1868 (QB). He said (at [76]),

> ‘Where the allegation is one of serious criminality (as here) clear evidence is required.'

44. Simon J's judgment concerned the common law, but neither party before me suggested that a different approach was required in this regard in consequence of the replacement of the common law defence of justification

> with the statutory defence of truth and see *Bokhova v Associated Newspapers Ltd* [2018] EWHC 2032 (QB), [2019] QB 861 at [28].”

(iii) Serious harm

49. At common law, in defamation cases, once the defamatory nature of a statement had been established, damage was presumed in the claimant's favour. However, following the enactment of the DA 2013, a claimant must now also satisfy the serious harm requirements of s 1. The relevant principles have been set out in a number of cases, including recently in *Amersi v Leslie* [2023] EWHC 1368 (KB), [144]-[163], from which the following is gratefully adapted. The leading case is the Supreme Court’s decision in *Lachaux v Independent Print Ltd* [2020] AC 612.

50. Whether the publication of the statement has caused or is likely to cause serious reputational harm is a matter 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’: *Lachaux,* [14], per Lord Sumption.

51. In *Sivananthan v Vasikaran* [2023] EMLR 7 Collins Rice J set out some more principles in relation to serious harm:

> “[42] The 'harm' of defamation is the reputational damage caused in the minds of publishees, rather than any action they may take as a result. Nevertheless the existence, and seriousness, of reputational harm are factual questions, and facts must be established by evidence. The relevant facts *may* be established by evidencing specific instances of serious consequences inflicted on a claimant as a result of the reputational harm. But they do not always have to be.
>
> [43] Particularly where a general readership rather than identified publishees are involved, the test may also be satisfied by general inferences of fact, drawn from a combination of evidence about the meaning of the words, the situation of the claimant, the circumstances of publication and the inherent probabilities. Relevant factors may then include: the scale of publication of the statement complained of; whether the statement has come to the attention of at least one identifiable person who knew the claimant; whether it was likely to have come to the attention of others who either knew him or would come to know him in the future; and the gravity of the allegations themselves.

[44] Aspects of the inferential evidential process have been explored in more detail in other leading cases. The well-established 'grapevine' or 'percolation' tendencies (*Slipper v BBC* [1991] 1 QB 283; *Cairns v Modi* [2013] 1 WLR 1015) of defamatory publications, particularly online and through social media, may in an appropriate case be factored into inference about scale of publication. Allowance may then be made for the inherent difficulties of identifying otherwise unknown publishees who thought less well of a claimant, since they are unlikely to identify themselves and share that with him. And the likely identity, as well as the numbers, of at least some of a class of publishees may be relevant to the assessment of harm, for example where some individuals may be particularly positioned to lose confidence in a claimant or take adverse action as a result. But these are highly fact-specific matters; the inferences which may properly be drawn in any individual case depend entirely on the circumstances of that case.

[45] Section 1(1) uses the language of causation prominently ('*caused or is likely to cause*'). The 'serious harm' component of libel therefore contains an important causation element, as with any other tort or civil wrong. The starting point is that defendants are responsible only for harm to a claimant's reputation caused by the effect of each *statement* they publish in the minds of the readership of *that* statement. A claimant therefore has to establish a causal link between each item he sues on and serious harm to his reputation, actual or likely.

[46] The causation element has a number of aspects of particular application to repeated statements. Since *each* publication must satisfy the serious harm test, it is not possible to aggregate or cumulate injury to reputation over a number of statements or publications in order to pass the serious harm threshold (*Sube v News Group Newspapers* [2018] 1 WLR 5767). If a statement has been repeated or republished *by a defendant*, and a claimant has elected to sue on a subset of those publications, he cannot rely on the effects of statements he has not sued on to establish harm caused by those he has (although they may be relevant to aggravation). Where multiple publishers have published the same statement, an individual defendant is responsible only where harm is caused by their own publication in the minds of their own readership. But at the same time, *if* such causation is established, it is not possible for a defendant to diminish the *seriousness* of the harm caused by pointing to the same publication by others, or else the claimant risks falling

> between the various stools (see the explanation of the so-called 'rule in *Dingle*' set out in *Wright v McCormack* [2021] EWHC 2671 (QB) from paragraph 149 onwards).

52. Even before the introduction of the new threshold requirement in s 1, assessment of harm to reputation was never just a 'numbers game': ‘one well-directed arrow [may] hit the bull's eye of reputation’ and cause more damage than ‘indiscriminate firing’: *King v Grundon* [2012] EWHC 2719 (QB)**,** [40]. Publication to a relatively small number of publishees may yet cause very serious harm to reputation: *Sobrinho v Impresa Publishing SA* [2016] EMLR 12 [47]; *Dhir v Sadler* [2018] 4 WLR 1 [55(i)]; *Monir v Wood* [2018] EWHC 3525 (QB) [196].

53. It is well-recognised that a claimant may struggle to identify, or to produce evidence from, all those to whom an article was published and in whose eyes his reputation was damaged: *Doyle v Smith* [2019] EMLR 15, [122(iv)]; *Sobrinho*, [48]; *Ames v Spamhaus* [2015] 1 WLR 3409, [55]. In mass publication cases, it may also be invidious for a claimant to have to seek out those who substantially thought the less of him because of a defamatory publication and, often, it will not be necessary to do so (because ultimately the evidence is likely to go to damages not liability). Whether a claimant can be expected to produce ‘tangible evidence’ of serious harm to reputation caused by a publication will depend on the circumstances of publication: *Ames***,** [55].

54. In *Turley v Unite the Union* [2019] EWHC 3547 (QB), [107]-[109], Nicklin J summarised the relevant principles as follows:

> “107. This provision [ie, s 1, DA 2013] was considered by the Supreme Court in *Lachaux v Independent Print Ltd* [2019] 3 WLR 18. Although, the Supreme Court agreed with the ultimate decision of the Court of Appeal dismissing the defendant’s appeal ([2018] QB 594), it disagreed with its reasoning and held that Warby J’s analysis of the law, at first instance ([2016] QB 402), was ‘coherent and correct, for substantially the reasons he gave’ [20] per Lord Sumption. The Supreme Court held:
>
> i) s 1 raised the threshold of seriousness above the tendency of defamatory words to cause damage to reputation; the application of the test of serious harm must be determined “by reference to actual facts about its impact and not just to the meaning of the words” [12]-[13].
>
> ii) Reference to the situation where the statement ‘has caused’ serious harm is to the consequences of publication, and not the publication itself [14]:

> "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."

iii) Reference to the situation where the statement "is likely to cause" serious harm was not the synonym of "liable to cause" in the sense of the inherent tendency of defamatory words to cause damage to reputation: [14].

iv) The conditions under s.1 must be established as facts [14] and 'necessarily calls for an investigation of the actual impact of the statement": [15]; a claimant must demonstrate as a fact that the harm caused by the publication complained of was serious [21].

v) If serious harm could be demonstrated simply by the inherent tendency of statements to damage reputation, little substantive change would have been effected by the Act [16]:

> "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."

vi) A claimant may produce evidence from publishees of the statement complained of about its impact on them, but his/her case does not necessarily fail for want of such evidence; inferences of fact as to the seriousness of harm done to reputation may be drawn from the evidence as a whole [21].

vii) In Mr Lachaux's case, the finding that serious harm had been proved was based on a combination of (a) the meaning of the words; (b) the situation of the claimant; (c) the circumstances of publication; and (d) the inherent probabilities.

viii) A judge's task is to evaluate the material before him/her and arrive at a conclusion, recognising that this is an issue on which precision will rarely be possible [21].

ix) The judge can consider the impact of the publication upon people who do not presently know the claimant but might get to know him/her in the future [25].

108. At first instance in *Lachaux*, Warby J expressed his conclusion on s1 as follows:

> '[65] In summary, my conclusion is that by section 1(1) of the 2013 Act Parliament intended to and did provide that a statement is not defamatory of a person unless it has caused or will probably cause serious harm to that person's reputation, these being matters that must be proved by the claimant on the balance of probabilities. The court is not confined, when deciding this question, to considering only the defamatory meaning of the words and the harmful tendency of that meaning. It may have regard to all the relevant circumstances, including evidence of what has actually happened after publication. Serious harm may be proved by inference, but the evidence may or may not justify such an inference.'

109. Finally, and consistently with Lord Sumption's analysis in *Lachaux*, there are three further relevant principles:

i) In an appropriate case, a Claimant can also rely upon the likely 'percolation' or 'grapevine effect' of defamatory publications, which has been 'immeasurably enhanced' by social media and modern methods of electronic communication: *Cairns v Modi* [2013] 1 WLR 1015 [26] per Lord Judge LCJ. In the memorable words of Bingham LJ in *Slipper v British Broadcasting Corporation* [1991] 1 QB 283, 300:

> '… the law would part company with the realities of life if it held that the damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity to

> percolate through underground channels and contaminate hidden springs.'

> ii) It is well-recognised that a claimant may struggle to identify, or to produce evidence from, all those to whom an article was published and in whose eyes the claimant's reputation was damaged: *Doyle v Smith* [2019] EMLR 15 [122(iv)]; *Sobrinho v Impresa Publishing SA* [2016] EMLR 12 [48]; *Ames v Spamhaus* [2015] 1 WLR 3409 [55].
>
> iii) Assessment of harm to reputation has never been just a 'numbers game': 'one well-directed arrow [may] hit the bull's eye of reputation" and cause more damage than indiscriminate firing': *King v Grundon* [2012] EWHC 2719 (QB) [40] per Sharp J. Very serious harm to reputation can be caused by publication to a relatively small number of publishees: *Sobrinho* [47]; *Dhir v Sadler* [2018] EWHC 2935 (QB) [55(i)]; *Monir v Wood* [2018] EWHC 3525 (QB) [196]."

Harassment

55. The Defendant's claim in harassment is brought under the PHA 1997. Section 1 provides:

> "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.
>
> (1A) A person must not pursue a course of conduct —
>
> (a) which involves harassment of two or more persons, and
>
> (b) which he knows or ought to know involves harassment of those persons, and
>
> (c) by which he intends to persuade any person (whether or not one of those mentioned above)—
>
> (i) not to do something that he is entitled or required to do, or

(ii) to do something that he is not under any obligation to do.

(2) For the purposes of this section or section 2A(2)(c), 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) or (1A) 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."

56. Section 7 of the Act makes further provision as follows:

"7. Interpretation of this group of sections.

(1) This section applies for the interpretation of sections 1 to 5A.

(2) References to harassing a person include alarming the person or causing the person distress.

(3) A 'course of conduct' must involve -

(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or

(b) in the case of conduct in relation to two or more persons (see section 1(1A)), conduct on at least one occasion in relation to each of those persons.

(3A) A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another -

(a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and

> (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.
>
> (4) ‘Conduct’ includes speech.
>
> (5) References to a person, in the context of the harassment of a person, are references to a person who is an individual.”

57. The key principles were discussed by Nicklin J in *Hayden v Dickenson* [2020] EWHC 3291 (QB), [40]-[44]. These were approved by the Divisional Court in *Scottow v Crown Prosecution Service* [2021] 1 WLR 1828, and applied in *Sayn-Wittgenstein-Sayn v HM Juan Carlos Alfonso Victor Maria De Borbon y Borbon* [2023] EWHC 2478 (KB), [69]-[73].

58. Nicklin J said in *Hayden*:

> “40. S 1 Protection from Harassment Act 1997 ("PHA") provides, so far as material:
>
>> ‘(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.
>>
>> (1A) [omitted]
>>
>> (2) For the purposes of this section …, the person whose course of conduct is in question ought to know that it amounts to … 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."

41. S 3 provides that any actual or apprehended breach of s.1(1) may be the subject of a civil claim by anyone who is or may be the victim of the course of conduct. Remedies in a civil claim include interim and final injunctions and damages for 'any anxiety caused by the harassment and any financial loss resulting from the harassment': s.3(2).

42. S 7(2) provides: 'References to harassing a person include alarming the person or causing the person distress'; and in subsection (3) (b): 'A 'course of conduct' must involve, in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person.' Conduct can include speech (s 7(4)).

43. A defendant has a defence if s/he shows: (i) that the course of conduct was pursued for the purpose of preventing or detecting crime; and/or (ii) that in the particular circumstances the pursuit of the course of conduct was reasonable (s.1(3)).

44. The principal cases on what amounts to harassment are: *Thomas v News Group Newspapers* [2002] EMLR 4; *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224; *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46; *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB); *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB); [2012] 4 All ER 717; *Hayes v Willoughby* [2013] 1 WLR 935; *R v Smith* [2013] 1 WLR 1399; *Law Society v Kordowski* [2014] EMLR 2; *Merlin Entertainments LPC v Cave* [2015] EMLR 3; *Levi v Bates* [2016] QB 91; *Hourani -v- Thomson* [2017] EWHC 432 (QB); *Khan v Khan* [2018] EWHC 241 (QB); *Hilson v Crown Prosecution Service* [2019] EWHC 1110 (Admin); and *Sube v News Group Newspapers Ltd* [2020] EMLR 25. From these cases, I extract the following principles.

i) Harassment is an ordinary English word with a well understood meaning: it is a persistent and deliberate course of unacceptable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress; 'a persistent and deliberate course of targeted oppression': *Hayes v Willoughby* [1], [12] *per* Lord Sumption.

ii) The behaviour said to amount to harassment must reach a level of seriousness passing beyond irritations, annoyances, even a measure of upset, that arise

occasionally in everybody's day-to-day dealings with other people. The conduct must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the border from the regrettable to the objectionable, the gravity of the misconduct must be of an order which would sustain criminal liability under s 2: *Majrowski* [30] *per* Lord Nicholls; *Dowson* [142] *per* Simon J; *Hourani* [139]-[140] *per* Warby J; see also *Conn v Sunderland City Council* [2007] EWCA Civ 1492 [12] *per* Gage LJ. A course of conduct must be grave before the offence or tort of harassment is proved: *Ferguson v British Gas Trading Ltd* [17] *per* Jacob LJ.

iii) The provision, in s 7(2) PHA, that 'references to harassing a person include alarming the person or causing the person distress' is not a definition of the tort and it is not exhaustive. It is merely guidance as to one element of it: *Hourani* [138] *per* Warby J. It does not follow that any course of conduct which causes alarm or distress therefore amounts to harassment; that would be illogical and produce perverse results: *R v Smith* [24] *per* Toulson LJ.

iv) s.1(2) provides that the person whose course of conduct is in question ought to know that it involves harassment of another if a reasonable person in possession of the same information would think the course of conduct involved harassment. The test is wholly objective: *Dowson* [142]; *Trimingham* [267] *per* Tugendhat J; *Sube* [65(3)], [85], [87(3)]. 'The Court's assessment of the harmful tendency of the statements complained of must always be objective, and not swayed by the subjective feelings of the claimant': *Sube* [68(2)].

v) Those who are *'targeted'* by the alleged harassment can include others 'who are foreseeably, and directly, harmed by the course of targeted conduct of which complaint is made, to the extent that they can properly be described as victims of it': *Levi v Bates* [34] *per* Briggs LJ.

vi) Where the complaint is of harassment by publication, the claim will usually engage Article 10 of the Convention and, as a result, the Court's duties under ss.2, 3, 6 and 12 of the Human Rights Act 1998. The PHA must be interpreted and applied compatibly with the right to freedom of expression. It would be a serious interference with this right if those wishing to express their own views could be silenced by, or threatened with, proceedings for harassment based on subjective claims by individuals that

they felt offended or insulted: *Trimingham* [267]; *Hourani* [141].

vii) In most cases of alleged harassment by speech there is a fundamental tension. s.7(2) PHA provides that harassment includes 'alarming the person or causing the person distress'. However, Article 10 expressly protects speech that offends, shocks and disturbs. 'Freedom only to speak inoffensively is not worth having': *Redmond-Bate v DPP* [2000] HRLR 249 [20] *per* Sedley LJ.

viii) Consequently, where Article 10 is engaged, the Court's assessment of whether the conduct crosses the boundary from the unattractive, even unreasonable, to oppressive and unacceptable must pay due regard to the importance of freedom of expression and the need for any restrictions upon the right to be necessary, proportionate and established convincingly. Cases of alleged harassment may also engage the complainant's Article 8 rights. If that is so, the Court will have to assess the interference with those rights and the justification for it and proportionality: *Hourani* [142]-[146]. The resolution of any conflict between engaged rights under Article 8 and Article 10 is achieved through the '*ultimate balancing test*' identified in *In re S* [2005] 1 AC 593 [17] *per* Lord Nicholls.

ix) The context and manner in which the information is published are all-important: *Hilson v CPS* [31] *per* Simon LJ; *Conn* [12]. The harassing element of oppression is likely to come more from the manner in which the words are published than their content: *Khan v Khan* [69].

x) The fact that the information is in the public domain does not mean that a person loses the right not to be harassed by the use of that information. There is no principle of law that publishing publicly available information about somebody is incapable of amount to harassment: *Hilson v CPS* [31] *per* Simon LJ.

xi) Neither is it determinative that the published information is, or is alleged to be, true: *Merlin Entertainments* [40]-[41] *per* Elisabeth Laing J. 'No individual is entitled to impose on any other person an unlimited punishment by public humiliation such as the Defendant has done, and claims the right to do': *Kordowski* [133] *per* Tugendhat J. That is not to say that truth or falsity of the information is irrelevant: *Kordowski* [164]; *Khan v Khan* [68]-[69]. The truth of the words complained of is likely to be a significant factor in the overall assessment (including any defence advanced under

> s.1(3)), particularly when considering any application interim injunction (see further [50]-[53] below). On the other hand, where the allegations are shown to be false, the public interest in preventing publication or imposing remedies after the event will be stronger: *ZAM v CFM* [2013] EWHC 662 (QB) [102] *per* Tugendhat J. The fundamental question is whether the conduct has additional elements of oppression, persistence or unpleasantness which are distinct from the content of the statements; if so, the truth of the statements is not necessarily an answer to a claim in harassment.
>
> xii) Finally, where the alleged harassment is by publication of journalistic material, nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment. Such cases will be rare and exceptional: *Thomas v News Group Newspapers* [34]-[35], [50] *per* Lord Phillips MR; *Sube* [68(5)-(6)]."

Data protection

59. Given the Defendant's stance on her data protection claim, I will pass over the principles for now and return to them later if I need to.

Approach to evaluating the evidence

60. I reviewed the authorities on how a court should go about evaluating evidence in *Aaronson v Stones* [2023] EWHC 2399 (KB), [247]-[253]. It is sufficient here to cite the often quoted words of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyds Rep 1, 57:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, references to the witness' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth."

The evidence

61. The papers in the case are voluminous. As well as my detailed trial notes, I have audio recordings of the trial to which I have cross-referred whilst writing this judgment. I also had trial Skeleton Arguments from counsel for the Claimant

and the Defendant, a Chronology, and written Closing Submissions from Mr de Wilde for the Defendant. The Claimant produced her own written Closing Submissions after the trial, for which I was grateful.

62. The Claimant was the first witness. She adopted her first witness statement of 12 December 2022. (She made two other witness statements, both of which I have read. From now on, all references are to the Claimant's first witness statement unless otherwise noted). In that statement, she set out her background as a counsellor and the establishment of APS. She met the Defendant in 2005 when they were both on holiday in Thailand. They lived near each other in East London and stayed in touch after their return. In due course the Defendant began to train as a therapist. She did part of her training with the Claimant, and then qualified and began working as a therapist. The Claimant said that her relationship with the Defendant changed as the Defendant neared qualification.

63. In 2011 the Claimant noticed a drop off in business. She could no longer afford to rent all the rooms in the Premises she had formerly rented. She got into debt with the landlord. She said that the Defendant's practice appeared to do well from the outset. She said she discovered later that phone calls intended for her were being diverted to the Defendant's mobile phone.

64. The Defendant initially worked from the Premises and appeared on the APS website. Eventually she and the Claimant fell out over business matters, and the Claimant ceased contact with her in early 2012. In January 2012 the Defendant began to practice from premises in Loughton.

65. In March 2016 the Claimant discovered from a colleague that Psychotherapy Experts had a listing with APS's website address, but with the Defendant's mobile number. The Claimant said at [27] of her statement:

> "Put simply, meaning the Defendant was using my company details and fraudulently passing herself as my business, but using her own mobile number."

66. At [28] the Claimant said that she then investigated via Google, and discovered that her Google listing had a 'Call' button which when pressed rang through to the Defendant's mobile number. She also said the Google directions link to APS took her to the Defendant's business address. She said, 'For the avoidance of doubt, at no point did I give authority for the Defendant to hijack my business.' She also said that the Defendant had used a photograph from the Claimant's website on her own site. She said that what the Defendant had done 'would create a perception to the public that APS belonged to the Defendant' (at [30]).

67. The Claimant said she contacted the Defendant and told her she would be taking matters further. She said that the Defendant told her that she had created the listing in 2009. Shortly afterwards, the Defendant contacted her to say 'that she had closed her Google account down and hoped 'that it resolved my problem'. She said the Defendant did not mention merged listings or a problem with Google at that time. The Claimant said that by then, the damage to her business had been done.

68. At [34] the Claimant said that what she alleges the Defendant had done explained the drop off in her business from 2011 and the growth in the Defendant's business, and that ([34]):

> "It appeared that enquiries meant for APS had been forwarded to the Defendant for years and as my business declined, her business increased. No removal of the Google link directing business to the Defendant could remedy the damage done."

69. The Claimant said she then contacted Google. She also contacted the police. (The Defendant later attended a voluntary interview with the police, accompanied by her solicitor, which I will address later).

70. The Claimant then dealt with her understanding of Google listing (at [46]-[48]). I can pass over the details. She said at [48]:

> "On the evidence, the Google listing was clearly changed in 2014 to coincide with the Defendant's new company address and as I was in discussion with Google to take back the listing which they informed me had been 'claimed' by someone else but were assisting me in gaining ownership and access to my listing again. As Google were completely removing the Defendant's ownership and giving my business back to me, there was a further attempt to amend the listing by the Defendant and make it look as it should, but with her full company details on it during this process."

71. At [49] the Claimant said that she felt it was her duty to inform other therapists and counsellors about what she said the Defendant had done. She said she believed she had 'an ethical duty to warn my own peers' ([50]).

72. At [51] she said:

> "I was informed at the time, that the Defendant had acknowledged creating the listing and confirmed directly to me that she had created it '7 years earlier' and that defamation could not apply."

73. The Claimant was then cross-examined by Mr de Wilde. His first topic was passing off.

74. She said her practice would receive telephone inquiries via word of mouth referrals and internet searches. She had her practice, and she rented rooms to other therapists. The building was owned by a landlord.

75. She was shown a Facebook post by her from 2014 (Core B/p739) and accepted that she had said her business was based primarily on referrals from current clients rather than her website. However, she added that was because, 'the fraud had already taken place'. This post also referred to her business 'thriving'.

76. The drop off in landline inquiries began in about 2010. She did not have paperwork for before that time.

77. She contacted a man called Adrian Pennington, her clinical supervisor, and said the phone had not been ringing for three months.

78. The enquiries were for counselling. She would talk to the potential client and either take them herself or refer them to another therapist. They were only allowed to work a maximum of 25 hours per week.

79. There were a mixture of central inquiries to her, and also direct enquiries to other therapists.

80. She was shown an email to Mr Pennington (Core B/p289) from 7 January 2012 in which she complained of lack of money/clients and expressed the hope that things would get better. Her practice was not going well. She had by then reduced her room rentals from three to one. She said her problems had begun earlier than that.

81. On 17 November 2011 she sent an email to other therapists wanting them to move to fixed contracts for their rooms at a monthly fee of £108.33 per month for five hours of appointments per week, and double that (£216.66) if more than five hours were required (Core B/p219). She said the email expressed a preference for direct debit, but she would not have refused *ad hoc* payments if someone did not sign up. They had the option of both.

82. It was put to her the point about *ad hoc* payments was not true, but she said she did not refuse to rent to anyone. She agreed, though, that the email said they had to move to fixed contracts.

83. Later in the email she said things had not been going well and more referrals were needed. She said by then the fraud had occurred and calls were drying up and that was the reason she had had to change the rental system. She said the fraud had occurred between 2010 and 2011.

84. The Claimant was shown her witness statement to the police of 2 June 2016 (Core B/p586). She agreed the Defendant had left the Premises at the end of 2011 and started renting a room elsewhere in January 2012. She also agreed she had told the police that referrals dropped off after the Defendant had left. But in answer to a direct question from me she maintained the drop off began in 2010.

85. Mr de Wilde's next topic was misrepresentation, which he said was what passing off claim was all about.

86. The Claimant agreed that she and the Defendant parted ways in about December 2011, and from then on were no longer friends and had no further contact. The Defendant ended up working from Cherry Tree Therapy Centre.

87. She said a colleague had informed a Facebook group that they were being advertised on Psychotherapy Experts (a trade website), of which she had no knowledge. She then went and had a look.

88. Core B/p568 was the listing in question. It had APS, the Claimant's trading style, with 'Buckhurst Hill Counselling and Psychotherapy' (the Defendant's first trading style) underneath; then the Defendant's phone number ending ***857; and then South Woodford and a postcode (E18 1BG), which is for the Premises.

89. The Claimant said that the police contacted Psychotherapy Experts. She also contacted them. She was asked whether she accepted that the Defendant had not created this listing and said that she 'could not answer 100%'.

90. She was then shown Core B/p580, which contained emails from the Defendant to Psychotherapy Experts asking how the listing had appeared. On 17 May 2017 the publisher wrote in response to the Defendant's enquiry:

> "We were asked for your company in the past (last year), but there was not a listing for your company on our website. Part of the initial listings were taken from Google search and other sources and data was entered by a 3rd party. It is pretty much the same process the search engines use to collect data and form listings."

91. The Claimant said she was shown another listing from Psychotherapy Experts for 'Transitional Therapies' (Code B/p569), which was at one time a trading style of the Defendant. This had her ***857 phone number, but the same South Woodford postcode for the Premises (which by the time of the listing was five years out of date).

92. The Claimant accepted the contents of the publisher's response to the Defendant. She also accepted on the basis of an email sent by the publisher to the Defendant in 2017 (Core B/p582) that psychotherapyexperts.co.uk was registered as a domain in February 2016 (they could not say when the directory went live).

93. The Claimant agreed that from memory she contacted Psychotherapy Experts in March 2016. She also agreed that meant that because the Psychotherapy Experts website did not exist until 2016, it could not have been responsible for any confusion between her business and that of the Defendant between 2011 and 2016.

94. Mr de Wilde then moved to the Google listing and took the Claimant to Core B/pp237-8.

95. He explained that if you had searched (for example) 'Essex Therapists' on Google Maps, then pins would have appeared on the map representing therapist businesses. Page 238 (a screen grab) shows what would have appeared if the user had clicked the pin at the location of the Claimant's Premises in South Woodford. It shows 'Buckhurst Hill Counselling and Psychotherapies' with the Defendant's ***857 phone number and a 'Call' button, but with the Premises' address and postcode (ie, APS's address and postcode). Underneath that was 'More about Buckhurst Hill Counselling and Psychotherapy' and then

underneath that, 'APS Psychotherapy and Counselling', and then underneath that, the URL for APS.

96. Page 237 shows what would have come up if the 'Call' button on p238 had been clicked, namely, the Defendant's number would have come up.

97. The Claimant agreed her passing off case rested on this material.

98. She said that in 2011 she did not know the Defendant was trading under 'Buckhurst Hill Counselling and Psychotherapy'. She came to know of it in 2016.

99. She said these pages showed the Defendant's phone number, but the address is where she practised from (and the Defendant did in 2011).

100. The Claimant said this listing was a 'business hijack' by the Defendant and passing off. She did not accept that the Defendant could claim the same, because the Claimant's business name and address was attached to her listing.

101. She did not accept this listing had been created by Google and not by the Defendant (ie, she denied any software merger).

102. She was taken to Core B/p574. This is a review by someone called Rebecca Elliott, which was attached to the listing at Core B/p238. It related to a therapist called Louisa, who worked with the Claimant at the Premises. It was a positive review. The Claimant agreed that she responded to the review, but disagreed its appearance on the merged listing was a 'mix up' by Google. She agreed that the Defendant would not have not attached the Claimant's response to the Defendant's own listing. She also agreed that for the Defendant to have attached the Claimant's review to her listing would not have helped the Defendant if the listing was a fraud. The Claimant was vague, but thought the review had been left in about 2015.

103. The Claimant was then taken to Core B/p594, which was her listing. The large photo of a treatment room is dated February 2015.

104. Mr de Wilde said that the Defendant's case was that what happened was the result of Google's software 'colliding' an old listing for the Defendant's business with a more recent listing (from 2015 or so) for the Claimant's business.

105. The Claimant said she thought she created her own listing in 2006 or 2007, but it had been up for years.

106. At this point, in exchanges with me, Mr de Wilde made clear that at the heart of his case was that, however precisely the merged listing at Core B/pp237/238 had been created, it was not by his client; and therefore she was not liable in passing off because there had been no actionable misrepresentation by her or for which she was responsible.

107. Mr de Wilde then turned to the third element of the tort of passing off, namely confusion and damage.

108. The Claimant said the fraud caused her to have to give up two rooms and therefore very seriously damaged her business.

109. She agreed there was no evidence that anyone had called her business and said (for example), 'I was trying to call you but spoke to Ms Ley by mistake'.

110. She was shown [35] of her witness statement, where she described an 'ex-client connected to the Defendant' coming to the Premises in 2014 asking for the Defendant, and saying that he thought APS was her business. She said the person had been a client of the Defendant whom she had referred on to the Claimant. The person had not looked on the internet.

111. She agreed records had been disclosed by the Defendant for an answering service she had used (answer.co.uk). The Claimant agreed that these records did not show anyone had ever called the Defendant looking for her (Core B/p494).

112. She said she had always traded as APS and under her own name. She said her concern was people seeing the APS listing but then pressing 'Call' and ringing the Defendant. She said she believed that that is what had taken place.

113. She said the nature of therapy is that those seeking it, if they had been wrongly put through to the Defendant, would not have said they were actually looking for the Claimant. They would just generally have requested a call-back.

114. Mr de Wilde then moved on to losses. The Claimant said her claimed loss was for three rooms and said that the police had calculated her loss at £1.655 million.

115. She said she had had to give up two rooms because of the fraud.

116. She was taken to her PoC at [19] and the claimed damages figure there of £1.422 million plus interest. She said those are the damages she is seeking.

117. She was challenged about her claimed hourly rate of loss of £21.67 in the table in [19], as against the rate of £5 per hour she offered to therapists in the email to them of November 2011. She could not really explain the discrepancy.

118. However, she agreed that the figures in the table were not accurate. For example, she agreed that it was unrealistic to base her loss on 14 hours a day (from 8am – 10pm) of lost rental fees (at the questionable rate of £21.67 per hour) for every day of the year because, for example, there would not have been 14 hours a day of therapy every single day of the year including on Christmas Day, Easter Sunday, Bank Holidays, Sundays, etc.

119. She disagreed with the suggestion that the figures in the table were 'grossly exaggerated', and said she had lost a lot of money.

120. She was asked about an allegation she had made in her witness statement at [64] that the Defendant had dissipated £2.9 million, and committed other acts of deception. She said her allegations were based on marketing material sent to the Premises in the Defendant's name relating to her son's company (CJS Ley Ltd).

121. Mr de Wilde then moved to the counterclaim and social media posts made by the Claimant. She was taken to Core B/p613, a thread on a counselling group public Facebook page. The thread included posts by the Claimant about the Defendant's alleged fraud from May 2017.

122. She wrote in a post, 'The police have put it in writing to me it costs too much to implement the [Mutual Legal Assistance Treaty with the United States] even though it's designed and created for this specific reason' (MLAT). She said that that was what the police 'had led her to believe'. She also said the police had classified it as fraud. She also wrote, shortly after that, 'The police interviewed [the Defendant] under caution, she acknowledged she did it, but blamed it on google.' Again, she said that that was what the police told her.

123. The Claimant said that the Defendant had messaged her and said she had created the listing seven years earlier.

124. It was put to her that on 29 September 2016 the police had confirmed they were taking no further action. She said she could not confirm the exact date.

125. She was then taken to Core B/p675, a letter dated 11 May 2021 from the Metropolitan Police's Directorate of Professional Standards (DPS) to the Defendant. The Defendant had complained to the police about things which the Claimant had said on Facebook she had been told by DC Yaw Annor (the investigating officer), including (for example) that the Defendant had admitted fraud. The letter from the DPS said (emphasis in original):

> "There is no evidence within the crime report to support the allegation that DC Annor said any of the comments claimed by Ms Crosbie. There is no reference of you making any admissions in interview, it is recorded that you denied the allegation during interview.
>
> The closing report of the crime explains that the 'loss' the victim incurred was hypothetical and that an MLAT was a disproportionate enquiry. Costs incurred are not mentioned.
>
> I asked DC Annor to provide an account in regards to the allegations made by you. He emailed me his response on 02/05/2021.
>
> DC Annor states:

• DC Annor denies saying that you admitted to the fraud in interview.

• DC Annor denies that the prosecution failed due to 'costs' or that this was what he told Ms Crosbie. MLAT's have a cost element but are agreed post charge. There was insufficient evidence to bring the case to the CPS for charging decision.

• DC Annor told Ms Crosbie that a warrant had been applied for but states she was never informed of Police resources, dates or tactics.

• DC Annor denies providing a value for the alleged fraud as there was deemed to be no quantifiable loss.

• Ms Crosbie asked DC Annor to be a witness and he declined. He states he would however attend by virtue of a Court Summons.

• Ms Crosbie's claim of being able to make accusations of fraud in the public domain and to other parties and being protected against any action for defamation or harassment or any similar conversation is wholly denied by DC Annor.

There has, at no stage, been any evidence shown to suggest that Ms Crosbie was informed of anything that she has claimed by the MPS or specifically DC Yaw Annor.

1 That Ms Crosbie was told you had committed fraud and you admitted to this in interview. – *No evidence of claim & directly denied by DC Annor*

2. That police did not prosecute due to the costs. - *No evidence of claim & directly denied by DC Annor*

3. That 20 officers were available to raid your house. - *No evidence of claim & directly denied by DC Annor*

4. Police have advised Ms Crosbie that the total sum of her losses was £1.6 million. - *No evidence of claim & directly denied by DC Annor*

5. DC Annor has told Ms Crosbie he would act as a witness for her at civil court. - *No evidence of claim & directly denied by DC Annor*

> 6. Police have told Ms Crosbie she is protected against any action for defamation or harassment. - *No evidence of claim & directly denied by DC Annor*
>
> 7. You also allege that in 2017 DS Vint wrote to you and informed you that DC Annor would no longer be investigating. You perceived this as an allegation you were wasting police time - I have read the email sent to you from DS Vint. The email is succinct in its nature but I do not believe it extends to rudeness. DS Vint invites you to make further contact via him directly and not DC Annor."

126. The Claimant did not accept the contents of this letter, and said that a freedom of information request she had made supported at least some of what she had said, for example in relation to the MLAT. She maintained the reason there had been no prosecution was not due to lack of evidence but an inability to 'get the information from Google'. She denied the suggestion that she had been 'only hearing what she wanted to hear'.

127. I was taken to the exhibit SCO2, which the Claimant filed shortly before the hearing. A document at p97 is an entry in police records from DC Annor saying that DS Vint had advised him that a mutual legal assistance request to the US would be necessary to obtain documents from Google and that 'the MLAT will take a minimum of a year to obtain and as the loss is hypothetical it would not be reasonable to continue this investigation for another year'. There was then a reference to 'Outcome Code 15', namely: '

> "Named suspect and victim willing but evidential reasons prevent a prosecution".

128. The Claimant maintained the police told her they would prosecute if further evidence came to light and 'they advised me to go down the civil route'.

129. I was also referred to a document (undated) at SC02/p101 which said (*sic*):

> "I have discussed this case with DS Liddar.
>
> The suspects actions have exposed the victim to a loss.
>
> I will continue with the investigation as the police believe this is a fraud and not a civil case."

130. It was unclear on the face of the document who wrote this, when, or whose belief exactly was being referred to. In her second witness statement at [34] the Claimant said it was written by DC Annor. For reasons I will explain later this document does not assist the Claimant.

131. Mr de Wilde then moved to the Claimant's publications giving rise to the counterclaim. The Claimant said she 'absolutely' believed then to be true.

132. I was taken to a Facebook thread at Core B/p637 in which the Claimant wrote of a '£1.6 million claim'. At p640 she wrote to another user, 'It is criminal.' At p644 she wrote, 'fingers crossed for me. Otherwise it's other avenues like a hit man lol.' As to this last comment, she denied it was a threat of violence and described it as 'Irish banter'. She accepted that in her posts she was giving a 'forceful account' of her case including that it involved seriously criminality by the Defendant.

133. She was shown a post warning her about libel risks, and said she had been told by an unnamed police officer (not DC Annor) that there was no libel risk. She later said that she did ignore the warnings, as she thought the Defendant would take no action unless she brought an action.

134. She accepted (Core B/p612, p657) that she had posted enough that the Defendant would have known she was being referred to (even if others may not have done).

135. The Claimant said she launched a crowdfunding website on GoFundMe in 2020 (Core B/p917). She accepted making a series of attacks on the Defendant. She reported the Defendant to multiple (quasi) regulators. She also complained to the University of East London (UEL), with which the Defendant had connections. She accepted her then solicitors, Tiger Law, had sent an aggressive letter of claim dated 30 July 2020 seeking payment of £2.4 million (Supp Bundle 1/p231). This also stated they were advising the Claimant on a private criminal prosecution.

136. Core B/p930 was a Twitter exchange between the Claimant and another therapist in May 2020 in which the Claimant named the Defendant and said she had admitted the matter under caution. She accepted that many people would have seen this. She was taken to other similar publications by her which named the Defendant (eg Core B/p942).

137. Mr de Wilde's final point to the Claimant was that her claim was a form of extortion because it involved a hugely exaggerated financial claim which made 'no sense at all'; she had made publications which had made the Defendant's life a misery; and that within the litigation she had included hurtful, sensitive and irrelevant information to cause her further intimidation and distress; all with a view to trying to force a settlement. The Claimant disagreed. She said she had hoped the Defendant would take action against her. She wanted other people to be aware of what she said the Defendant had done.

138. In re-examination, the Claimant said one of the Facebook threads was just for therapists, the other was public/open; her Twitter was locked down (ie, to view you had to be a follower of hers).

139. She said those who read her 'hitman' comment, for example, had not taken it seriously although they were angry for her. She had put 'lol'. She said the Defendant had a right of reply.

140. The next witness was Peter Phelps. He adopted his witness statement. He is a therapist with practices across London including in South Woodford He worked with the Claimant from 2008. He received referrals from her, and the volume of referrals went down from 2011. He said as far as he was aware, it was just the referrals from the Claimant which declined, his practice was otherwise healthy as were other therapists' practices. Before 2011 the Claimant's practice was doing well.

141. In cross-examination he said he did not rely solely on referrals from the Claimant. He said he did not have a detailed knowledge of the disputed listing. He was made aware of it by the Claimant in 2016 but did not see it himself. He said he believed he lost several thousand in income through the Defendant's actions. This assertion was based on what the Claimant told him. He said he was not just making up evidence to help the Claimant. He was shown a letter he had written in 2020 to the Claimant saying that referrals had declined from early 2012 (and not 2011, as he said in evidence). He said the drop off had been 'around this time', and he could not help on precise dates.

142. The next witness was Rob Frazer. He said that the Claimant's business had been thriving when he first came across her in 2008/9. Her business went down quite markedly and she had had to give up rooms. She commented that the Defendant seemed to be thriving and was perplexed. She said, 'I think she must be good at IT'. His impression was that the dip was just for the Claimant, and there was not an industry dip at this time. He said, 'It was all a bit perplexing.'

143. In cross-examination he agreed that he had worked at the Premises and received referrals from the Claimant, but his practice was not solely based on referrals from her. In 2011/12 his practice was just starting and when it dipped for her it dipped for him. In 2010 she had been expanding but then in 2010 and 2011 her practice decreased. When the Defendant finished her training her private practice grew and the Claimant's went down – it was 'inversely proportional'.

144. The next witness was Sally Baker, a senior therapist and the Claimant's clinical supervisor. She adopted her letter of 31 October 2022. Her role is to support therapists in their practices. Her role depends on the level of the therapist's experience. She has known the Claimant since 2021. A trainee would not work on their own. They need to have supervised work. The Claimant was very experienced.

145. She said she would expect a therapist who had concerns about another therapist to air those concerns and if necessary to go to the governing bodies. She said she had no knowledge of the Defendant's practice and training in 2010 and had no knowledge of the Claimant's publications.

146. David Sleet was the next witness. He set up an organisation called APA with the Claimant which aimed to raise standards in the therapy industry. I think I can largely pass over his evidence, except he explained that the Claimant had left a review in the name of APA of Cherry Trees Therapy (the Defendant's business) alleging fraud, which should not have been in APA's name, but in the Claimant's own name. The Defendant made a complaint to APA.

147. The evidence of the Claimant's last witness, Paul Silas, was taken as read. This was character evidence about the Claimant.

148. That was the Claimant's case.

149. The Defendant's first witness was Delrene Walker. She is a therapist. She worked at the Premises and rented a room from the Claimant. Then, when the Defendant left at the end of 2011/early 2012, Ms Walker went with her to premises in Loughton. She is friends with the Defendant, whom she described as a 'brilliant businesswoman' with 'enormous energy and commitment' and so has been successful as a result. She said it would have been out of character for the Defendant to have done what the Claimant has accused her of, as she is honest and straightforward.

150. In cross-examination, she said she had rented a room at Cherry Tree Therapy Centre, the Defendant's current business. She had also worked with her in Loughton, and before that at APS at the Premises.

151. The next witness was the Defendant's son, Charlie Ley. He was called mainly because of evidence in the Claimant's witness statement at [62]-[63] alleging that the Defendant had been director of a company called CJS Ley Ltd, and some veiled suggestion by the Claimant (mentioned earlier) that the Defendant had tried to move assets, including money belonging to that company.

152. Mr Ley explained that starting as a teenager he built a successful and lucrative YouTube business producing gaming videos. As the business grew, the Defendant suggested to her accountant that Mr Ley needed to form a limited company. The Defendant had a dormant company of which she was the director and shareholder, Transitional Therapy Ltd. The accountant suggested changing the name of the company; that the Defendant resign as a director and be replaced by Mr Ley; and that her shares be transferred to him. The accountant said doing this would be cheaper than forming a new company. This was therefore done, and Transitional Therapy Ltd became CJS Ley Ltd. The Defendant had no involvement after October 2014 and it became the vehicle through which Mr Ley ran his video business. Eventually, in 2019 he sold the company for a substantial amount of money.

153. The Defendant then gave evidence. She adopted her first witness statement. She made a second witness statement, however from now on all references are to her first witness statement unless otherwise noted.

154. She first dealt with her background. After a career as a full-time mother she became a social worker, and also worked for her father's company until December 2011. She met the Claimant on holiday in 2005 and they became friends. They were close and in the early years the Claimant helped her through a period of personal and relationship difficulties.

155. Around 2007/2008. the Defendant began a diploma course in counselling and psychotherapy. When she first met her, the Claimant was working from a room

in South Woodford and later moved to the Premises, which had a number of rooms. It was owned by a Roger Fry, and initially the Claimant rented a single room. She said the Claimant initially planned a joint venture with two other therapists (APS being their initials) but this did not happen and the Claimant used APS as her personal trading style. The website apspsychotherapyandcounselling.co.uk was registered in March 2009.

156. In 2008 she began a post-graduate diploma at UEL and eventually APS was approved as a place where she could do her placement. She started there in January 2009. Adrian Pennington was her clinical supervisor and she gave her client fees to the Claimant (which was standard practice). She saw about seven clients in 2009 and 2010 and these mainly came through the Claimant. She also referred a couple of clients to APS. In June 2010 she was awarded her diploma.

157. In May 2010, shortly before qualifying, she registered a domain name for 'Buckhurst Hill Counselling' (buckhursthillcounselling.co.uk) in the anticipation that she would eventually use it to develop a site for her own practice. She chose Buckhurst Hill because that was where she lived, and she had started to create a counselling room in a spare room in her house that she had intended to use. She continued to work for her father's company and continued to see her APS clients.

158. In summer 2010 she built a website with the trading style 'Buckhurst Hill Counselling & Psychotherapy' (ie BHCP) which went live in October 2010. In September 2010 she registered as a sole trader with HMRC.

159. The Defendant undertook further courses to develop her skills, and in October 2010 registered a second domain name (transitionaltherapy.co.uk). She had met another therapist and they planned to open a business 'Transitional Therapy'. In the event the other therapist decided not to go ahead, and so the Defendant proceeded alone.

160. In [29] of her witness statement she said this, which is important for the purposes of this case:

> "29. … In January 2011, I created an email account transitionaltherapy@gmail.com and an associated Google account. I added a business profile for Buckhurst Hill Counselling and Psychotherapy to 'Google Places' (this service has since been rebranded many times by Google, becoming known as Google+ Local (2011), Google My Business (2014) and more recently, Google Business Profiles (2021)). I used the Buckhurst Hill name to set up the listing as at this point the only website that I had live was www.buckhursthillcounselling.co.uk and I was yet to rebrand myself as Transitional Therapy. I had also set up a counselling room at my home in Buckhurst Hill with the intention of seeing clients. I also linked my website to Google Search Console to monitor web activity (I produce at page 11 of my exhibit CSL/1, an email from Google to

> transitionaltherapy@gmail.com referring to the Search Console and my Buckhurst Hill website). This was my first Google listing, so it needed to be verified by Google to ensure that it was a genuine business, and was located at the address given. In order to verify my listing, Google sent a postcard to 10 The Shrubberies [the Premises], which included a code which I then entered into my Google Business account."

161. In 2011 the Defendant commenced a master's degree, and she also created a website for www.transitionaltherapy.co.uk. Her income from counselling in the tax year 2010/11 was less than £2000.

162. In [34] she said:

> "In the early part of 2011, I began to rent an additional counselling room on an *ad hoc* basis in Prestige House, Queens Road, Buckhurst Hill, with a view to gaining additional clients from a different location. This was the first time I rented rooms in addition to the one I rented at APS. The Queens Therapy Rooms operated in a similar way to APS. I recall adding this new location to my website and setting up a second Google Places listing for 'Buckhurst Hill Counselling' using the Queen's Road location. I later added a Google Places listing for Transitional Therapy at the Queens Road address when I had rebranded (I produce at page 38 of my exhibit CSL/1, a screenshot of the Transitional Therapy Google listing. I didn't immediately replace the Buckhurst Hill Counselling listings with the Transitional Therapy listings as returning clients would not be able to find me if I removed them completely. I have since tried to see if I can obtain the precise dates for the set-up and closures of all my Google Business listings, but have unfortunately been unable to do so. Google does not appear to document this information."

163. In mid-July 2011 the Defendant was added to the APS website. She also introduced Delrene Walker to the Claimant, and Ms Walker began to rent a room at the Premises on an *ad hoc* basis.

164. During 2011 the Defendant's business began to grow and she was able to refer clients to the Claimant and to Ms Walker. She also decided to focus exclusively on counselling and so deferred her master's degree and decided to stop working for her father.

165. During 2011 the Defendant's relationship with the Claimant became, as the Defendant put it at [41], 'increasingly strained'. The exact reasons do not matter. It became (or had become) clear to the Defendant that the Claimant's business was not doing well and that she was going to give up some of the rooms she rented, and there was friction between the two about various matters.

At the end of 2011 the Defendant decided to move out of the Premises entirely and saw a room she liked in Loughton.

166. Around that time, rooms were being offered in The Premises for between £10.50 and £14 per hour, although the Defendant herself paid £10.

167. On 17 November 2011 the Claimant sent the email to therapists about room contracts that I mentioned earlier. The contract was for £108.33 per month, for five hours' room rental per week. This equated to a room rental charge by the Claimant of £5 per hour as follows:

> £108.33 per month x 12 months = £1300 *per annum* (after rounding)
>
> £1300 *per annum* / 52 weeks = £25 per week, or £5 per hour for five hours per week

168. In late December 2011, APS's website was advertising rooms at £5 per hour.

169. This figure will become important when I come to the Claimant's pleaded losses.

170. The Defendant took the decision to take the room in Loughton and give up The Premises and the Queen's Therapy Room. She moved out just before Christmas 2011. She said she thought the Claimant viewed this as an 'act of betrayal', but as far as the Defendant was concerned things had become uncomfortable, and so she was ready to move on. Ms Walker came with her and gave up renting at the Premises.

171. On 1 January 2012, the Defendant moved into the counselling room in Loughton. She still had her Google+ Local (as she believes it was then called) listings for Transitional Therapy and Buckhurst Hill Counselling (as well as websites for each). She amended the listings to the Loughton address so that old clients searching for her services would see that she had changed location.

172. During this period, enquiries came through several avenues. She continued to pay for an advert in the Counselling Directory she had taken out previously, and she continued to receive enquiries through the Transitional Therapy website. She also pursued a number of networking opportunities in an effort to build her client base. For the tax year 2011/12, her earnings from counselling were £12,726.

173. In October 2012 the Defendant was informed by another therapist called Louise, who had recently met up with the Claimant, that she had expressed hostility towards the Defendant. The Claimant blamed the Defendant for 'taking away her business'. The Defendant said she was not surprised at the hostility, but that she had not taken any of the Claimant's business; the only lost income was from the Defendant's room rent and that of Delrene Walker.

174. In 2012 the Defendant moved her practice to Woodford Green. In early 2013 she formed Transitional Therapy Ltd, although this remained dormant. Her income for 2012/13 was £23,682. In October 2013 she obtained her master's degree. Her income in 2013/14 was £22,310.

175. In the spring of 2014 the Defendant found premises in Cherry Tree Rise, Buckhurst Hill, to operate her counselling business from, and rebranded as Cherry Tree Therapy Centre. On 6 April 2014, she registered the domain name cherrytreetherapycentre.co.uk, and started to build a new website. She began working from the Centre at the end of May 2014.

176. Around this time she 'redoubled' her marketing efforts in order to attract new clients, eg, by newspaper advertising; contacting local GP surgeries and health centres; distributing leaflets in the neighbourhood; and holding 'taster' days at the Centre, where people could drop in to meet the Defendant informally.

177. During this period, she decided to abandon the Transitional Therapy brand and focus exclusively on Cherry Tree Therapy Centre. On 24 September 2014, she instructed her accountant to file dormant accounts for Transitional Therapy Ltd, and then close down the company. She then dealt with how her company had become CJS Ley Ltd, which I explained earlier.

178. Her income in 2014/5 from counselling and room sub-rentals was £32,970.

179. By March 2016, the Defendant had six counsellors and psychotherapists working regularly from Cherry Tree Therapy Centre (in addition to herself). She said the Centre had built up a good reputation in the local area. For the tax year 2015/16, her turnover was £47,566.

180. I now turn to the Defendant's account of events from March 2016, when the Claimant started to accuse her of passing off her business as the Claimant's business via the Google listing.

181. The Defendant was first contacted by the Claimant on 26 March 2016. She said at [74]:

> "On Saturday 26 March 2016, after facilitating a peer supervision group at the Centre, I was surprised to see I had a missed call from Siobhain, and that she had apparently left me two voicemail messages. I had had no contact with her since December 2011, more than four years prior. Upon listening to the voicemails, I was shocked to hear two very angry, loud, threatening messages. I recall her saying that she was 'finding my number attached to her business all over the Internet', that I had 'taken over her website', 'hacked into Google' and 'replaced a Google button' (or words to these effects). She said she did not know how I had done it, but that she would not be letting it go."

182. The Defendant says she looked at the APS website and saw she was still listed there, even though she had not worked there for some years. She mistakenly believed that that was what the Claimant was referring to. She told the Claimant she was happy for her to remove her details, and that she had no control over the APS website.

183. The Defendant went on at [77]-[78]:

> "77. The following night (27 March 2016), I went through various search terms on Google, and came across my old Google business listing for Buckhurst Hill Counselling and Psychotherapy. At first glance, I thought it was just my old listing, but then I noticed that it did not look right, and that the details had been changed. The listing showed my trading name (Buckhurst Hill Counselling and Psychotherapy), my old work address at 10 The Shrubberies, and my work number (which was and still is my number ending in 857), but displayed a link to Siobhain's (APS) website instead of my own. I noted that the listing was coming up on Google searches for both Buckhurst Hill Counselling, and APS. The listing also had a review from someone I did not recognise (a Rebecca Elliott) saying:
>
> > 'I have now referred several women to Louisa for issues that have arisen during or shortly after pregnancy, whether birth related or historical issues that then become an issue once the dynamics have changed. I am pleased to say that all of my clients have been able to either resolve their issues or have learnt coping techniques to help them better manage their concerns.'
>
> I did not know who Louisa was, and had never worked with anyone called Louisa. There was also a comment on the review by Siobhain. I produce a copy of the review, on which Siobhain's comment is just about visible (originally disclosed by Siobhain in pre-action correspondence) at page 236 of my exhibit CSL/1. I was really confused as to why both the review and Siobhain's comment on the review had been left on an old Buckhurst Hill Counselling listing. The business listing was also marked as closed. This meant that if anyone had come across the listing, they would see that the business was no longer in operation at that address.
>
> 78. I thought that someone might have suggested an edit as I believed that Google My Business was a public platform which allowed anyone to suggest edits to listings, bar the actual name of the company. This is evident from

> images produced by Siobhain which seemingly show her in 'edit mode' on the listing. At the time, this was the only explanation I could come up with as I knew that I had put in the web address www.buckhursthillcounselling.co.uk when I set up the listing in 2011 and now the listing appeared with the incorrect web address of www.apspsychotherapyandcounselling.co.uk. Having these incorrect details would potentially be damaging to my own marketing and so was obviously not something I would have done."

184. The Defendant then exchanged messages with the Claimant telling her she would do her best to delete the listing, even though it was old. She also said that if anyone had contacted her in error looking for the Claimant she would have passed them on to her. This did not appease the Claimant, who maintained that she was going to take matters further.

185. For several days the Defendant tried to gain access to the old listing. She did not want a Google listing of hers directing people to the Claimant's website. She said ([80]) that she could have lost prospective business that way, and that in any event she had no desire to be publicly linked with the Claimant.

186. The Defendant then did some work on Google to try and rectify matters by changing/updating the details to her current business, and she received confirmation from Google of the changes (although it said the changes would take some time to take effect). However, when the Defendant checked, searching for APS still brought up her listing, so in the end she just deleted it and told the Claimant that she had done so, in a message dated 31 March 2016. In another message (Core B/pp539-540) she told the Claimant to stop contacting her:

> "That's now the third time you have threatened me. I am not worried about you taking it further because all of it is beyond my control as I have done nothing to create the situation. I'm formally asking you to stop contacting me directly from now on as it amounts to harassment."

187. Matters then took a turn in July 2016 when the Defendant received a call from the police asking her to attend to be questioned following the making of an allegation of fraud by the Claimant. She attended Romford police station and was interviewed. The Defendant said ([84]):

> "I answered the police questions fully and to the best of my ability, explaining how I had obtained my clients over the years, and the history of my websites and trading names and so on. I confirmed that I had not received any enquiries or referrals intended for Siobhain. I explained that Siobhain was struggling to rent out her additional therapy rooms when I was still working with her. The

> police read me parts of a statement made by Siobhain. A lot of it seemed to be irrelevant. However, the police showed me an advert that Siobhain had apparently discovered on a directory website called Psychotherapy Experts. I had never heard of the site, so this completely threw me. I could see that the advert apparently had some of my details on it, and I guessed that these details must have been taken from the mixed-up Google listing."

188. The Defendant has produced in her exhibit CSL1 a police summary of her interview. She went through the history, and creation of listings, but it is sufficient to note for now that she did not admit to creating a listing with both BHCP's details and her phone number, and also the APS web address. She said at [86] of her witness statement:

> "I categorically denied deliberately altering Siobhain's Google listing or having any knowledge of the details apparently given on the Psychotherapy Experts website. I left the Police Station, with the police saying they would investigate the matter further."

189. DC Annor's closing report of 9 September 2016 (Core B/p370-1) stated:

> "Caroline was interviewed and denied altering [blacked out] listing and stated she had created her own to advertise where she was working at the time to generate her own clients. She did not alter [blacked out] listing and denied any knowledge of the details on Psychotherapy Experts.
>
> …
>
> Despite the extensive investigation undertaken by DC Annor there has been no evidence obtained to support a charge of fraud in the criminal courts.
>
> As such this report can be closed."

190. On 12 May 2017 the Defendant received a letter before claim from the Claimant's then solicitors, Russell Cooke, alleging passing off and unlawful economic interference. It also alleged that the Defendant had committed criminal offences. The claimed loss (at [18]) due to a drop off in business was put at £632,790.06.

191. Receipt of this letter caused the Defendant to do further work. She contacted Psychotherapy Experts, who told her that they had obtained their information from Google. The relevant website had only existed from February 2016, which means, given the details were removed following the Claimant's complaint in March 2016, that listing could only have been up for a matter of weeks when the Claimant discovered it.

192. At [92]-[93] the Defendant said:

> "92. On 19 May 2017, I reached out to the Google Advertiser community to see if anyone could explain how the mixed-up listing might have arisen, if it was not the result of any deliberate action by me or Siobhain. I was told that it 'could be that Google has the two businesses confused as one in the same', and that 'this happens more easily if both business are the same category or closely related categories' which of course Buckhurst Hill Counselling and APS were. I produce a copy of this email at page 288 of CSL/1. I also contacted Google My Business support, who stated that there could not be more than one listing at one location (see page 289 of CSL/1). It started to appear to me that what might have happened is that both me and Siobhain created Google business listings which were initially recorded as being at 10 The Shrubberies and would have been under the category of Counselling or Mental Health Services, and that at some point in time (possibly in 2015) the details of these listings were merged by Google, and became unmerged (as it were) once I deleted my old listing in March 2016. Further support for this 'merging' theory came from the Rebecca Elliott review. As noted above, the Rebecca Elliott review, and a response by Siobhain appeared on a listing in the name of Buckhurst Hill Counselling. However, the review left by Rebecca Elliott on 24 May 2015 was never left on a listing in the name of Buckhurst Hill Counselling, but rather a listing in the name of APS Psychotherapy.
>
> ..
>
> 93. All of this is quite confusing, and we may never know exactly what happened. I did not – and do not – feel that it is actually for me to posit, much less prove this theory, because I did not do anything wrong – and more importantly – I do not believe that there was ever any actual confusion caused to the public, or any damage to Siobhain/APS' goodwill (I am not aware of any evidence to this effect). However, since Siobhain appeared to believe that I had acted dishonestly in some way, I felt obliged to try to get the bottom of the matter in order to persuade her otherwise."

193. In her statement from [95] onwards the Defendant dealt with her claim in defamation and harassment. In summary, she discovered from being told by peers that the Claimant had been making public allegations about her and that although the Defendant had not been named, people had been able to work out

who it was the Claimant was referring to. An acquaintance emailed her some of what had been posted and she was shocked and distressed at what she read.

194. The Defendant then went through the various publications, including the Claimant's repeated claims that the Defendant had 'admitted it' to the police. At [108] she said:

> "As the Facebook posts that I had seen referred to readers being 'updated on the fraud case', I knew that there had almost certainly been previous statements about it. I therefore carried out a search, as I was deeply concerned about this misinformation being published to thousands of people. I discovered that Siobhain had been posting publicly about her allegations for some time. The earliest comments which appeared as though they might relate to me, dated back to at least 14 March 2016 (i.e. before she had contacted me about it). On that date, Siobhain wrote on her personal Facebook page: 'That was a very direct, assertive email I've just sent to a therapist. Nice I may be, but piss on my business and you will hear from me!!!!!' Pausing there, I never received any email, which makes me question whether this post was about me but in any event, it demonstrates her aggressive, vitriolic nature."

195. At [121], [123], the Defendant said:

> "I was angry at the police during this time as Siobhain was stating that she had been told by the police that she was within her rights to say all this openly in public as I had admitted the offence of fraud ('…police made it very clear I can't be done for libel as she admitted it under caution in police interview' (see page 372 of CSL/1). I could not understand why the police would tell her this. I needed to reach out to the police for help, but I felt very mistrusting of them. I did report Siobhain to the police (as set out below) but it would not be until several years later (in 2021) that I received formal confirmation from the police that the statements Siobhain was making at that time (and has consistently repeated since) about what the police had said to her, were untrue …
>
> 123. I was in a bad way emotionally at this time; I started experiencing anxiety attacks and was nervous about leaving the house, fearful that Siobhain was going to be out there. My ex-husband, Christian wrote to the Metropolitan Police on my behalf as he was witnessing first-hand the outcome of the ongoing harassment and was concerned for my welfare as I was alone in the house with my children. He wrote to the officer who had originally questioned me at Romford Police Station as Siobhain was

> alleging that she had been given information from the original investigation which was untrue and extremely worrying. As stated above, I have (many years since) had formal confirmation that this was not the case."

196. The Defendant reported the Claimant to the police for harassment, however after an investigation no further action followed.

197. The Defendant then dealt with the resumption of the Claimant's online postings in 2020. She was informed by an acquaintance that the Claimant had started a GoFundMe page to raise funds for civil proceedings against the Defendant. She at [130]:

> "130 … It is difficult to put into words the distress and upset I felt when seeing that Siobhain's public campaign against me had resumed, and that this time around she was using my name (at least on Twitter), and my professional details, including my telephone number. I know that Siobhain had around 2,500 followers on Twitter at this point, but I have no way of estimating how many people saw the GoFundMe campaign on the GoFundMe website. GoFundMe is a public platform that will email new campaigns out to its subscribers."

198. At [131] the Defendant estimates that the GoFundMe campaign was posted to many thousands of people on Twitter. Further social media posts alleged that she was a 'dangerous, unethical, criminal therapist from whom the public, the counselling profession, and clients needed protecting' ([135]). At [136] she said:

> "136. I remember breaking down when reading these posts; the stress of it all was overwhelming. I was fighting to keep my business afloat at this point during the pandemic, and I was now once again being falsely labelled a criminal. This time it was worse as I was being expressly identified and my name, business address and home address were easy to find online. Once again, I feared that, particularly once the lockdown was lifted, I might be targeted in person by Siobhain and/or by people acting on her encouragement. I once again felt extremely vulnerable and unsafe. I frequently checked Siobhain's Twitter and Facebook accounts to try to keep on top of what was being said about me."

199. At [139] the Defendant said that it was difficult for her to keep track of all of the Claimant's posts because there were so many of them, but that the Claimant had targeted counselling professionals, companies, and organisations in order to maximise her reach. The Defendant's details, including her business name and location, were included in some posts.

200. In May 2020 the Defendant reported the Claimant to the police for a second time for harassment, however the police concluded it was a civil matter.

201. In July 2020 the Defendant received the second letter of claim from Tiger Law, which I mentioned this earlier. The Defendant said of this at [158]:

> "It was stated that the police had been 'extremely keen to pursue proceedings' against me, and that Siobhain was considering a 'private criminal prosecution'. All of this was incredibly distressing to read. Yet more shocking, however, was that the supposed loss caused by my alleged actions had risen from £632,790.06 in the first Letter Before Claim (itself a ridiculous figure) to £1,442,156.30, with no real explanation given for this enormous change. Whilst I had read reference to '£1.8 million' in one of Siobhan's social media posts, I could not believe that professional lawyers were putting forward such a figure, and seeking interest of over £1 million on top, asking me to forward a sum of £2.4 million 'within 14 days'. I felt that the intention was to intimidate me as much as possible."

202. This letter also referred to the Defendant having 'siphoned off' the Claimant's income. It said that the police 'cyber crime squad' had calculated 'predicted lost rental income' to be £1.6 million. It again mentioned the possibility of a private prosecution.

203. In 2020 the Defendant said that Claimant continued her harassment, including by making contact with UEL, where the Defendant had been working and by whom she had been offered a permanent contract. The Defendant felt unable to take this up because of the Claimant's actions. The Claimant made a number of additional allegations, including that the Defendant had seen clients whilst training and not permitted to; and that the Claimant was going to seek to have the Defendant's qualification revoked.

204. At [170] onwards the Defendant dealt with complaints – which she says were false – by the Claimant about her to professional therapy bodies such as the British Psychological Society.

205. At [180] the Defendant set out what she believes happened with regards to the listing (and produced a number of articles and other material to support her contention that Google's software can and does merge business listings as a result of a 'glitch'):

> "… it appears that at some point in time (and unbeknownst to me), my Google business listing for Buckhurst Hill Counselling and Psychotherapy was somehow merged or connected with Siobhain's APS listing. As above, I say this because the listing started to display Siobhain's website, whereas I always had my own website. Based on

research I did subsequently, I believe this to have been the result of an automated process by Google which owed to the fact that the businesses were similar and in similar categories."

206. An example of what the Defendant found is this, from Search Engine Roundtable (www.seroundtable.com) dated April 2009 (Core B/p861):

> "I found a very disturbing Google Maps issue via Google Maps Help forums. Mike Blumenthal has uncovered that Google is merging competing businesses that have nearby addresses. Let me say that again, but show you an example, that was uncovered by Mike.
>
> Here are the results for two different hotels/motels in the same area, but that have different addresses. The map result for South Pier Inn displays the correct information, but their competitor, The Inn on Lake Superior is somehow merged into this record, showing the South Pier Inn's information and web address, while not showing the Inn on Lake Superior's information. They did however merge both hotel's phone numbers."

207. At [186]-[187] the Defendant concluded:

> "186. In short, I do not believe that I have ever done anything wrong or that anything I have done, or failed to do, has caused Siobhain loss, much less the kind of serious loss that she now ascribes to me. I have certainly never been dishonest or engaged in fraud, which is how Siobhain has always chosen to characterise my alleged actions. I have not deserved the horrid campaign of defamation and harassment that Siobhain has subjected me to. I believe that I am paying a high and warped price for rejecting Siobhain's friendship, and for choosing to try to build my own business at a time when hers was struggling. Unfortunately, I cannot avoid the conclusion that she is motivated by jealousy and bitterness.
>
> 187. As touched upon at various points above, the feelings of stress, anxiety, fear, vulnerability, frustration, and sadness which I have variously felt since 2016 as a result of Siobhain's actions have, at times, been overwhelming. This had a huge impact on my work. I found it difficult to sleep during the periods where she was particularly active in her hate campaign against me. This would leave me drained and depleted. I would cancel my clients and/or reduce my client list for periods of time to cope with what was happening …I was often tearful and distressed. It felt

like a sustained attack over many years and to this day I feel as if it will never end."

208. The Defendant was then cross-examined by Mr Siriwardena on behalf of the Claimant.

209. She did not send cease and desist letters but consulted solicitors about sending such letters. She did not report the Claimant to her professional membership bodies because she did not think it was a matter for them, ie, she did not see it as a counselling matter.

210. Her case is that the merged listing happened because of how Google's technology works.

211. The site www.transitionaltherapy@gmail.com was set up in January 2011. She did not use it for Google related matters. Between January and June 2011 she would have set up the listing for Buckhurst Hill Counselling and Psychotherapy (BHCP). She verified it via a postcard sent to her by Google to the Premises' address. It contained a code and she went online and entered the code to verify the listing.

212. In the first half of 2011 she began to the rent *ad hoc* the room at Prestige House and set up a second listing for BHCP at Prestige House on Google My Business.

213. She explained that once you set up a business listing it appears on Google Maps with an icon, which when you click it, brings up the listing details at the side of the page (address, phone number, etc). If there is some kind of error you can edit it yourself; there is a 'backend' where changes can be made.

214. She created the listings to generate business.

215. She was asked whether she got updates from Google to the registered email; she said that Google has changed over the years, and that you do now get quite a lot of data (and have done for the last four or five years), but not at the time. She only went into the listing when she needed to change it. She reiterated that these days you get a lot of data but back then, not so much.

216. She moved to a room in Loughton in 2012 and then to Woodford Green later that year. She changed her listings when she moved; she said you could either amend the details, or delete it.

217. She bought the domain name for Transitional Therapy in October 2010 – but did not get a server for it until April 2011 and the website was complete in June 2011. She did not get statistics about use of the website.

218. She moved to Cherry Tree Rise in 2014 and registered a website for Cherry Tree Therapy Centre, but she still had the transitionaltherapy.co.uk website and also the BHCP website. The Cherry Tree Centre was the building and Transitional Therapy was her work within it.

219. She started in 2010. The majority of her clients came from online directories. The websites were created for business purposes. She did not necessarily check numbers of 'clicks' if the phone was ringing.

220. She was asked about people leaving reviews. She said that people cannot leave reviews on her websites because they are not set up that way. She said you would get an email if someone left a review on the Google listing. She did not have any reviews on the BHCP listing.

221. She paid for a web designer, and her own web skills were limited back then.

222. She had an intake form from about 2012 which asked clients where they had heard of her, however it was not until 2016/17/18 that she made more of an effort to find out where people came from.

223. She was taken to the 'merged' listing (Core B/p238). The 'Call' button would go to her mobile number. The directions would go to the Premises.

224. The Defendant reiterated in response to a question that the first she knew about the merged listing was when the Claimant told her about it in March 2016.

225. She said she had sought to use a photo of an APS website on her BHCP website in 2010 but the Claimant had been upset and wanted £50, so she did not use it.

226. When she found about the merged listing in 2016 she was concerned that people who were looking for her/BHCP might click on the APS website link (eg, for more information) and go there instead.

227. She said initially when she saw it, she thought that the Claimant had changed the listing; it was only later that she began to think it was a Google issue. She later deleted it.

228. It was when she received the letter before action in May 2017 that she really began to try and get to the bottom of what had happened.

229. She sent Google an email – they replied you could not have more than one business at the same address because of the risk of a merger.

230. She started to do research, and there was lots of information on forums from people who had had the same issue.

231. The Defendant said she had been supervised by Adrian Pennington. The Claimant had been her placement manager. The Defendant had respected her.

232. Her relationship with Delrene Walker is that they are colleagues and friends. Their relationship has developed over the years.

233. She was then taken to some pages in the exhibits.

234. She was shown Core B/p229 and confirmed this is what the police showed her in 2016 (and is the Psychotherapy Experts listing)

235. Core B/p308 - this is a page from the BHCP website from October 2010. She had BHCP, and was then still working at APS's Premises (renting a room from APS).

236. Core B/p396: the Defendant's words are in blue on the right hand side. She was talking about how competitive counsellors could be. She was not talking about the Claimant specifically. This was a conversation with a colleague.

237. Core B/p426: this was an exchange with the friend who told the Defendant that the Claimant had been 'moaning' about her, and said she had taken away her business. She did not agree it was the same as the Claimant's threats about breaking legs, etc, and pointed out what she had said had been private, and not public.

238. Core B/p533: this is after the merger listing emerged. It was the Defendant communicating with the Claimant saying that she could not log in and did not have the password. In the end the Defendant deleted it, about three days later. Eventually she told the Claimant not to contact her. She did not know what had happened so she did not give her any further explanation. After about 31 March 2016 all further contact between them was through solicitors.

239. Core B/p536: this is the review by Rebecca that comes from the merged BHCP/APS listing. It was left on the APS listing, and remained there even after I deleted the BHCP listing.

240. Core B/p564: this is the letter before claim from Russell Cooke. She was shown [8], and said it contained information only the Claimant could verify.

241. The Defendant said that when the Claimant contacted her in March 2016 her recollection was that the Claimant had said she taken over her website. She went to the APS website and her profile was still there and she thought that was what the Claimant was talking about.

242. Core B/p566: the Claimant's solicitors asked for various disclosure at [21]. She said she provided a lengthy response and gave over what she had; but did not give telephone records at the time, but did so later.

243. Core B/p569: this was from Psychotherapy Experts. IG8 0TG is the Defendant's Woodford address. It was probably five miles from the Premises.

244. Core B/p573: this is a photo which the police showed the Defendant in her July 2016 interview. It is a building on Cherry Tree Rise with 'APS Psychotherapy' superimposed. She said she believed this happened because the weekend of the exchange between the Claimant and her, she went into the listing to change the address to Cherry Tree Rise, and it did change (see Core B/p571). The Defendant's theory is that when she made that change, APS got merged with the

Streetview picture of a building at Cherry Tree Rise (not Cherry Tree Therapy Centre).

245. Core B/p985: the green is the Defendant. This was a conversation that she had with Delrene. The Defendant said she had looked at what the Claimant had been posting and had accidentally 'liked' one of the posts. She shared her knowledge of what was happening with friends. Page 986 was a conversation between her and a friend. The Defendant was aware of the Claimant's GoFundMe page to raise funds to take her to court 'to protect the public'. Page 987 is a message from a friend telling the Defendant to 'to go to the people who police you'. She said she went to the police, but did not view it as a regulatory matter for membership bodies and did not approach them.

246. Code B/p995: the Defendant wanted the Claimant to take her to court so that she could 'end it'. She needed it to be over. She could not reason with her. She ended up thinking, 'I just hope she gets here', and added 'Here we are.' The Defendant had been told what was going on on the Claimant's Twitter feed, and she monitored it because the Claimant was trying to ruin her business.

247. Core A/p113, the Defendant's witness statement, [29]: she registered the domain name for transitionaltherapy.co.uk in October 2010, but her main business then was BHCP. The Transitional Therapy website was live until about 2021/2. She used a company called Social Media Marketing Ltd to develop the website. She did not have a contact at Social Media Market – there was no ongoing relationship, she had a one off arrangement with them.

248. She was asked whether she had taken professional advice in March 2016 when the problem emerged. She said that because she had taken the listing down, she thought the problem had gone away, and she did not.

249. Core A/p152, [147]: in 2020 Google would email you if someone left a review. When she received the notification of the one star review she responded, but then just decided to delete it.

250. She did not complain to Google about the merger, but she did ask them what had happened

251. Core B/p308: that is the webpage for BHCP. It shows her home address and also the Premises' address, where she was then renting rooms.

252. She was asked about creating a Google business listing and said she could not recall if in 2010 she was asked about other similar businesses nearby. She said that now Google does that, so far as she was aware. She denied deliberately claiming the APS name on Google listings.

253. In re-examination, she said that she had personally responded to the Claimant's solicitors referring to harassment and defamation; she sent them the posts and asked them to tell the Claimant to stop doing it.

254. Core B/p571: this is a copy of the changed merged listing after she had edited it via the backend in March 2016 after the Claimant contacted her. She thought it had been live for about a day.

255. She was then shown Core B/p588, an email from Google dated 18 May 2017 to her, which read:

> "Hi Caroline
>
> This could be that Google has the two business confused as one in the same. This happens more easily if both businesses are the same category or closely related categories."

256. This was after Russell Cooke had sent their letter of claim in May 2017 wanting c.£630,000.

257. The Defendant said she had never been sent any evidence by the Claimant of the APS listing.

258. The Defendant said she became aware of the Claimant's Facebook posts in 2017 following tip-offs, and then again in May 2020 when she was informed by a colleague and a member of the public after they saw her telephone number being advertised. She did not become aware of the Claimant's posts as a result of monitoring her.

259. She checked up on the Claimant and went back to the police to try and get her to stop because it was distressing. They said it was low level harassment and would not take it any further.

260. The Defendant finished her evidence by saying that what had happened had been 'horrific for seven years … for something which did not happen.' She said that 'every single thing has been twisted'. She said the Claimant was 'vile'. Finally, addressing the Claimant, she said, ' … what you've done is vile. It is just disgusting.'

Submissions

261. In his trial Skeleton Argument, Mr Siriwardena for the Claimant submitted as follows.

262. On passing off, and goodwill, it is apparent that the APS business had goodwill and a reputation attached to the services it provided through the Claimant and the self-employed therapists working under its brand. The mere fact that the Defendant completed a placement indicates that the Claimant has a reputation worth protecting. Further, it was not disputed that other qualified therapists either rented consulting rooms from the Claimant or accepted referrals from her. Her goodwill also existed in the form of her online presence which would cause members of the public and other professionals to seek out APS, which was recognisable through its logos and photos and in other ways.

263. As to misrepresentation, he said (as I understood it), that the Defendant had allowed the merged listing to exist over a number of years, and must have become aware of it given her changes in business name and premises over the relevant period. He said at [18]:

> "18. D would have been aware of any anomalies on her site. She used her email address to register the listing, she would have been updated on a regular basis with web traffic statistics from Google and over the period, there would have been multiple confused customers querying where C was or worse , being purloined by D."

264. As to damage, [19] he argued:

> "19. If the proposition that traffic would have been diverted from C to D, then it is reasonable to assume that a quantity of business that would have been utilised by C would have also been lost to D. It is left to the court to assess what level of damage has occurred as a result of D's actions."

265. In respect of the Defendant's Part 20 claim, the defence of truth under s 2 of the DA 2013 was advanced.

266. In respect of harassment, s 1(3) of the PHA 1997 was relied on, in that it was said that the Claimant's course of conduct was pursued for the purpose of preventing the Defendant from committing any potential offences connected with directories or misleading others.

267. In her own Closing Submissions, the Claimant referred to the defence of truth under s 2, and also the public interest defence in s 4 of the DA 2013, notwithstanding the latter was apparently expressly abandoned by amendment to her Defence to the Counterclaim (see above).

268. She made a number of other points, all of which I have read but do not need to set out. At least some of her points are really evidence, rather than submissions on the evidence given in court. Some of what she said has not been pleaded or was not referred to at the trial (eg, limitation in relation to defamation; and the Fraud Act 2006). Some of it just irrelevant. The Claimant did, however, maintain that the Defendant had admitted creating the listing (see eg at [45]: '… this is a direct admission to creating the information contained in the listing …') and that the police believed she had committed fraud (see eg at [30]: '…their belief of a criminal act of fraud as shared with your honour in court.'

269. On behalf of the Defendant Mr de Wilde submitted as follows.

270. The Defendant is not liable to the Claimant for passing off, and the Claimant has failed to prove any of the three elements of the tort, in particular, an

actionable misrepresentation by the Defendant, or one for which she is responsible in law. Her claim is totally without merit.

271. The Claimant is liable to the Defendant in defamation in respect of the publications in which she named the Defendant provided that she shows defamatory meaning and serious harm. No defence had been relied on.

272. She is also liable to the Defendant in harassment. If the Defendant is correct as to liability in defamation and harassment, there is no need for me to consider the claim under the GDPR (although it would inevitably follow that the Claimant's processing of the Defendant's personal data was unlawful).

273. The Defendant seeks an award of substantial damages (including aggravated damages), to take into account the Claimant's 'appalling' conduct, both in respect of the publications, and also the proceedings themselves. The Defendant also seeks injunctive relief to prevent further publication of the Claimant's allegations, and an order under s 12 of the DA 2013.

Discussion

The Claimant's passing off claim

274. As will be clear, the Claimant's case is not just that the Defendant committed the tort of passing off, but also that she committed criminal offences for which she should have been prosecuted. That being the case, in accordance with the principles I outlined earlier, it is for the Claimant to prove her case on the balance of probabilities by clear evidence.

275. I begin with the goodwill element of passing off.

276. Paragraph 4(a) of the Defendant's Defence admitted that the Claimant owns any goodwill that she possesses through trading as APS. In his Closing Submissions, however, Mr de Wilde argued at [7] that the Claimant's case on goodwill was 'confused'.

277. I am prepared to assume that the Claimant owns (and owned at the relevant time) goodwill in the business of APS for the purposes of passing off, and thus that the Claimant has satisfied the first of the three elements of the tort.

278. However, it is upon the second element that the Claimant's case founders. She has signally failed to prove on a balance of probabilities – let alone proved by clear evidence – that the Defendant made an actionable misrepresentation. The evidence unarguably points the other way.

279. I am satisfied that the merged listing, and the subsequent Psychotherapy Experts online directory listing, came about as the result of Google's software having merged together the Defendant's initial BHCP listing (for which she returned the postcard) and the Claimant's APS listing, which was then picked up by the directory. I will explain why I have reached that conclusion in a moment. I unhesitatingly accept the Defendant's evidence that she was entirely blameless,

and unaware of any issue about listings until she was contacted by the Claimant towards the end of March 2016.

280. I acknowledge at once that there are some unanswered questions, and in the absence of evidence from Google, or from a forensic computer expert, some matters may never be ascertained definitively. However, the burden lies on the Claimant to prove her case and it was for her to show what happened. That said, the Defendant's evidence as to what she did, coupled with the evidence she was able to assemble from March 2016 onwards, is more than sufficient to comprehensively disprove the Claimant's case and lead to the conclusion I have reached.

281. I start in 2011. I accept the Defendant's evidence that at some point during that year, whilst she was working from The Premises, she created a Google listing for BHCP (and without any mention of APS or its website) which she then verified via a postcard sent to her by Google to the Premises' address. That contained a code, and the Defendant went online and entered the code to verify the listing. It is that step which linked BHCP with the Premises' address in Google's servers, and must have led in part to what happened.

282. It is clear to me, and I find, that any 'admission' which the Defendant made about having created a 'listing' was in relation to this initial *true* and *accurate* listing for BHCP. I find that at no stage did the Defendant ever admit to having created a false or misleading listing with BHCP's trading style, her phone number, and also APS's address and website. This is borne out by the contemporaneous police summary of her July 2016 interview, and also DC Annor's closing report, both of which, whilst hearsay, I am satisfied are accurate. The Claimant's belief to the contrary – and her repeated public assertions on Facebook, etc, to that effect - were and are wrong. As I will discuss later, this was just one of a number of things which the Claimant said the police had told her which were not true.

283. A moment's thought suffices to show why the Defendant is unlikely to have done as the Claimant alleged in order to dishonestly poach her clients. As the Defendant said, to have done so would have run the risk that someone searching for her or BHCP online who brought up the merged listing would then have gone onto APS's website rather than call the Defendant's number and decided to use the Claimant or another APS therapist in preference to the Defendant. Because the Defendant's phone number was linked to the 'Call' button, it would appear that the Claimant was only ever able to conceive that this would have diverted clients away from her. But quite possible, as I have said, it is that the APS web address appearing on the merged listing might have brought clients to her and away from the Defendant.

284. The next reason I am satisfied that the Defendant did not create the merged listing is because of the review which Rebecca Elliott left for the APS therapist Louisa, to which the Claimant responded. That review and response could only have come from the APS Google business listing. There was no hypothesis put forward by the Claimant – nor can I think of one - as to how information relating to an APS therapist came to feature on the merged listing, other than by

having come from the APS listing. It would not have benefitted the Defendant to have added this review to BHCP's listing if she was trying to promote BHCP over APS, or pass her business off as that of APS, given Louisa was nothing to do with BHCP.

285. The next reason I find in favour of the Defendant and reject the Claimant's case is because merged Google business listings is a known problem. Earlier, I set out one extract from the evidence gathered by the Defendant. Another example is this, from 2012, contained in Appendix M to the Defendant's response to the Russell Cooke letter of claim, dated 7 July 2017:

> "The fun continues with my wife's business listing in Google Places! As expected, Google has unmerged her listing with the Windermere Real Estate office in Richland. But it's since re-merged the listing and created an even bigger mess. Ready to follow along?
>
> Google emailed to let me know the merged-with-Richland issue was being fixed. Sure enough, the Richland office now has its own listing, no sign at all of anything related to Cari's account. Good for them.
>
> In the meantime, I updated Cari's business name while all this was going on. I removed 'Windermere Real Estate' and replaced it with 'Real Estate Agent', which seems to have helped disassociate the listing with the Windermere office listings.
>
> But her listing has been merged again … only not with the main Windermere office in Kennewick, and not with one of her fellow agents, but it's been merged with two other agents in her same office. Here's the link for the live version, and here's a screenshot showing everything that's screwed up with this listing. (click for larger version)."

286. As against this, the Claimant was able to offer little in the way of evidence to support her contention that the Defendant had created the merged listing, or the Psychotherapy Experts listing, beyond the fact of their existence.

287. I therefore find for the Defendant and reject the Claimant's passing off claim. There is no evidence that the Defendant was responsible for the merged listing, and the evidence, and the inherent probabilities, all point to it having been the result of a software error.

288. This is sufficient to dispose of the Claimant's claim, however I should say something about the Claimant's case on damage.

289. The third element the Claimant needs to prove is actual or really likely damage to the property in her goodwill. However, there was no evidence that the Claimant had suffered any damage.

290. At the root of the Claimant's case was her belief that as her business began to decline in 2011 or so, the Defendant's practice was inexplicably growing rapidly, and that this meant the Defendant was stealing her clients through the merged listing.

291. Based on the hearsay evidence from Louise (which I accept), who told the Defendant around October 2012 that the Claimant thought the Defendant had been stealing business, I conclude that this was a belief which the Claimant formed years before she discovered the merged listing.

292. But her belief is not borne out by the facts. The Defendant meticulously set out her earnings from therapy on her tax returns and these were, if I may so, comparatively modest in the early years. The notion that there was a sudden rush of clients from the Claimant/APS to the Defendant from 2010 or 2011 onwards finds no basis in reality.

293. Second, I am unpersuaded that there is any evidence of actual damage in the shape of confusion between APS and the Defendant's business, resulting in a loss of business. The only confusion which appears to have occurred on the Claimant's case was in the mind of one person who had been a *pre-existing* client of the Claimant, and who had in fact been referred to her by the Defendant, ie, not someone who had found out about the Claimant's business online or through Google (as the Claimant accepted in cross-examination). The phone records of calls to the Defendant's own business, maintained by answer.co.uk (and disclosed by the Defendant), show that not a *single* person between 2014 and 2016 ever called the Defendant's business in the belief that they were calling the Claimant/APS.

294. The Claimant also faces the difficulty that much of her business came from word of mouth referrals and not – or not just – the internet. I reject as incredible her evidence that she had been driven to rely on word of mouth referrals because of the Defendant's alleged fraud.

295. My scepticism is reinforced by the Claimant's own claims about her success over many years. The Defendant cited some of these in her reply to Russell Cooke of 7 July 2017 (Core B/pp708-9):

> "Siobhain Crosbie I must point out, I've done this for 14 years and most years I am fully booked up and I've never been accredited, barely have time other than to relax after work, but my experience is extensive and it's my rep not my letters that work for me. Just my experience so sharing. :) 17 October 2013 at 21:10 ·
>
> Siobhain Crosbie Miles I'm pleased your qualification has helped you. I don't have a masters, but I do have a permanently full list of clients and the majority 98 per cent of referrals come from previous clients. It's my actual work that's achieved that and I'm very proud of that alone,

but if your masters got you a full list too on a pretty constant basis then that way has worked for you. I genuinely prefer my learning to have arisen from my experience and that's what sells me and that's what makes me feel proud so I think we simply have different perspectives of the "hot" jobs

Siobhain Crosbie Hi Kay, one little tip from a successful practice, hand your cards to literally everyone you meet, and I mean everyone even at the checkout in your local supermarket, plus it takes time, if your good at what you do your reputation will spread, one client can equate to 5 plus new referrals and that in my opinion is the best way to grow a successful practice. Don't expect overnight success you will be disappointed, like everything it takes time and experience to build it up. :) good luck.4 January 2014 at 13:29.

Siobhain Crosbie That sounds Irish marketing ops endless so didn't take it up, meant too busy to need it, but on reflection should have purely to get my name out more. Reputation everything :) 28 November 2013 at 22:22

Siobhain Crosbie Thanks Jo, I will have a look but and I wholeheartedly admit this I have a brilliant ridiculously cheap web designer who has done the designing. I just gave him the content and let him run with it. I think this is often though where I find too many therapists fall down. Two sides of the business. The therapy and it's business presentation. Mine needs updating now but got two much going on (sic) and honestly my business thrives on referrals from current clients rather than the website. It doesn't do the job I think it should, but I don't mind as get enough work. Will take a look though and if you want my web designers num feel free to ask. :) 3 April 2014 at 21:56"

296. Even allowing for an element of 'puffery' or self-promotion, these posts do not sit easily with the Claimant's case. If what she now says is true, these claims were untrue or at least highly misleading.

297. I am also troubled by the financial loss pleaded in the PoC (which, I should make clear, were not settled by Mr Siriwardena). The figures were wrong, as the Claimant accepted. The errors were not hard to spot.

298. Firstly, the claimed occupancy rate for rooms at 14 hours per day every day over a year was exaggerated, as I explained earlier (no allowance for Christmas Day, etc).

299. Second, that alleged occupancy rate assumed all the Claimant's clients came via Google, which they did not.

300. Third, the hourly rate of £21.67 was wrong. It was worked out as rent charged per five hours of treatment in one room at £108.33, giving a supposed hourly rate of £21.67 (ie, £108.33/5). But as I explained earlier, £108.33 was the *monthly* rental, for five treatment hours per *week*, which equates to a room rate of £5 per hour (and that was the rate advertised by APS). Hence, the claimed loss was wrong by a factor of more than four, even accepting the claimed 100% occupancy rate.

301. The PoC were verified by a Statement of Truth, but they should not have been. Ultimately, the Claimant has to take responsibility for advancing a false damages claim.

302. I am reinforced in this conclusion by the reaction of some on Facebook at the time. In 2017 the Claimant claimed on the Counsellor Connect page that the Defendant had cost her £1.6 million in lost income (a figure she said the police had calculated). More than one user was plainly sceptical about this. For example, therapist Lee Adams expressed incredulity and said, 'I apologise if my reply seems harsh … perhaps you need to look at what you have written and check if correct' (Core B/p639). Another therapist, Simon Brodie, wrote: 'You paid £1.6 million in room rental over 5 years? That figure seems astounding mainly because of the mental projections I am making about your income' (Core B/p640). Another user, Tony Whitaker, was able to reach a figure of about £1.6 million, but nonetheless wrote (Core B/p659):

> "I feel as if I am missing something huge here but can't see how your case would stand up to scrutiny if the charges and occupancy rates above form the basis.
>
> It may be different here up north but £21 room rental is more than twice the going rate. And no group or charity I know has clients from 8am to 10pm 365 days per year. At an average of 20 client hours per week you'd need need (sic) 15 counsellors using the rooms. Allowing for holidays etc it becomes closer to 20 practitioners.
>
> And overall the assumption is that all your room bookings came via that google link. I think it may be time to review the basis of the claim."

303. Later he wrote (Core B/p660):

> "The calculation leads to a number that is extreme and potentially damaging to any case, civil or criminal."

304. The Claimant's case in passing off therefore fails. The Defendant submitted that I should find that the claim was totally without merit. This means, per Males LJ in *Sartipy v Tigris Industries Inc* [2019] 1 WLR 5892, [27]:

> "27. A claim or application is totally without merit if it is bound to fail in the sense that there is no rational basis on which it could succeed …"

305. I have carefully considered this submission and have come to the conclusion that the passing off claim was indeed totally without merit. It never had any prospect of succeeding. There was no evidence that the Defendant had committed any unlawful act. (The undated document at SC02/p101 saying the police believed there had been a fraud does not assist the Claimant. It must have been written when the investigation was ongoing in 2016, and so was superseded by the police's final conclusion in September 2016 that no evidence had been 'obtained to support a charge of fraud in the criminal courts', as well as their conclusion that any loss was 'hypothetical'.) The Claimant was given the relevant evidence showing there is a general problem of merged listings Google long before she commenced this claim. There was no evidence of confusion or damage. The figures put forward by the Claimant by way of loss were plainly wrong, which again was pointed out to her at the time. It does not appear the Claimant heeded any of these warnings.

306. It therefore seems to me likely that the Claimant became fixated at an early stage with the notion that the Defendant had taken her business, which then hardened into a belief that the Defendant had behaved dishonestly in so doing, and no amount of evidence to the contrary was capable of shifting that misapprehension.

The Defendant's Part 20 claim

(i) Defamation

307. Mr de Wilde did not settle the Defendant's Defence and Counterclaim. There was a single defamatory meaning pleaded in respect of the four publications complained of, at [24]:

> "The Defendant is a criminal fraudster. She is guilty of an offence of dishonesty. Despite having admitted to the police under caution that she is guilty of fraud, she has, deceitfully and unethically, withheld this information from the professional bodies. She is so dangerous and deceitful that her vulnerable clients need protection from being exploited by her."

308. On behalf of the Defendant, Mr de Wilde accepts that separate meanings should have been pleaded in respect of these publications (Closing Submissions, [10]). He put forward the following suggested meanings, which he said departed from the Defendant's pleaded case in form, but not in substance, the imputations in

each case being within the boundaries of the meaning originally pleaded by the Defendant:

a. 23B: the Defendant is guilty of fraud and admitted to the police that she had committed an offence.

b. 23C(i): the Defendant has committed such a serious fraud that she is a danger to clients.

c. 23C(ii): the Defendant is guilty of perpetrating a criminal fraud over a period of five years and is a danger to clients.

d. 23E: the Defendant is guilty of fraud and unethical conduct, and is a danger to clients and therapists.

309. There was no objection on behalf of the Claimant to this formal re-shaping of the Defendant's case. Whilst meaning is a matter for me, I am satisfied that Mr de Wilde is correct that his suggested meanings fall within the four corners of the originally pleaded imputation, and that there is no unfairness to the Claimant.

310. Applying the *Koutsogiannis* principles, I am satisfied that each of the publications bears the meaning complained of. I am also satisfied that each meaning is defamatory at common law. These conclusions are self-evident.

311. As to serious harm, I am satisfied that each of the publications in question caused or was likely to cause serious harm to the Defendant's reputation. That is for the following reasons.

312. First, I understood the Claimant to accept that in each case, publication was made to significant numbers of people. Also, it is inevitable that the Claimant's allegations would have come to the attention of a broader audience among therapists, given it was an unusual public dispute between two of their number. I consider this to be a classic 'hidden springs' case. In *Slipper v British Broadcasting Corporation* [1991] 1 QB 283, 300 Bingham LJ said:

> "… the law would part company with the realities of life if it held that the damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs."

313. In relation to 23B, this was a Twitter conversation (ie, a Reply) to a fellow therapist on Twitter (Colour Purple Therapy), who it would appear had liked or forwarded the GoFundMe page. I regard it as overwhelmingly likely that this was then published to many Twitter followers and more broadly within the psychotherapist community.

314. In relation to 23C(i) and 23C(ii), these were both published on the APA Ayanay Facebook page. The Claimant accepted in her evidence that they would have been seen by many members of the group, and it is clear from the comments left in the thread number of members read them and believed the accusations within them.

315. In relation to 23C(ii), the Defendant said this at [142] of her statement, the factual aspects of which I accept:

> "Needless to say, this was, and is, an appalling false account of the whole situation, and invoking the safety of clients – as well as referring to having had cancer – in order to rally people to her cause, was despicable, but it is clear from the engagement that it worked. The APA Facebook page had 756 followers at this time and was a public group (so viewable by anyone). The followers were/are a mixture of colleagues in the counselling professions and members of the public who are interested in mental health issues. These groups of people represent potential room renting clients and counselling clients. My fear is that they, and potentially their wider circle or colleagues and friends, have been negatively influenced by the lies and misrepresentations posted by Siobhain in which my name, business name and location has been given."

316. In relation to 23E, the review posted in the name of APA, the Defendant's unchallenged evidence in her witness statment was that it was likely to have been seen by around 430 people during the period of its publication between May and June 2020:

> "151. My only means of removing this potentially highly damaging 'review' was to remove my Cherry Tree Therapy business listing entirely. My fear was that current and potential clients, therapists, and their clients would see the review and believe its contents, and that my response would not be sufficient to negate any damage. This would not only impact my work as a therapist, but also my colleagues who would then not want to be associated with the Cherry Tree Therapy Centre. My listing (once I had created it anew again) was typically seen by around 62 people per day during 2020 (see data at page 721 of CSL/1), so I would estimate that during the period that the review was visible it would have been seen by around 430 people – many of whom would have been existing clients or individuals searching for 'therapy'. The Google My Business listing primarily drives traffic to the Cherry Tree website and helps people locate the Centre, while reviews help with pushing the listing higher through the Google algorithm. The new listing, that I had to replace it with,

> without any reviews, would (for a time) have been less prominent in Google search results than the older listing had been."

317. There is clear evidence of many publishees' reaction to the Claimant's post, eg the response the Defendant got from APA when she complained (Core A/pp153-4):

> "… the review highlights the unethical foundations on which you chose to build your private practice, basing all therapeutic engagement on your misrepresentation. This is a fundamental breech [sic] of trust and ethical practice with clients and fellow professionals. As such APA reserves the right and duty, (where the evidence, which, as you know is clear), to protect the integrity and principle of the therapeutic relationship. Protection of clients must be paramount. Professionals should be aware of and have trust in the integrity and ethics of their peers. Transparency of professional conduct should be a measure of good practice. APA will always support members that stand up against such unethical practices, for the protection of clients and professionals."

318. Although the Defendant accepts the Claimant might have written this herself, or had it written for her, there are numerous examples in the evidence of similar sentiments from other therapists in support of the Claimant, see eg, Lisa Wright's message to the Claimant (Core B/p940):

> "It would be good to share your experience of being so betrayed with other types of self-employed businesses & I'm sure you will get a lot of support. This character should have been weeded out & stopped from practicing but look at you now & all you have done for so very many! I believe in karma & good things are coming your way & I see it all the time"

319. In short, the Claimant put the Defendant to proof on serious harm, and the Defendant has proved it. Given the nature of the allegations; the extent of their publication; the identities and predominant occupation of the publishees; the evidence of their reaction; percolation; and the inherent probabilities, there is an ample basis for me to conclude that the test in s 1 of the DA 2013 is satisfied in respect of each publication complained of.

320. To the extent that the Claimant relies on the s 2 defence of truth, it follows from my earlier conclusions that the defence fails. The Defendant did not commit fraud or any criminal offence. She did not admit doing so to the police or to the Claimant. She did not commit unethical conduct. She is not a danger to clients. She did not undermine the therapists' profession. The Claimant's accusations were groundless.

321. As for the public interest defence in s 4, which the Claimant referred to in her Closing Submissions, this was removed by amendment from the Claimant's Defence to the Counterclaim; it was not referred to in Mr Siriwardena's trial Skeleton Argument; Mr de Wilde therefore did not address it, and it would accordingly be unfair to the Defendant to allow the Claimant to try and resurrect it now. But in case I am wrong, I have considered it on its merits, and it fails in any event.

322. I recently reviewed the relevant principles on s 4 in *Aaronson*, [318]-[324]. There are three questions to be answered (*Banks v Cadwalladr* [2022] EMLR 21, [100]-[135]), and the burden of proving them in this case lies on the Claimant: (a) was the statement complained of on a matter of public interest, or did it form part of such a statement?; (b) if so, did the Claimant believe that publishing the statement complained of was in the public interest?; (c) if so, was that belief reasonable?

323. The first and third questions require an objective assessment. The second question concerns the Claimant's actual state of mind at the time of publication. She must have addressed her mind to the issue. This question is not satisfied by showing that a notional reasonable person *could* have believed that the publication was in the public interest, but that the Claimant *did* believe that it was. In terms of evidence, if a defendant leaves this issue unaddressed in their witness evidence, the defence is likely to fail at this initial hurdle: *Turley*, [138(vii)].

324. As to the first question, I am not satisfied that any of the four publications were on or formed part of a publication on a matter of public interest. They were part of an ongoing and public targeted vendetta by the Claimant against the Defendant. Any suggestion that client safety or protection of the therapist's profession elevated any of the publications into the realm of public interest is far-fetched and not objectively justified. As to the second question, there is nothing in the Claimant's witness statement to the effect that she considered the public interest before she posted. Thirdly, publishing as she did was self-evidently not reasonable. The matter had been investigated by the police four years earlier and there had been insufficient evidence to bring a prosecution. Some of the publications were bolstered by statements which the Claimant must have known were untrue (I will address this later in more detail). It was therefore unreasonable for the Claimant to continue to make the claims that she did.

Harassment

325. The Defendant's pleaded claim in harassment is as follows:

> "30. By publishing the statements set out above [the four defamatory publications complained of, plus an additional one] and in the Appendix to this Counterclaim, the Claimant pursued a course of conduct which she knew, or ought to have known, amounts to harassment of the

Defendant contrary to sections 1(1) and 3 of the Protection from Harassment Act (PHA) 1997.

31. The nature of the allegations and the manner of, and persistence of their publication were calculated to cause alarm, fear and/or distress and were offensive and oppressive. The Claimant knew, or ought to have known, that they would have the effect, inter alia, of causing the Defendant unjustifiable alarm and distress. In addition to the Claimant's harassing and threatening conduct, she encouraged others in the Defendant's professional field to make abusive statements about her, greatly increasing the Defendant's alarm and distress.

32. The Claimant's statements have placed the Defendant in fear of violence, including the following set out in the Appendix:

a. 'I did, looking forward to the lying deceitful response, but I aired my thoughts lol I'd hate to get a pissed off very eloquently written email from myself. The underlying message is I slit your throat the next time you try to slit my therapists wallets lol. But I'm more professional than threatening death I have to be lol' (14 March 2016)

b. 'Fingers crossed for me. Otherwise, it's other avenues like a hitman lol. And yes it's taken it's toll, my patience ran out tonight… I break her legs lol' (19 January 2017)

'Lol Anne, the temptation to punch her in the face was def there' (13 May 2017)

33. She pursued her harassment in 2020, including stating on Facebook on 31 May 2020 that:

'… gone to all membership bodies prior to this, they refuse to either look at the evidence or find a reason not to ie. Not a member at the time of the offence et cetera and I'm coming to terms with few care, if clients are being deceived or worked with by unscrupulous therapists. I've kept silent for too long and I simply won't do it anymore despite hating doing this I am facing it head-on as its the best I can do to protect clients.'"

326. The Appendix contains numerous other publications by the Claimant from 2016 onwards.

327. In considering the Defendant’s harassment claim, I bear firmly in mind that I am principally concerned with whether what the Claimant published from 2016 onwards tipped over the line from the merely annoying, irritating or unpleasant (which is not harassment and not unlawful), into the unacceptable and oppressive, which was calculated to, and did, cause the Defendant alarm, fear or distress; in other words, whether it constituted ‘a persistent and deliberate course of targeted oppression’: *Hayes v Willoughby*, [1], *per* Lord Sumption.

328. In *Sayn-Wittgenstein-Sayn*, [68]-[69], Collins-Rice J said, after setting out ss 1 and 7 of the PFA 1997:

> “68. There are accordingly a number of key components of the tort. Crucially, there must be a *course of conduct* – two or more acts, that is things said or done, direct or indirect …
>
> 69. The nature of the tort of harassment was considered more generally by Nicklin J in *Hayden v Dickinson* [2020] EWHC 3291 (QB). He characterised it as 'a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress'. The conduct 'must cross the boundary between that which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the border from the regrettable to the objectionable, the gravity of the misconduct must be of an order which would sustain criminal liability' ([40]).”

329. In *Scottow,* the Divisional Court approved Nicklin J's summary in *Hayden* and continued:

> “25. Three further points may be added:
>
> (1) A person alleging harassment must prove a ‘course of conduct’ of a ‘harassing' nature. Section 7(3)(a) of the PHA provides that, in the case of conduct relating to a single person, this ‘must involve … conduct on at least two occasions in relation to that person’. But this is not of itself enough: a person alleging that conduct on two occasions amounts to a ‘course of conduct’ must show ‘a link between the two to reflect the meaning of the word 'course'': *Hipgrave v Jones* [2005] 2 FLR 174, para 74 (Tugendhat J). Accordingly, two isolated incidents separated in time by a period of months cannot amount to harassment: *R v Hills* [2001] 1 FLR 580, para 25. In the harassment by publication case of *Sube v NewsGroup Newspapers Ltd* [2020] EMLR 25 I adopted and applied this interpretative approach, to distinguish between sets of newspaper articles which were "quite separate and

> distinct'. One set of articles followed the other 'weeks later, prompted, on their face, by new events and new information, and they had different content': paras 76(1) and 99 (and see also para 113(1)).
>
> (2) As Ms Wilson reminded us, where the claimant is, by choice, a public figure that should influence any assessment of whether particular conduct amounts to harassment of that individual; such a person has "inevitably and knowingly laid themselves open to close scrutiny of their every word and deed", and others can expect them to be more robust and tolerant accordingly: *Porubova v Russia* (Application No 8237/03) (unreported) 8 October 2009, para 45, and domestically, *Trimingham v Associated Newspapers Ltd* [2012] 4 All ER 717, paras 249–250.
>
> (3) In a case of alleged harassment by publication the court, in order to protect the right to freedom of speech,
>
>> 'should take account of the extent to which the coverage complained of is repetitious and taunting, as opposed to being new, and prompted by some fresh newsworthy event. The imposition of liability in respect of coverage that falls in the latter category will be harder to justify': *Sube* at para 106(2)."

330. Given this is a case of harassment by publication (albeit not of journalistic material, to which particular considerations apply: see *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [34]-[35], [50]), I have borne in mind in accordance with the authorities the Claimant's right to freedom of expression under Article 10 of the European Convention on Human Rights.

331. I have reached the conclusion that the Defendant has made out her case against the Claimant in harassment on the balance of probabilities by clear evidence. That is for the following reasons.

332. First, the length of time spanned by the Claimant's course or courses of conduct. As Mr de Wilde pointed out in his Closing Submissions, there were two distinct phases. In total, the publications spanned over four years, from 2016 onwards. Whether the two phases amounted to a single course of conduct, which I consider they probably did because they were all part of a public campaign by the Claimant against the Defendant centred around a common theme and carried out by the same means, or two separate courses of conduct, there is no doubt that the Claimant's course or courses of conduct were protracted. In my judgment, the Claimant's posts were persistent, deliberate, oppressive and unacceptable.

333. Next, there is the question of identification and targeting. During the first phase of her campaign, in 2016-7, the Claimant did not directly identify the

Defendant. However, she posted enough (eg, that the Defendant had trained with the Claimant and then trained students at UEL) to allow for the jigsaw identification of the Defendant. The Defendant's friend Zoe Clements identified her. The fact that the Claimant posted to the therapist community meant that it was inevitable that her posts would come to the Defendant's attention. Also, obviously, once she discovered the Claimant's posts, the Defendant knew that she was the person being referred to, and she was predictably upset and distressed. She said at [115] of her witness statement:

> "When I read the Facebook threads and what Siobhain and others were saying about me, I broke down. I had spent years building up a good reputation, fighting to have a career against the odds, and to read that someone was trying to do everything in their power to ruin that, was truly heart breaking. I began panicking as I was working at the University at the time and the University had been named in the posts. Siobhain had also stated that she had contacted the University about me. Many students join these groups, and I was concerned that someone from the University would read the lies and believe them. I felt that I had no choice but to contact the University to make them aware of the situation. I was extremely anxious and upset as I risked losing my position at the University. I found the whole thing deeply exposing and humiliating."

334. During the second phase of her campaign in 2020, the Claimant did identify the Defendant and her business by name. That was gratuitous. Even more gratuitous was the Claimant's inclusion of the Defendant's phone number in the GoFundMe page. The Claimant's behaviour risked subjecting the Defendant to further harassment from publishees, many of whom were firmly on the Claimant's side and hostile to the Defendant, as I will discuss in a moment.

335. Thus, in this case, in contrast to *Hayden,* where it might have been that the claimant would have been 'entirely unaware' of the posts in question had she not sought them out (see at [70]), the Defendant could not have avoided the posts coming to her attention. The Claimant targeted the Defendant in vitriolic terms, and published her personal data as part of her campaign.

336. Next, I find that the harassing effect of what the Claimant did was magnified by the untruths which she used to bolster her case. These included: that the Defendant had admitted fraud to the police; that the Defendant had also admitted it to her by text; that the police had not prosecuted the Defendant only because of cost; that the police had valued the Claimant's claim at £1.6 million; that they had advised the Claimant about defamation and harassment; and that they told her that, 'unless a bomb [went] off in London', they were going to raid the Defendant's house at 6am with 20 officers and arrest her and 'seize her electronics and accounts'.

337. I consider that the Claimant's untruths must have affected the reaction of those who read her posts by making the case against the Defendant seem stronger than

it was. For example, I note that one commented that the 'evidence' was 'damning' (Core B/p617). By 'evidence' they meant the Claimant's assertions. The overwhelming number of respondents were hostile to the Defendant, with many calling for her to be removed from the profession and/or for her prosecution. One respondent said she would have 'smacked her one', ie, assaulted her (Core B/p615). Another called the Defendant a 'bitch'. The Claimant's falsities therefore acted as an 'echo chamber' and served to magnify the harassment and oppression experienced by the Defendant.

338. The DPS letter to the Defendant which I quoted earlier (and which, whilst hearsay, I accept) comprehensively disproved each of the Claimant's claims. To repeat just part of it:

> "There has, at no stage, been any evidence shown to suggest that Ms Crosbie was informed of anything that she has claimed by the MPS or specifically DC Yaw Annor."

339. Whilst there might have been room for the Claimant to have misunderstood one or two matters in her dealings with the police (eg in relation to MLATs), I have little hesitation in concluding that she must have known that much of what she was claiming was untrue. For example, as well as the Claimant's false assertion that the Defendant admitted the 'fraud' to the police, there is nothing to support her claim that the police put a value on the 'fraud' of £1.6 million. In fact, it was the opposite; the police said the value of the claim was 'hypothetical' and that there was 'no quantifiable loss' (Core B/p677). I also reject as incredible her claim that the police would have advised her about defamation, and that they discussed their operational tactics with her.

340. Next, there are the threats of violence and other intemperate language which the Claimant used. There were, for example, references in the Claimant's posts to: her slitting the Defendant's throat; 'Karma sure is a bitch when it comes back to bite you in the ass, by the time I'm done there won't even be an ass to bite!'; the Claimant breaking the Defendant's legs; her employing a 'hit man' (Core B/pp621, p622, p650, p677); and punching the Defendant in the face (13 May 2017). There were also references to 'annihilation' (22 February 2017); and to the Defendant being a 'monkey', a 'devil' and a 'cow' (12 April 2017, 11 May 2017 and 12 May 2017).

341. I find the Claimant's threats of violence especially concerning. In her statement she tried to explain them as being 'Irish Cultural language' ([51]) and that she was being humorous, and had included 'lol'. In cross-examination she said they were just 'banter'. However, even if she was telling the truth, the Defendant was not to know that at the time. Anyone would have been alarmed reading the Claimant's threats (whether accompanied by 'lol' or not). The Defendant said in [108] of her witness statement, which I accept:

> "… the decidedly ugly, even violent nature of these comments, together with the numerous posts which clearly were about me, really disturbed me, and left me feeling anxious and unsafe."

342. Also, I find it surprising that the Claimant, as a member of a profession where high standards of behaviour are expected (a point she repeatedly stressed) should have thought it appropriate to publicly abuse a fellow professional as a 'monkey' and a 'cow'.

343. I turn to the question of the Claimant's suggested defence under s 1(3) of the PHA 1997. It plainly has no application to the facts of this case. The Claimant's conduct was not done for the purposes of the prevention or detection of crime (the police's investigation closed in 2016 for lack of evidence), and any conduct by the Defendant was long past when the Claimant was continuing to harass her. Nor was the Claimant's conduct reasonable, given her untrue statements, and its prolonged, targeted and intemperate nature.

Quantum of damages and other relief

344. The Defendant seeks general damages for defamation and harassment, including a sum by way of aggravated damages, of £70,000 or more (Closing Submissions, [19], [24(1)]). Mr de Wilde suggested that I award a global sum to reflect all of the heads of damage including aggravated damages; cf *Lachaux v Independent Print Ltd* [2021] EWHC 1797 (QB), [227]; *Blackledge v Persons Unknown* [2021] EWHC 1994 (KB), [34-[35]; *Ware v French* [2022] EWHC 3030 (KB), [142]. In *Blackledge* (a case of defamation and harassment) Saini J said at [34]-[35]:

> "34. Counsel for C submitted that I should award C a single global sum to vindicate his reputation and compensate him for distress in relation to all the defamatory publications. I agree that in the circumstances that would appear to be the most efficient and just way of proceeding (as opposed to distinct awards). However, in determining the amount of such global award I proceed on the basis that judgment on any one of the Articles would ordinarily, and if assessed separately, give rise to a substantial award.
>
> 35. It was submitted to me that the question whether there should be separate awards in relation to defamation and harassment is one for my discretion. I accept that submission. In my judgment, in circumstances where there is a substantial (even if not a complete) overlap of the matters relied on for constituting libel and constituting harassment it would be wholly artificial to separate out the distress caused by the libels and the course of conduct amounting to harassment. I will accordingly make one award in relation to the libels and the course of conduct. That is not an uncommon course on this type of fact pattern, as the cases cited to me demonstrate."

345. I propose to take the same course in this case.

346. I make clear that whether the Claimant is in a position to pay any significant award of damages is not a matter for me. My task is to make a suitable award to the Defendant in line with the relevant legal principles.

347. General damages for defamation are compensatory in nature. Warby J summarised the key principles in *Barron v Vines* [2016] EWHC 1226 (QB), [20]-[21]:

> "20. The general principles were reviewed and re-stated by the Court of Appeal in *John v MGN Ltd* [1997] QB 586 … Sir Thomas Bingham MR summarised the key principles at pages 607-608 in the following words:
>
> > 'The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must [1] compensate him for the damage to his reputation; [2] vindicate his good name; and [3] take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is [a] the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. [b] The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. [c] A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that [d] compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way. Although the plaintiff has been referred to as 'he' all this of course applies to women just as much as men.'

21. I have added the numbering in this passage, which identifies the three distinct functions performed by an award of damages for libel. I have added the lettering also to identify, for ease of reference, the factors listed by Sir Thomas Bingham. Some additional points may be made which are relevant in this case:

(1) The initial measure of damages is the amount that would restore the claimant to the position he would have enjoyed had he not been defamed: *Steel and Morris v United Kingdom* (2004) 41 EHRR [37], [45].

(2) The existence and scale of any harm to reputation may be established by evidence or inferred. Often, the process is one of inference, but evidence that tends to show that as a matter of fact a person was shunned, avoided, or taunted will be relevant. So may evidence that a person was treated as well or better by others after the libel than before it.

(3) The impact of a libel on a person's reputation can be affected by:

a) Their role in society. The libel of Esther Rantzen was more damaging because she was a prominent child protection campaigner.

b) The extent to which the publisher(s) of the defamatory imputation are authoritative and credible. The person making the allegations may be someone apparently well-placed to know the facts, or they may appear to be an unreliable source.

c) The identities of the publishees. Publication of a libel to family, friends or work colleagues may be more harmful and hurtful than if it is circulated amongst strangers. On the other hand, those close to a claimant may have knowledge or viewpoints that make them less likely to believe what is alleged.

d) The propensity of defamatory statements to percolate through underground channels and contaminate hidden springs, a problem made worse by the internet and social networking sites, particularly for claimants in the public eye: *C v MGN Ltd* (reported with *Cairns v Modi* at [2013] 1 WLR 1051) [27].

(4) It is often said that damages may be aggravated if the defendant acts maliciously. The harm for which

compensation would be due in that event is injury to feelings.

(5) A person who has been libelled is compensated only for injury to the reputation they actually had at the time of publication. If it is shown that the person already had a bad reputation in the relevant sector of their life, that will reduce the harm, and therefore moderate any damages. But it is not permissible to seek, in mitigation of damages, to prove specific acts of misconduct by the claimant, or rumours or reports to the effect that he has done the things alleged in the libel complained of: *Scott v Sampson* (1882) QBD 491, on which I will expand a little. Attempts to achieve this may aggravate damages, in line with factor (d) in Sir Thomas Bingham's list.

(6) Factors other than bad reputation that may moderate or mitigate damages, on some of which I will also elaborate below, include the following:

a) 'Directly relevant background context' within the meaning of *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 and subsequent authorities. This may qualify the rules at (5) above.

b) Publications by others to the same effect as the libel complained of if (but only if) the claimants have sued over these in another defamation claim, or if it is necessary to consider them in order to isolate the damage caused by the publication complained of.

c) An offer of amends pursuant to the Defamation Act 1996.

d) A reasoned judgment, though the impact of this will vary according to the facts and nature of the case.

(7) In arriving at a figure it is proper to have regard to (a) jury awards approved by the Court of Appeal: *Rantzen* 694, *John*, 612; (b) the scale of damages awarded in personal injury actions: John ,615; (c) previous awards by a judge sitting without a jury: see John 608.

(8) Any award needs to be no more than is justified by the legitimate aim of protecting reputation, necessary in a democratic society in pursuit of that aim, and proportionate to that need: *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670 . This limit is nowadays statutory, via the Human Rights Act 1998.”

348. Nicklin J also gave a comprehensive account of the principles of assessment of damages in libel in *Turley*, [171] - [176]. The principles identified by him are: (a) damages must compensate the claimant for the damage to his reputation; (b) damages must vindicate the claimant's good name; (c) damages must take account of the distress, hurt and humiliation which the defamatory publication has caused to the claimant; (d) in assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; (e) the extent of publication and the relationship of the publishees with the claimant is also relevant; (f) a successful claimant may properly look to an award of damages to vindicate his reputation. The significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place; (g) it is well established that compensatory damages may and should compensate for additional injury caused to the claimant's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise; (h) the impact of a libel on a person's reputation can be affected by their role in society; (i) the impact of a libel on a person's reputation can be affected by the extent to which the publisher of the defamatory imputation is authoritative and credible; (j) the impact of a libel on a person's reputation can be affected by percolation of the libel through 'hidden springs'; (k) a reasoned judgment may affect the level of damages awarded, though the impact of this will vary according to the facts and nature of the case; and (l) in arriving at a figure it is proper to have regard to previous awards by a judge sitting without a jury.

349. The principles relating to damages for harassment were set out by Nicklin J in *Suttle v Walker* [2019] EWHC 396 (QB), [54]-[57]:

> "54. Damages for harassment under the Protection from Harassment Act 1997 are to compensate a claimant for distress and injury to feelings, see *ZAM v CFW and anor* [2013] EMLR 27, [59]. As I have noted, an award under this head overlaps with that element of compensation that is a constituent part of an award for libel damages.
>
> 55. So far as assessment of harassment damages is concerned there are established guidelines taken from employment discrimination cases, see *Barkhuysen v Hamilton* [2018] QB 1015, [160]:
>
>> 'Guidelines for damages in harassment were given by the Court of Appeal in *Chief Constable of West Yorkshire Police v Vento (No 2)* [2003] ICR 318. The court identified three broad bands for compensation for injured feelings: a top band for very serious cases, a middle band for moderately serious cases and a third band for less serious cases, such as isolated or one-off occurrences. Only in the most exceptional cases, it was said, would it be

> appropriate to award more than the top band and awards of less than £500 were to be avoided as they risked appearing derisory. Again, adjustment for inflation is required. The former adjustment was made by the Employment Appeal tribunal in 2009 in *Da'Bell v National Society for the Prevention of Cruelty to Children* [2010] IRLR 19. Inflation since then has been some 20%, leading to a range in band 3 of up to £7,200, a middle band from £7,200 to £21,600 and a top band from £21,600 to £36,000. A *Simmons v Castle* adjustment is also required.'

56. The *Vento* bands, as they are called, have since been increased again: see paragraph 10 of The Employment Tribunal's Presidential Guidance of 5 September 2017:

> 'A lower band of £800 to £8,400 (the less serious cases), a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band) and an upper band of £25,200 to £42,000 (the most serious cases), with the most exceptional cases capable of exceeding £42,000.'

57. I consider that the following particular elements of the harassment, separate from the harassing element in the defamatory nature of the publications themselves, have an impact on the seriousness of the harassment and to the assessment of damages:

a. The campaign was clearly and deliberately targeted by the Defendant at the Claimant via Facebook. The foreseeable response to it was vicious and frightening; it was calculated to (and did) whip up hatred for the Claimant and to put her in fear for her safety.

b. The campaign was relentless over a period of three to four weeks and I am satisfied, on the evidence, that has had a lasting adverse effect on the Claimant.

c. The use of a Facebook group was deliberately to recruit others to 'gang up' on the Claimant, whilst the Defendant and some of the commentators who chose to post comments on the page hid behind online anonymity. This is a hallmark of 'cyber bullying'. It is a particularly pernicious form of harassment because the victim may well feel constantly under siege and powerless to stop it.

58. Overall, my assessment is that this was a very serious and nasty case of online harassment that has frightened the Claimant and caused her very real upset, fear and distress.

> In my judgment the harassment claim alone would justify an award in the upper *Vento* band."

350. Regarding aggravated damages, the editors of *Gatley on Libel and Slander* (13th Edn) say at [10-16] (footnotes omitted):

> "The conduct of a defendant which may often be regarded as aggravating the injury to the plaintiff's feelings, so as to support a claim for 'aggravated' damages, includes a failure to make any or any sufficient apology and withdrawal; a repetition of the libel; conduct calculated to deter the claimant from proceeding; persistence, by way of a prolonged or hostile cross-examination of the claimant, or in turgid speeches to the jury, in a plea of justification which is bound to fail; the general conduct either of the preliminaries or of the trial itself in a manner calculated to attract wide publicity; and persecution of the plaintiff by other means.
>
> '[I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.'
>
> 'The conduct of a defendant which may often be regarded as aggravating the injury to the plaintiff's feelings, so as to support a claim for 'aggravated' damages, includes a failure to make any or any sufficient apology and withdrawal; a repetition of the libel; conduct calculated to deter the claimant from proceeding; persistence, by way of a prolonged or hostile cross-examination of the claimant, or in turgid speeches to the jury, in a plea of justification which is bound to fail; the general conduct either of the preliminaries or of the trial itself in a manner calculated to attract wide publicity; and persecution of the plaintiff by other means.'"

351. Mr de Wilde submitted as follow in support of the Defendant's claim for damages in excess of £70 000 (Closing Submissions, [24]):

   a. The gravity of the Claimant's allegations against the Defendant. The two essential imputations made by her were (a) fraud, ie, criminal dishonesty; and (b) that clients required protection from her. Both of these went to the heart of her professional reputation, as well as her personal reputation.

These were unqualified and consistently (and falsely) presented as 'having the *imprimatur* of the police'.

b. The scale and nature of publication in defamation: while publication does not, relative to some social media cases, appear to have been very extensive, it was targeted at those in whose eyes the Defendant's reputation was particularly important, namely peers; colleagues; and students.

c. The scale and nature of publication in harassment: these were extensive and involved the Claimant repeatedly making serious allegations of wrongdoing by the Defendant over a four year period, in the context of other, wide-ranging attacks on her.

d. The Defendant's evidence of the distress she suffered as a result of the Claimant's four year campaign is compelling, and there is no basis for it to be seriously challenged or contradicted.

352. Mr de Wilde also said that there were features of the Claimant's conduct both in relation to the publications, and to how she had conducted the proceedings, which justified an award of aggravated damages. He submitted as follows (Closing Submissions, [25]):

a. If, I were to find the passing off claim to be totally without merit, it would follow that there was no proper or arguable basis for the Claimant's allegations of fraud or endangering the public against the Defendant.

b. The Claimant has shown no remorse for her conduct, or even the slightest recognition of how misconceived and damaging it was. There has been no apology.

c. The repetitive and relentless scale on which the Claimant made her publications, and over a period of four years, exacerbated the Defendant's distress. A single misguided and failed complaint to the police pursued over a period of months is one thing, but what followed over the subsequent four years is quite another.

d. The Claimant's conduct of the litigation has been 'outrageous' (Mr de Wilde's word):

(i) It was based on a grossly exaggerated *quantum* claim, which the Claimant was unable to justify.

(ii) That claim was accompanied by threats and demands which were improper, including demands for even greater amounts than the sum claimed in the PoC, and the threat of a private prosecution.

(iii) Some of the evidence filed by the Claimant which, it was eventually conceded on the morning of the trial, should be struck out, was inappropriate and intimidatory, and had no conceivable relevance to the proceedings. It was a transparent attempt to deter the

Defendant's participation in the proceedings by 'making the process so painful and unpleasant for her that she would not want to pursue them'.

(iv) The Claimant remained defiant during cross-examination, essentially asserting without further explanation that the merged listing and/or input into her complaint from the police during their investigation was a proper basis for what followed.

(v) The Claimant concluded her evidence by admitting that she had deliberately conducted the entire unlawful campaign in order to encourage the Defendant to bring proceedings against her. Whilst the Defendant does not pursue any claim for exemplary damages (not least because no case is put forward for it in the pleading), knowing commission of tortious conduct in the face of the legal and other consequences in fact crosses into the territory in which exemplary damages might be available. It certainly points to a substantial award of damages in aggravation.

353. I turn to my conclusions. The quantification of damages in the present context is not a precise science, as I commented in *Ware*, [137]. That said, I accept the substance of Mr de Wilde's submissions.

354. In my judgment the following matters, in particular, are relevant to the *quantum* of compensatory damages for defamation: (a) the seriousness of the Claimant's defamatory allegations of guilt, having regard to the Defendant's profession, and her false claims in support; (b) the targeting by the Claimant of the therapist and counsellor community and the extent of publication; (c) the Defendant's palpable anger and distress.

355. In relation to harassment, there are the following additional matters: (a) the Claimant's extensive four year campaign; (b) her threats of violence and personal abuse of the Defendant; (c) the evidence of the negative way her campaign caused other therapists to view the Defendant; (d) the inclusion of the Defendant's personal data including her phone number and business name.

356. The following features of the Claimant's conduct which serve properly to aggravate the level of damages are, in particular: (a) that the passing off claim was totally without merit (and her plea of justification was therefore always bound to fail); (b) her varying false and exaggerated claims for losses in correspondence and in the PoC; (c) her inclusion of personal evidence about the Defendant that was irrelevant, and was done (I find) to intimidate the Defendant; (d) the Claimant's lack of real contrition about her behaviour; (e) her continued reliance in her evidence on false claims about the police; (f) her admission that she had conducted her campaign at least in part to provoke the Defendant into action.

357. I have not overlooked the Claimant's written Closing Submissions in which she said at [38]-[39](*sic*):

> “38. I was not asked if I regretted the posts I made in relation to the defendant, to your honour I do regret them and would have acknowledged this if asked this question, I regret them, not because I don’t believe the content was inaccurate, but due to the fact it has led to more issues and caused harm to the defendant which does not detract from the harm she has caused myself , furthermore I have grown as a person and appreciate that albeit I spoke what I believed, it is at times, despite my sense of helplessness throughout the past 7 years, not the right action to take. I believed I was colluding by staying silent.
>
> 39. My passion for the integrity of a mental health profession, alongside my own knowledge, I openly accept, got the better of me. This has been a lesson for me. My actions provided the defendant the opportunity to deflect from the main allegations of Fraud and Torte.”

358. I am not entirely sure what this means, but I do not regard it as an apology or retraction. The Claimant plainly still believes in the truth of her libels. At [145] she repeated her belief that the Defendant is a ‘repeatedly fraudulent individual’ who is a ‘danger to clients’. In the same document she also made numerous allegations against the Defendant (and not just in relation to Google listings).

359. Taking all matters together, the amount I award the Defendant in total by way of damages for defamation and harassment, including aggravated damages, is £75,000.

360. Finally, I turn to the other relief sought by the Defendant.

361. Firstly, the Defendant seeks an injunction. I consider this to be an appropriate case for an injunction to restrain the Claimant and to guard against the possibility of further harassing publications about the Defendant. The terms of such an order, if they cannot be agreed, will have to be the subject of further submissions.

362. Second, the Defendant seeks an order under s 12 of the DA 2013. This provides:

> “(1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.
>
> (2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.
>
> (3) If the parties cannot agree on the wording, the wording is to be settled by the court.

> (4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.
>
> (5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims)."

363. In *Monir*, [239]-[241], Nicklin J explained the purpose of s 12 as follows:

> "239. The purpose of this section is to provide a remedy that will assist the claimant in repairing the damage to his reputation and obtaining vindication. Orders under the section are not to be made as any sort of punishment of the defendant.
>
> 240. Orders under s 12 are discretionary both as to whether to order the publication of a summary and (if the parties do not agree) in what terms and where. Exercising the power to require a defendant to publish a summary of the Court's judgment is an interference with the defendant's Article 10 right. As such, the interference must be justified. The interference may be capable of being justified in pursuit of the legitimate aim of 'the protection of the reputation or rights of others'. Whether an order under this section can achieve this aim will be a matter of fact in each case. If the interference represented by a s 12 order is justified, then the Court would then consider whether (if the parties agree) the terms of the summary to be published is proportionate. The Court should only make an order that the defendant publish a summary of the Court's judgment if there is a realistic prospect that one or other of these objectives will be realised and that the publication of a summary is necessary and proportionate to these objectives.
>
> 241. There is an obvious purpose, in an appropriate case, for ordering a newspaper to publish a summary of the judgment because there is a realistic basis on which to conclude that the published summary will come to the attention of at least some of those who read the original libel and others who may have learned about the allegation via the 'grapevine' effect. In a smaller scale publication, where it is possible for the original publishees (or at least a substantial number of them) to be identified, again an order requiring the publication to them of a summary of the judgment may well help realise the objectives underpinning s 12. Each case will depend upon its own facts. If the defendant has already published a retraction and apology then, depending upon its terms, that may mean that an order under s 12 is not justifiable or required. The

> claimant will be able to point to that to assist in his vindication or repair to his reputation."

364. I consider this to be an obvious case for such an order. There has been no retraction or apology by the Claimant (quite the reverse), and I am satisfied an order would be proportionate and not a violation of the Claimant's Article 10 rights. Publication of a s 12 summary on the platforms where the Claimant published her libels would assist in repairing the damage to the Defendant's reputation and in providing her with vindication by serving to ensure that the truth of this case is read by at least some of the original publishees.

365. As I have found for the Defendant in defamation and harassment, I need not determine her GDPR claim.

Summary

366. The Claimant's claim for passing off is dismissed. It was totally without merit.

367. The Defendant's Part 20 claims for defamation and harassment succeed.

368. The Defendant is awarded £75,000 general damages for defamation and harassment, and this amount includes a component of aggravated damages.

369. There will be an injunction to restrain further publications by the Claimant, the terms of which will be determined by me if they cannot be agreed.

370. There will be an order under s 12 of the DA 2013 for the publication of a summary of this judgment, the contents of which will be determined by me if they cannot be agreed.