Neutral Citation Number: [2014] EWHC 2361 (QB)

Case No: HQ12D04594

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2014

Before :

THE HONOURABLE MRS JUSTICE NICOLA DAVIES

- -

Between :

Building Register Limited	**Claimant**
- and -	
Mark Weston & anr	**Defendants**

- -
- -

Justin Rushbrooke QC and Felicity McMahon (instructed by **Hugh James)** for the **Claimant**
David Price QC (of **David Price Solicitors and Advocates**) for the **Defendants**

Hearing dates: 18 and 23 June 2014

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Judgment

Mrs Justice Nicola Davies:

Introduction

1. A Case Management Conference has been held in a claim for libel brought by a company, BR Network Limited (formerly known as Building Register Limited) against Mr Mark Weston and his company All Clean Limited, which is a commercial cleaning company and a former customer of the claimant. The claimant sues in respect of defamatory material posted on a website set up by the defendants under the name " www.buildingregistercomplaints.co.uk".

2. The hearing follows a determination by Dingemans J ([2014] EWHC 784 (QB)) as to the meaning of the words complained of. Dingemans J at [2]- [11] set out the history of the proceedings as follows:

> "2. This libel action is brought by the Claimant, Building Register Limited. The Claimant provides an online directory and managed data registration service under the name "the Building Register" for suppliers and contractors in the construction and cleaning industry who wish to have their details made available to potential customers.

3. The action is brought against the First Defendant, Mark Weston, and the Second Defendant, All Clean Limited. The First Defendant is the managing director of the Second Defendant. The Second Defendant is a commercial cleaning company based in Worcester, and is a former customer of the Claimant. The Defendants became dissatisfied with the way in which the contract with the Claimant had been concluded and renewed, and the services that the Defendants received.

4. The Defendants set up a website "Buildingregister complaints.co.uk". It gave readers the opportunity to voice complaints regarding the service of the Claimant. The website was operational between 23rd October and 6th November 2012. Links to the website were emailed by the Defendants to about 70 customers of the Claimant.

The relevant publication

5. The relevant parts of the publication on the website, with the bold from the original publication, are set out below:

"My name is Mark Weston and I'm Managing Director of All Clean Ltd, a cleaning company specialising in after build cleans for the construction industry. Just over a year ago I was subjected to heavy sales pressure over the phone by this organisation, Building Register. They are a computer software company that claim to present your critical company information such as health and safety documentation in front of your potential customer in an easy to read format.

During the sales process they introduced me to their website and in order to gain more information I inadvertently clicked a tab which they then claimed was an electronic signature. As a result I had to part with £1600.00. Although I complained at the time about this they refused to budge on the fact that I had apparently placed an order. I was annoyed that I had been duped like this but I consoled myself with the thought that if half of the benefits they sold me came through, at least I would get my money back and it would be of some benefit.

Soon after parting with my cash things started to go wrong!

Firstly the national coverage I had been sold turned out to be regional, after a protracted argument they did give me national coverage. We then had very little help setting up our details, then all went quiet until the end of august 2012 when I had a call from my "new" account manager. I explained to her that I had never had an account manager, however she went onto explain that as I had not cancelled back in June I was liable for another year's subscription starting in September and as my

first year had been discounted … **it was going to cost me a further £2,150.00, a rise of £550 over the first year!**

I asked her why they had a clause that if you didn't remember to cancel after 9 months you were liable for another 12 months. She said it was because in the past a number of organisations had sued them because their membership to the site had lapsed and yet they were still expecting the benefits! How bizarre is that! I told her that absolutely no benefit had come to my company over the past 9 months and I most certainly did not want to continue with them for another year. She said that I had benefited a great deal from the site and she sent me a list of companies that had clicked on my information.

I can prove that I have not done business with any of them, in fact not one of them has even been in contact for a quotation!

The upshot of all this is that Building Register are suing me for £2154.00 and I'll be putting in a counter claim for the original £1600 because I believe I was mis-sold their product in the first place. I will be calling on the Building Register staff I've dealt with over the phone to attend court so that I can cross examine them. I will also be asking why in their recording when you phone them they say they are putting you through to one of their six offices, **is not true**, I've established they don't have six offices and this is simply another example of their embellished sales tactics…

Building Register use these bullying tactics on small organisations such as mine, probably correctly assuming that most will buckle and pay money for no benefit… "

Procedural matters

6. The Claimant served Particulars of Claim pleading the natural and ordinary and inferential meaning of the words. The Claimant claimed general damages and special damages in respect of cancellations from other customers.

7. On the 18th January 2013 a Defence was served, which it appears had been prepared by the First Defendant and which did not comply with the provisions of the Practice Direction for defamation claims relating to statements of case. The Defence suggested that the Defendants would justify the statements on the website.

8. By order dated the 18th March 2013 Master Eastman ordered the Defendants to file and serve by 4pm on 12th April 2013 an amended Defence verified by a statement of truth in accordance with CPR Part 22.1 which complied with paragraph 2.5 of the

> Practice Direction to CPR Part 53. Provision was made for service of a Reply and a further case management conference on 4th June 2013.
>
> 9. On the 30th April 2013 Master Eastman made an order, having read the Claimant's solicitors' letter dated 25th April 2013 and the Defendants' email dated 29th April 2013, that unless the Defendants comply with paragraph 2 of the order of 18th March 2013 by 4pm on the 10th May 2013 there should be judgment for the Claimant. An amended Defence, in substitution for the first Defence, was served on the 9th May 2013.
>
> 10. The publication of the website was admitted but it was not admitted that the words were defamatory, or that the number of readers were substantial, or that all the recipients of the email would have read the words. It was also pleaded that the words on the website were true or substantially true. The meanings that the Defendants alleged to be true were set out. In the alternative the defence of honest comment was pleaded. It was pleaded that the Defendants would rely if necessary on section 5 and 6 of the Defamation Act 1952.
>
> 11. A Reply was served dated the 3rd July 2013. In the Reply reference was made to legal proceedings in the Maidstone County Court between the Claimant and Second Defendant, in which the Judge had given judgment for the Claimant on its claim in the sum of £2846.15. Issues of res judicata and issue estoppel were said to arise. A draft re-amended Defence has since been produced."

3. At [25] Dingemans J determined that the passage of which complaint is made had the following meanings for the reasons which he identified:

> "1) The Claimant duped the Defendants into placing an order with it online".

This meaning appears from the words in the second paragraph, and is a nearly literal use of the words.

> "2) The Claimant failed to provide Mr Weston with the service he had contracted for initially providing only regional coverage when he had been sold national coverage."

This was an agreed meaning, and it appears from the fourth paragraph of the website. The word "initially" needs to be inserted into the original agreed meaning, because the website made it clear that national coverage was subsequently provided.

> "3) The Claimant lied about having six offices when in fact it did not."

This was a variation of the agreed meaning that the Claimant "dishonestly claimed". I have also put "embellished sales tactics" into the meaning at (6) below.

> "4) The Claimant unreasonably insisted on payment by reference to an automatic renewal clause when the Claimant had provided no benefit to the Second Defendant".

Although the Claimant had not set out that part of the text which related to the automatic renewal provision in the Particulars of Claim, Mr Rushbrooke made it clear that it was part of the Claimant's complaint, and there is a clear overlap with other relevant meanings. This meaning is a modification of the Defendants' suggested meaning. The word "unreasonably" is derived from the Claimant's reported insistence on payment when there has been no benefit.

> "5) The Claimant mis-sold to the Second Defendant a service which it knew did not deliver the substantial benefits that it promised".

I did entertain some doubts in submissions about whether it was correct to spell out the allegation of knowledge on the part of the Claimant about the absence of substantial benefits. This was because the website set out the response on behalf of the Claimant about the benefits of companies clicking on the Second Defendant's information. However, I accept the joint submissions of the Claimant, and the Defendants (see paragraphs 37 and 38 of the Defendant's Skeleton Argument), that this is a proper inferential meaning from the whole website article. This is because the use of the words "duped" and "mis-sold", and the phrase "is not true" in the article, which affect the meaning which is to be inferred. The meaning is specific to the Second Defendant, which the hypothetical reasonable reader would have taken from the Defendant's website.

> 6) "The Claimant used heavy and embellished sales tactics, and then used bullying tactics on small organisations calculating that most would buckle and pay for no benefit".

This meaning is taken from words used in the article, but picks up parts of the whole article."

4. Dingemans J determined that the meanings at paragraphs 25 (1) (4) (5) (6) are comment. The meanings at [25] (2) and 25 (3) are statements of fact.

5. Following the Judgment of Dingemans J the defendants sought to re-amend their Defence, by Application Notice dated 12 June 2014. The claimant objects to a number of the proposed amendments. The areas of contention relate to the first and

fifth meanings found by Dingemans J now set out in paragraphs 4.1 and 4.5 of the draft Re-Amended Defence ("the Re-Amended Defence"):

> "4.1 the Claimant duped the Defendant into placing an order with it online……
>
> 4.5 The Claimant mis-sold to the Second Defendant a service which it knew did not deliver the substantial benefits that it promised."

The claimant also opposes the Particulars relied upon in the Re-Amended Defence in respect of sub paragraphs 4.1 and 4.5. The Particulars are as follows:

> "*The Claimant duped the Defendants into placing an order with it online*
>
> 4.7 In or about June 2011 the First Defendant was cold-called by Liam Tuffrey, a salesman employed by the Claimant. Mr Tuffrey stated that the Claimant was in contact with a construction company in the Defendants' area that was currently requiring the specific cleaning services offered by the Second Defendant and that existing contractors were overworked. He asked if the First Defendant objected to the Second Defendant's name being put forward. The First Defendant asked: "what was the catch?" Mr Tuffrey stated that there was none and that the Claimant was paid by the construction company to find good reliable suppliers. On 10 June 2011 Mr Tuffrey sent an email to the Claimant in the following terms:
>
> "From:Liam.Tuffrey@buildingregister.com
>
> Sent: 10 June 2011 12:41
>
> To: markw@allclean.co.uk
>
> Subject: Causeway and Building Register,
>
> Mark,
>
> Please find this email as confirmation that I have sent the All Clean company profile off to my clients for the deep clean we have just discussed.
>
> At Causeway, we directly manage and operate the approved supply chains and live working systems of our clients. We also operate their enquiry processes.
>
> At the moment, there is too much for the approved supply chain to handle, and as a result we have been asked to add to these lists – and after talking to you and looking at the services you offer online, I believe you should have been on here a long time ago.

We are in no way an advertising or marketing medium, nor a Project Lead Service. We make our money from our clients, who in effect become your direct customers.

Therefore there is no subscription charges for addition to the Building Register; I will upload you as an unverified company free of charge. If you wanted to go down the route of becoming universally checked and verified, we would pass on any cost for Health and Safety/Insurance checks.

Kind Regards,

Liam

Supply Chain Management / Senior Project Co-ordination Manager

Causeway and Building Register (UK)

UK Head Office: 3rd Floor, North Wing, Kent House, Romney Place, Maidstone, Kent ME15 6LH T: 01622 662 668, F: 01622 331 099"

4.8 Subsequently, Mr Tuffrey made a number of calls along similar lines with new leads. The First Defendant asked Mr Tuffrey why he kept calling him with the same tantalising information and why nothing came of it. Mr Tuffrey's response, which had not been mentioned previously, was that to get a definite chance of receiving enquiries the Second Defendant needed to become one of the Claimant's exclusive and registered suppliers as the enquiries from the construction companies always went to them first. Mr Tuffrey repeated that as the Claimant made its profits not from suppliers like the Second Defendant, but from its clients (the construction companies), the only fee that the Second Defendant would have to pay would be to cover the cost to the Claimant of checking and verifying the data he sent them. Mr Tuffrey stated that if the Second Defendant became a registered supplier it could expect at least 25 sales enquiries a month and would quickly and easily recoup the subscription cost.

4.9. It is to be inferred that:-

4.9.1 The proposed introductions were non-existent and/or there was no prospect of the Claimant facilitating an introduction without the Second Defendant paying for the service. The

Defendants will rely on the following matters in support of the inference:-

4.9.1.1The disparity between the representations of Mr Tuffrey as to demand exceeding supply and the absence of a single enquiry arising from the Claimant's website over the entire period in which the Second Defendant was registered on it (whether as an "unverified" or "approved" supplier).

4.9.1.2 Mr Tuffrey's sole motivation was to persuade the First Defendant to pay for the Second Defendant to become a registered supplier, from which both he [Mr Tuffrey] and the Claimant would profit. The sales approach referred to in paragraph 4.7 above was a good way of attracting the interest and attention of a small business such as the Second Defendant and was less likely to be rebuffed than an honest but direct sales approach, particularly in the relatively poor economic climate.

4.9.1.3 The other facts and matters referred to in paragraph 4 of this Re-Amended Defence which are probative of the above inference.

4.9.2 There was not too much for the approved supply chain to handle in relation to the cleaning services offered by the Second Defendant. The Defendants will rely on the same matters as in relation to paragraph 4.9.1 above.

4.9.3 The Claimant did make profit from registered suppliers. The Claimant makes its money solely or predominantly from registered suppliers. Mr Tuffrey deliberately conflated Causeway and the Claimant in order to give the false impression that the Claimant would not be seeking to profit from the Second Defendant and that demand for its services exceeded supply. In the email of 10 June 2011 Mr Tuffrey described himself as "Supply Chain Management / Senior Project Co-ordination Manager of Causeway and Building Register (UK)". The reality is that Mr Tuffrey was employed as a salesman and solely by the Claimant. In a witness statement dated 7 March 2013 he stated that he was employed by the Claimant as a "sales executive". In addition, the Claimant's address in the email was described as the "UK Head Office" when it was the sole office of the Claimant.

4.9.4 Any costs of checking and verifying were a fraction of the cost charged to suppliers and Mr Tuffrey's representation that the Claimant merely passed on the costs involved in such a process was false. Any checking and verifying of the Second Defendant's data was cursory.

4.9.5 The Second Defendant was highly unlikely to get at least 25 sales enquiries a month and/or quickly and easily recoup the

subscription cost, and alternatively, that this could not be expected. The Defendants will rely on the following matters in support of the inference:-

4.9.5.1 The disparity between the representations and the absence of a single enquiry arising from the Claimant's website over the entire period in which the Second Defendant was registered on it.

4.9.5.2 Mr Tuffrey's sole motivation was to persuade the First Defendant to pay for the Second Defendant to become a registered supplier, from which both he [Mr Tuffrey] and the Claimant would profit.

4.9.5.3 Clause 19 of the Claimant's Conditions of Supply provides: "Building Register's employees or agents ARE NOT authorised to make any representations concerning Building Register or the Building Register Service(s) unless confirmed by a Building Register director IN WRITING. In entering into the Contract the Customer acknowledges that it does not rely on any such representations, which are not so confirmed." The Claimant's sales process is predominantly oral (accompanied by emails from the salesperson). It inevitably involves a salesperson making representations to potential customers who rely on them in deciding to purchase the service, which by virtue of this clause are deemed to be not relied on. The Conditions of Supply are generally only introduced at the point of sale in circumstances in which many customers will not read clause 19. The insertion of such a clause in such circumstances is an attempt by the Claimant to absolve itself of any legal responsibility for overselling by its salespersons and encourages such a practice.

4.9.5.4 The false denial in paragraph 4.7.2 of the Reply served on 3 July 2013 that Mr Tuffrey made the representations.

4.9.5.5 The other facts and matters referred to in paragraph 4 of this Re-Amended Defence which are probative of the above inference.

4.9.6 Mr Tuffrey was aware of these matters. The Defendants will rely on the following matters in support of the inference:-

4.9.6.1 Mr Tuffrey's direct knowledge of the matters.

4.9.6.2 His financial interest in making a sale.

4.9.6.3 The other facts and matters referred to in paragraph 4 of this Re-Amended Defence which are probative of the above inference.

> 4.9.7 Mr Tuffrey deliberately failed to state from the outset that his objective was to get the Second Defendant to pay to become a registered supplier. Paragraph 4.9.3 above is repeated.
>
> 4.10 On or around 12 September Mr Tuffrey volunteered to provide the First Defendant with an "online demonstration" of the service, to which the First Defendant agreed. At 10.31 on 12 September Mr Tuffrey sent an email to the First Defendant which stated among other matters that the "cost for checks" was £1,395.
>
> 4.11 At around 11.00 Mr Tuffrey commenced the demonstration. This took the form of a telephone conversation between Mr Tuffrey and the First Defendant during which they both had access to the same pages of the Claimant's website and Mr Tuffrey had remote access to the First Defendant's computer. Mr Tuffrey gave directions to the First Defendant to navigate through it or navigated it himself. During the course of the conversation Mr Tuffrey repeated his previous sales pitch in relation to expected enquiries, the assistance that would be provided by the Claimant, that the Claimant's profit was made from the construction companies who were actively looking for the specialist service that the Second Defendant provided and that the charge made by the Claimant simply reflected the cost of verification and would be refunded if the Second Defendant failed the verification process.
>
> 4.12 The First Defendant was deceived by the dishonest representations pleaded in paragraphs 4.9.1 to 4.9.5 above that led him to place an order online on behalf of the Second Defendant with the Claimant online, that he would not have done without the representations. "

6. Objection is also taken to the content of paragraphs 4.25 to 4.27 which relate to the "usage statistics" provided by the claimant to the first defendant. The relevant paragraphs are set out save for paragraph 4.26.1.6. as the defendant no longer relies upon it.

> "4.25 In response to the First Defendant's statement that he had received no enquiries as a result of registration, Ms Galvin provided a document, by email of 29 August 2012, purporting to show 1,197 website "hits" from potential customers that the Second Defendant had received as a result of its registration ("the Usage Statistics").
>
> 4.26 Ms Galvin was at the time seeking to obtain payment of all or part of the second year's subscription. This involved a carrot and stick approach. The carrot was selling the benefits of renewal. The stick was the threat of litigation. The implicit representation in supplying the Usage Statistics was they indicated a likelihood of significant enquiries arising by virtue

of the Second Defendant's registration and/or that the number of "hits" indicated the number of potential genuine customers. In fact, for the reasons set out below, the Usage Statistics do not indicate any such likelihood or provide any such indication.

4.26.1 The Defendants will invite the court to infer, on the basis of the matters set out below, that the hits attributable to registered users do not correspond to genuine enquiries from the companies appearing within them.

4.26.1.1 Each user appears in the four heavily populated subsections on average three times. Few users appear less than three times and fewer still only once, which is inherently unlikely.

4.26.1.2 Of the 297 occasions on which the Second Defendant is said to have appeared on a registered user's results screen (ostensibly meaning the results returned by a search query), it appears that on more than two thirds of these occasions the user went on to view the Second Defendant's telephone number, details and website separately. Further almost every one of these users viewed the telephone number, details and website separately either on every occasion or on all but one in which the Second Defendant appeared in their "results". This suggests that most users went through the same four-step process (i.e. including the search) on an average of three separate occasions, which is inherently unlikely.

4.26.1.3 Very few users (almost none) looked only at the Second Defendant's website or telephone number or details in isolation; or even at two out of these three. This is inherently unlikely.

4.26.1.4 The pattern of access suggests a little over three accesses per user spread rather evenly over the year; one near the end of 2011, one near the start of 2012 and one in the summer of 2012. This is inherently unlikely.

4.26.1.5 The Claimant has also insisted on payment by reference to the automatic renewal clause from LG Blower Specialist Bricklayer Ltd, T&I Solutions Ltd and Close Care Crisis Management Ltd trading as Tru-Clean. The Claimant also provided usage statistics to them. LG Blower is a small specialist bricklaying business, T&I is a small specialist rope access business and Tru-Clean is a domestic cleaning company based in North-West London which was seeking to enter into the commercial cleaning market. In each case, in common with the Second Defendant, the businesses received no enquiries from any of the companies appearing in the usage statistics or indeed as a result of registration with the Claimant. Furthermore, the usage statistics supplied to them demonstrate

> a level of overlap in relation to user and date with the Usage Statistics supplied to the Defendants, which is improbable to a very high degree.
>
> 4.26.2 Further or alternatively, the total of registered visitors is more accurately stated as 89 registered users, not 940 (and possibly less, because certain corporate entities appear as several distinct users). The sets of visiting companies listed under: "telephone number", "details" and "website" are almost entirely subsets of "results", as would be expected. Moreover, these subsets are very nearly overlapping. Hence, it is highly misleading to add each subset's population together and then add to that result the population of its superset (results) to obtain what the Claimant describes as "Total Usage".
>
> 4.26.3 Further or alternatively, the counting of non-unique IP addresses in relation to unregistered visitors is also statistically meaningless, particularly as the vast majority are multiple visits from the same small subsets of IP addresses, many of which belong to the Claimant or Causeway. The majority of the remaining unregistered visitors are "web robots" or foreign IP addresses.
>
> 4.27 It is to be inferred that Ms Galvin and/or Mr Gilchrist were aware of the implicit representation in the supply by the Usage Statistics to the Defendants and that it was false, by virtue of the knowledge acquired from their employment by the Claimant and because it is the Claimant's standard response to a supplier raising the absence of any enquiries. The Defendants will in this regard rely on the use made by the Claimant of the Usage Statistics in the course of the small claims hearing at Maidstone County Court on 26 April 2013 at which Ms Galvin was present and gave evidence. This included her false statement that the "257" non-registered users in the Usage Statistics "would be people who just generally have come across the site on the web, so they could be private individuals or smaller companies who maybe don't subscribe to our service" and her acquiescence in the submissions of the Claimant's advocate that the District Judge could be absolutely satisfied that the Usage Statistics were a straightforward report of what happened and the 1,197 hits equated to "100 people looking at it a month, 1 in 4 of those would perhaps come on to enquire from you". Further in paragraph 8 of the Reply the Claimant has relied on the Usage Statistics as evidencing "a substantial number of viewings via the Claimant's website from potential customers throughout the year, equivalent to around 100 hits per month. "

7. In summary the areas of contention are:

i) Meaning 4.1. The claimant contends that the defendants' case fails to justify the sting of the charge conveyed by the relevant words, which is of a specific kind;

ii) Further or alternatively, the claimant opposes paragraph 4.1 and the Particulars thereunder together with paragraph 4.5 and the Particulars thereunder on the grounds that they constitute an impermissible attempt to re-litigate a case which the second defendant brought unsuccessfully in related County Court proceedings between the claimant and the second defendant. This has variously been referred to as the res judicata/abuse of process objection;

iii) Paragraphs 4.25 – 4.27 of the Re-Amended Defence seek to make a case based upon the claimant's "usage statistics", that is said by the claimant to be based on a factual premise that is manifestly false. Insofar as the allegation is one of fraud or dishonesty it is tendentious and lacking in proper particulars.

Permission to Amend

8. Permission to amend a pleading is a matter for the discretion of the court. The case sought to be advanced must have a realistic prospect of success. In the context of defamation proceedings the rules of pleading require that the Particulars provided in support of a plea of justification or (honest comment) are sufficient in that they are capable of proving the truth of the defamatory meaning sought to be justified and are pleaded with proper particularity. If an inferential case is pleaded the Plea and Particulars must be such as to allow the tribunal of fact to draw appropriate inferences from what is put forward *Lord Ashcroft v.Foley* [2011] EMLR 30. "The court should rule out, as a matter of case management, proposed particulars of justification which are of only peripheral relevance to the central case in support of which they are advanced". *McPhilmey v. Times Newspapers Limited* [1999] 3 All ER 775.

Meaning

9. A specific charge cannot be justified by reference to other examples of conduct which are shown to be true unless they carry with it a broader imputation of misconduct. Specific allegations do not automatically carry a broader meaning, each case depends upon its own facts and the context in which words are used and the gravity of the misconduct imputed. *Bookbinder v Tebbitt* [1989] 1 WLR 640 (CA).

10. By reason of the order of Dingemans J the court and the parties know the meaning which the relevant words are to bear. The court is in a position to assess whether the Particulars of justification match the meaning, do they meet the sting of what is complained of?

Res Judicata/Abuse of Process

11. In written submissions the issue of res judicata was raised, however, the claimant's submission was developed before court upon the basis of issue estoppel or abuse of process. Re-litigating of a previously decided matter may be an abuse of process pursuant to the rule in *Henderson v Henderson* 1843 3 HARE 100 or pursuant to the

court's inherent jurisdiction to prevent a party from making a collateral attack upon an earlier decision *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529. Encompassed within this is the principle that where a matter is litigated, the party should bring forward the whole of their case in that litigation where it is practical to do so.

12. In *Johnson v Gorewood & Co* [2002] 2AC 1Lord Bingham of Cornhill cited the passage in *Barrrow v. Bankside Members Agency Limited* [1996] 1WLR 257 at 260 as follows:

> "The rule in *Henderson v Henderson* 3 HARE 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may finally be decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense nor even on a strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability in the general interest as well as that of the parties themselves that litigation should not draft on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

At 31a Lord Bingham stated:

> " "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in the proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings

> it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt a too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question of whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. …. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interest of justice."

13. In the subsequent decision of *Aldi Stores Ltd v. (1) WSP Group Plc (2) WSP London Ltd (3) Aspinwall & Co Ltd* [2008] 1WLR 748 the Court of Appeal referred with approval to the summary of Clarke LJ of the principles to be derived from *Johnson*:-

i. Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.
ii. A later action against B is much more likely to be held to be an abuse of process than a later action against C.
iii. The burden of establishing abuse of process is on B or C or as the case may be.
iv. It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.
v. The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.
vi. The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.

14. The function of the court in considering the issue of abuse of process is not the exercise of discretion but involves the assessment of a large number of factors to which there can only be one correct answer to the question of whether or not there is an abuse of process *Aldi Stores Limited v. WSP Group PLC* [2008] 1 WLR 748.

Factual Background

15. In summary, the claimant's business is described in the judgment of Dingemans J paragraph 2 above. The claimant's online directory has been integrated with the services of Causeway, a company providing supply chain management and estimating software to thousands of contractors. The estimating software is linked to the Building Register database and provides access to that database to customers of Causeway. In order to provide the requisite service it was necessary for the Building Register database to have an adequate number of specialist contractors to offer to clients of Causeway known as Estimators.

16. It was the claimant's former sales representative, Mr Tuffrey, who contacted the first defendant to ask whether All Clean Limited wished to be put forward for consideration. Two forms of registration with the Building Register were possible; without payment as unverified entries or by paying a subscription a contractor could obtain a "verified" or approved status. In order to become a customer an electronic questionnaire had to be completed by the contractor. Assistance would be given by the claimant's company in this process which resulted in the contractor's details being transferred to the Building Register. A contractor would have to go through a series of links in the online order system, which includes the viewing of the contractor's order form on the screen. The screen shot seen by the contractor prior to authorisation of payment has at the bottom of the page reference to "Site Map, Terms and Conditions, Privacy Policy, Causeway". On the page is a box followed by the words "tick here to show you have read our Terms and Conditions". It is not possible to process any payment until the Terms and Conditions box has been ticked. In the order form of the first defendant the box was ticked. Within the conditions is clause 10 which states "the minimum term of this agreement is for the period set out in the authorisation form, after which time this agreement will extend for further annual periods or periods of six months if the minimum term is six months. Unless either party gives written notice to terminate this agreement not less than three months prior to the end of the minimum term or the renewal term…"

17. All Clean Limited became registered as a verified contractor with the claimant on 12 September 2011. By a letter dated 16 September 2011 the first defendant wrote to Mr Tuffrey to complain, seeking a full refund and threatening legal action if the refund was refused. The letter stated "my complaint is that you never drew my attention to your lengthy terms and conditions in the appropriate manner prior to sale. I have made purchases on the internet before and if terms and conditions are applicable the box comes up for you to tick that you have read them, this was not the case in this instance. In this case it was not just an internet sale as you were talking through it at the same time, never did you draw my attention to the terms and conditions…" As a matter of fact the statement made by Mr Weston that he had not seen or ticked a box was wrong.

18. A further dispute arose between the parties in August 2012 when Mr Weston refused to pay the renewal fee which was about to become due. It was in this correspondence that Mr Weston was sent what have become known as the "usage statistics". Following correspondence between the parties the claimant issued proceedings in the Maidstone County Court for recovery of the subscription due. The defendant was All Clean House Limited. It was following service of the County Court proceedings that Mr Weston posted the allegations now relied upon by the claimant on a website which he had set up in order to record complaints against the claimant and its businesses. Of note is the following extract from the posting. "During the sales process they introduced me to their website and in order to gain more information I inadvertently clicked a tab which they then claimed was an electronic signature. As a result I had to part with £1600. Although I complained at the time about this they refused to budge on the fact that I had apparently placed an order. I was annoyed that I had been duped like this but I consoled myself with the thought that if half of the benefits they sold me came through, at least I would get my money back and it would be of some benefit."

19. In the County Court proceedings All Clean Limited entered a Defence and a Counterclaim which included the following:

> "Defence and reason for counterclaim
>
> Our defence for not wishing to pay a second year's subscription is that I feel that we were wrongly sold the initial year's subscription in the first place hence our counter claim. Part of the claimant's sales process involved going on the claimants website, (along with them giving a high pressure sell over the phone), where it is all too easy to inadvertently give an electronic signature, (something I'd never come across before). Having immediately, (same day), realised my error I tried to retract the deal however the claimant would not let us out of their strangle hold. ….. We can prove that we have had zero benefit from the claimant's product contrary to their high pressure sales promises and I would ask to cross examine the three people I have dealt with verbally……"

20. Prior to the County Court hearing on 5 March 2013 Mr Weston produced two documents: a signed witness statement and a document entitled "The Building Register Sales Process". In the latter document Mr Weston detailed telephone calls made by Mr Tuffrey prior to the order being placed when Mr Tuffrey allegedly told Mr Weston that there was a construction company in the area of All Clean Ltd, which was looking for cleaning services, could "your name" be put forward. Mr Weston stated that he had been told by Mr Tuffrey that in order to obtain a 'definite' chance of receiving such enquiries 'we' needed to become one of the Building Registers 'exclusive and registered suppliers'. He stated:

> "Liam Tuffrey endorsed his arguments during this call by saying that I could expect at least 25 sales enquiries a month…… During the sales process I allowed Liam to have remote access to the BR website on my PC monitor and he guided me through how the system worked right up to me clicking the final, fatal, no going back button. It was soon after clicking this button that I realised I had been duped. Firstly Tuffrey's involvement was completely withdrawn and I was then left to figure out how to upload our data on my own with no support from BR. Liam Tuffrey had, in my mind instantly gone from the position of helpful advisor, claiming that BR made their profits from their clients etc., a completely calculating, ruthless salesman with no further interest in me. I therefore tried to retract my electronic order, which I felt had been made under pressure, but BR would have nothing of it".

21. The document ended with these words "The crux of the matter is that we were assured at least 25 leads/enquiries a month, a promise that was worse than misleading, as not a single enquiry to date has resulted from the BR website."

22. In his witness statement Mr Weston made reference to the calls received from Mr Tuffrey prior to the order being placed, he stated:

> "I was told to expect at least 25 enquiries a month as he presently had far too many enquiries to fulfil from his current registered suppliers and that our listing would be national. He then took me on a guided tour of the BR directory, having logged onto my computer he guided me through the sales process… As it turned out, his claims were totally false,we have never taken a single enquiry as a result of our BR listing over the last year, let alone a sale… I sincerely believe that the BR product is completely worthless and is sold in a completely dishonest manner…"

23. The County Court hearing took place on 26 April 2013 before District Judge Horrocks. Mr Weston in person represented the company, however, it is clear from the transcript of the proceedings that a solicitor had been instructed and had possession of the papers in the case. It had been the wish of Mr Weston to call Liam Tuffrey to give evidence but Mr Tuffrey did not attend court. The claimant was represented by counsel. It called Mrs Lorna Galvin a senior accounts manager at Building Register Limited. It was Mrs Galvin who had been in contact with Mr Weston in and around August 2012 when the issue of renewal of the contract arose. Mr Weston was taking issue with the automatic renewal process. By an email dated 29 August 2012 Mrs Galvin sent to the first defendant what was described as "a copy of the 'hits' your company has had as a result of being registered with us over the last 12 months." (The usage statistics) The total number of "hits" resulting from searches of All Clean Ltd in the previous twelve months had been 1197. Mrs Galvin explained that the "hits" represented the companies which had accessed All Clean Limited as a result of being registered with the Building Register.

24. Mr Weston cross-examined Mrs Galvin as to how many "leads", the company could expect in a month. Mrs Galvin said that the company could not guarantee what the results would be. It was her evidence that the company had no means of 'tracking' the hits, in particular whether they became anything more, only the customer could do that. It was open to the customer using its username and password to access a 'hit' at any time during the duration of the contract. Questioning Mrs Galvin, Mr Weston said "so what I'm suggesting, in the absence of Mr Tuffrey, is that he perhaps said a little bit more than that. I specifically remember him saying: "you can expect 25 leads a month – not guarantee it, not guarantee it, expect." The point which Mr Weston was making to Mrs Galvin was that "there might have been 1100 hits, but I'm aware that hits on the internet can be completely meaningless, and the fact of the matter is that we have had zero enquiries for an 18 months period – zero enquiries".

25. The Judge pressed Mr Weston as to what his defence was. Mr Weston stated "I clicked the button to say that I accepted the terms and conditions. I can't deny that. The basis of my defence and counter claim is that I was completely mis-sold the product." The Judge identified her understanding of the defendant's case by stating "the basis of your defence is that the claimants were in breach of their contract because they did not perform as was represented to you? Is that right?" Mr Weston replied "correct". The Judge continued "so you accept that the claim as claimed – you

are liable for that, but that you have a counterclaim for non-performance". Mr Weston agreed with the proposition.

26. When cross-examined Mr Weston confirmed that at no time did Mr Tuffrey guarantee 25 calls a month. Clause 19 in the terms and conditions was drawn to his attention namely that "… representations made by the sales person are only binding if they are in writing from the directors…" The Judge questioned Mr Weston as to why he had not contacted companies to ask them why they hadn't followed up on their hits. She pointed to the fact that some of the hits were from substantial companies for example Bovis Homes, Mansard Construction, Taylor Wimpey, Chorus Construction, Waites Group. Mr Weston's response was that as the companies were very large organisations it was difficult to speak to the correct person.

27. In her closing submissions counsel for the claimant identified the fact that the Counterclaim alleged that the product which was sold was not fit for the purpose intended and further some form of misrepresentation was made namely that the first defendant was induced solely or significantly by representations which turned out to be incorrect. Counsel identified that the "highest" that Mr Tuffrey allegedly placed his sales pitch was that Mr Weston could have expected 25 enquiries a month. She submitted that this did not begin to cross the threshold for fraudulent misrepresentation even if the same had been properly pleaded.

28. The Judgment was as follows:

> " 1. In this case the defendant agreed the services of the claimant and has accepted that he agreed to a contract via an on-line registration process and that, as part of that process, he ticked a box to say that he had read the two page terms and conditions. One of those conditions was that there would by an automatic renewal of the contract at the expiry of the year, unless a specific request was made for that not to happen.
>
> 2. The defendant has accepted that he is bound by the terms and conditions to which he agreed. That is a realistic view of the case. There will therefore be judgment for the claimant in the sum of their claim.
>
> 3. However, the defendant has a counterclaim which he seeks to set off against the claim. That has been the focus of the evidence today. It was not necessarily central to either party's claim for Mr Tuffrey to attend to give evidence because Mr Weston accepted that Mr Tuffrey at no stage made any guarantees about the level of business that would be generated by registering with the claimant. At the highest, Mr Tuffrey may have said that he expected enquiries at the rate of some 25 a month. That may have been optimistic, or it may have been reasonable, because the claimant has many thousands of customers on its register and the experience of some of those customers may be that the 25 per month response rate is to be expected.

> 4. The data that has been produced by the claimant shows that Mr Weston's company had an average of about 100 hits a month, which sounds reasonable. Furthermore, it is not within the claimant's capacity to turn hits into specific enquiries. That would depend on the needs of those people searching the website, the type of services and their cost being offered by the defendant. It is certainly not within the claimant's capacity to monitor whether hits are turned into enquiries or indeed into firm orders. That must be the logical outcome of this sort of service.
>
> 5. However, even if Mr Tuffrey did make the comments that Mr Weston ascribes to him it is very clear from the contract that any representations made by the sales force cannot be relied upon unless confirmed in writing by a director of the claimant company. Mr Weston did not read that clause before he signed up to it, but that does not mean to say that the clause has no effect. That clause does mean that any reliance that Mr Weston placed on Mr Tuffrey's sales pitch cannot be used as a basis for alleging that the contract should be avoided or rescinded.
>
> 6. Accordingly, I find that the defendant's counterclaim fails and that judgment should be entered for the claimant."

The decision of the judge was not appealed by the defendant.

29. In the draft Re-Amended Defence, for the first time, reliance is placed upon an e-mail dated 10 June 2011 between Mr Tuffrey and the first defendant. In particular the contention by Mr Tuffrey that "there is too much for the approved supply chain to handle, and as a result we have been asked to add to these lists – and after talking to you and looking at the services you offer online, I believe you should have been here a long time ago." As can be seen from the detail of the pleading set out at paragraph 5 above the defendants were seeking to widen the evidential ambit of the case in respect of the duping allegation contained at 4.1 of the Re-Amended Defence. Underpinning all of the allegations or inferences which it is said should be drawn is the fact that during the period of registration with the Building Register no enquiries were received by the defendants. Aside from the defence of justification, it is pleaded at paragraph 5 that the allegations are honest comment. The facts relied upon are the same pleaded inferences as are relied upon for the defence of justification.

The Defendants' Case
Paragraph 4.1
Duping

30. The defendants rely on the representations now pleaded in paragraphs 4.7 and 4.8 of the Re-Amended Defence. The representations are alleged to have been made before and during the ordering process. They are said to be false, Mr Tuffrey knew them to be false, as a result the first defendant was duped into entering into the contract. In summary the representations are to the effect that demand exceeded supply; there was

no profit element for the claimant; the defendants could expect 25 sales enquiries per month. Underlying the submissions is this premise; as the claimant received no enquiries, any representations as to demand or expectation must be false.

31. Linked to the first submission is a second; the usage statistics are not true statistics, they do not correspond to genuine enquiries. It is "inconceivable" that genuine customers could have behaved in this way. Reliance is placed upon the fact that each hit represents a search in the usage statistics. If a person looked only at the details, that would provide access to the website, hyperlink and the telephone number. Identified in the statistics are the number of hits relating to the second defendant's telephone number, specifically 213. Why if there are 213 hits to the telephone number of the second defendant, did it receive no enquiries? Given the information contained in the initial detail there was no need for any user to access the specific telephone number. What possible reason could 213 people have to search the telephone number other than to telephone the defendant.

32. In respect of registered users, each user appears on average three times, the access of each being evenly spread out. Very few registered users access only once. For all of the above reasons the figures are said to be inherently improbable.

33. Reliance is placed on the overlap of such statistics with the three companies identified in the Re-Amended Defence who are also unhappy with the service provided by the claimant. The overlap exists in relation to the identity of the registered user, the dates of access namely the same users on the same day at regular times throughout the year in the detail, website and telephone numbers. This is said to be improbable to a very high degree particularly so when none of the users contacted any of the companies. To suggest that almost 900 people viewed the unnecessary telephone number function and none called defies belief. The companies are small businesses, differing in nature, size and/or location. For them to appear on the same search would require a very wide search with a large number of other companies appearing in it.

34. As to unregistered users it is said the counting of non registered users is "statistically meaningless". All but a small number were viewed on the result screen as part of a search. The second defendant had nationwide registration and would be likely to come up on wide searches comprising thousands of companies. The vast majority are from the claimant or Causeway and the majority of the remainder are said to be web robots or IP addresses. The response of the claimant namely that the claimant or Causeway hits are likely to be caused by customers using Causeway software is said not to satisfy a Part 24 test and fails to explain why these customers are ostensibly behaving differently to registered owners or why it is appropriate to count inclusion in search results as a hit where no information is accessed about the supplier.

Res Judicata/Issue Estoppel/Abuse of Process.

35. The defendants prepared their written submissions upon the basis that the claimant would pursue an argument based upon res judicata. The claimant, at the hearing, concentrated its case on issue estoppel/abuse of process. Notwithstanding the shift in emphasis of the claimant's case the legal principles and the facts relied upon by the defendants in their written submissions are of relevance. The defendants rely upon the fact that the purpose of a defamation claim is to vindicate reputation. Relying

upon the observations of Sir Thomas Bingham MR in *Basham v Gregory [1996]* (unreported) 21/2/96 they contend that the courts are extremely reluctant to deprive a defendant on technical grounds of proving the truth of matters that could be relied on in support of truth or comment defences. Further there is the public interest in avoiding false vindication. Depriving a defendant of the opportunity to prove relevant allegations in support of viable defences is a restriction of his rights under Articles 6 and 10 ECHR. It can lead to an award of damages and an injunction against repetition in relation to allegations that may be true or defensible comment. It can also give rise to real difficulty in relation to the necessity test in Article 10 (2). It is said that it cannot be necessary for the protection of the claimant's reputation because reputation is not vindicated by muzzling the defendant.

36. The defendants rely upon the authority of *Tanner v. Filby & anr* [2003] All ER (D) 279 a decision of Eady J. In that case the second defendant had purchased an assembled kit car from the claimant or from PC Limited, which represented the claimant's commercial endeavours. The second defendant experienced many problems with the car which led to him bringing small claims proceedings against PC Limited. The second defendant obtained limited success in those proceedings, the District Judge dismissing a number of aspects of the claim. The first defendant owned and edited "Which Kit?" magazine. The second defendant wrote a letter to the magazine which formed the basis of an article which the claimant alleged was defamatory of him and which was published subsequent to legal proceedings. The defendants pleaded fair comment and justification. The claimant sought to strike out those defences on the ground of issue estoppel and/or a ground of abuse of process, in that the issues contained in the defences had formed the subject matter of the small claims proceedings. Eady J dismissed the application and held that the defences were not bound by issue estoppel; the small claims proceedings had not comprised the same parties as the instant action; although there was a degree of overlap in terms of the raw factual data in both actions there was not a complete match of factual issues. Further he held that to raise the small claims action in order to prevent the defendants from criticising the claimant, or from defending themselves in a High Court action which concerned their right to free speech, would run contrary to established common law principles and the requirements of the ECHR.

37. Eady J, having found that there were different parties in both actions and there was not a complete match in the factual issues considered the defendant's argument upon abuse of process. He stated:

> "29. However it is put, I cannot see why the defendants should be regarded as under a permanent ban from criticising Mr Tanner, or from defending themselves in High Court proceedings in respect of their right of free speech. They may, of course, fail in their defences because they are unable to establish material elements of their factual case, or because of malice, but the present application is based on the proposition that they should not be permitted by the court to advance any substantive defence at all before the jury.
>
> 30. Such an argument, leaving aside its merits under established law principles must surely now have to be tested also against the demands of Article 10 and Article 6 of the

> European Convention on Human Rights. In my judgment, it would be unsustainable against those criteria as well."

Eady J provided no reasons for his conclusions at paragraph 29.

38. The defendants contend that their case is even stronger than that of the defendant in *Tanner* because the Small Claims Court in the present case did not rule on any of the issues advanced in support of the justification and comment defences. Further only the second defendant was a defendant, the first defendant was not a party. The sole issue on which the Small Claims Court ruled is said by the defendants to be whether any representation of Mr Tuffrey as to the level of sales enquiries would entitle the second defendant to avoid or rescind the contract. The only determination was that clause 19 of the claimant's terms and conditions prevented the second defendant from relying on any oral representation of Mr Tuffrey as a means of avoiding or rescinding the contract. The defendants' justification and comment defences do not rely on any contractual consequences flowing from Mr Tuffrey's pleaded misrepresentations nor do they fail by reason of absence of any such consequences.

39. There was no reason for any other issue to be determined in the Small Claims Court still less for it to constitute an abuse of process for the defendants to raise it in the present claim. In paragraphs 3 and 4 of her judgment the District Judge commented on the alleged representation of Mr Tuffrey but made no finding as to whether it was made or whether it was reasonable. In paragraph 4 reference was made to the claimant's counsel's submissions that the 1200 hits in the usage statistics evidenced 100 potential customers a month. It is said this is now plainly false. In any event the District Judge made no finding upon it simply observing that it "sounds reasonable". There is nothing in the judgment that is inconsistent with the case the defendants advance in support of their justification and comment defences. The legal basis of the respective claims issues raised, the formality and complexity of proceedings, the amount at stake, the role of legal representation and the recoverability of legal costs are all different in these proceedings.

40. There is no suggestion of any "unjust harassment or oppression" of the claimant if the defendants are permitted to advance defences of their choosing. Given the small amount at stake in the small claims hearing, the nature of the claim and the existence of clause 19, it would have been a waste of money and court resources for the second defendant to take on the burden of establishing Mr Tuffrey had made dishonest representations.

41. Pursuant to Article 10 it is said that there are no circumstances in which res judicata could be relied upon to prevent a defendant from defending a claim which is true when there is a real prospect he could establish the case to be true. The defendants accepted that Article 10 (2) ECHR permitted areas of restriction but contended that the same should be proportionate. It is said that the effect of permitting the claimant's application would be to prevent the defendants from establishing the truth of their allegations.

42. There is also a wider public interest involved in the context of this case. It is a corporate claimant suing in respect of allegations of dishonest business practice it would be unsatisfactory if such practices could not be tested by reason of previous findings in the small claims court.

The Claimant's Case

Meaning
4.1 Duping

43. The duping is expressed as an allegation of sharp practice of a particular kind. The first defendant had been led into inadvertently clicking on a tab which was then claimed to be an electronic signature, as a result the first defendant was thereby duped into placing an order i.e. entering a contract online. The "like this" after the word "duped" in the words complained of puts this beyond doubt, "online" qualifies the type of misconduct alleged. This interpretation was found by Dingemans J at [25] of his judgment, in particular his reference to the "nearly literal use of the words".

44. As a matter of fact this allegation is false. The first defendant must have known it was false at the time he first wrote to complain. He has never since sought to suggest that it is true. It is not surprising that he states that he has no interest in repeating the words complained of. As the duping allegation is a particular charge of the kind identified, the defendants' plea under paragraph 4.1 of the Re-Amended Defence fails to engage with the particular sting alleged and has no real prospect of success.

Paragraphs 4.1 and 4.5. Abuse of Process

The County Court Proceedings

45. Extrapolating from the Defence and Counterclaim dated 15 October 2012 and signed by the first defendant the claimant contends that the defendants were from the outset alleging that they had been "wrongly sold" the initial year's subscription to the claimant's products; they had been the victim of "high pressure sales promises"; they had received "zero benefit" from the claimant's product and as a result there was a complete failure to deliver what had been "promised". At this stage their case did not contain any express allegation that the second defendant had been the victim of a fraudulent representation. Reliance is placed on the final sentence in the "Building Register Sales Process" document signed by the first defendant which ended with the statement that the "crux of the matter is that we were assured at least 25 leads/ enquiries a month, a promise that was worse than misleading, as not a single enquiry to date has resulted from the BR website." The first defendant's witness statement is in a similar vein.

46. Unchallenged is the fact that the first defendant was given a fair and proper opportunity to put his case on behalf of the second defendant in the County Court. The first defendant had access to advice and assistance from a solicitor. Reliance is placed upon the process, as described by Mrs Galvin, which the first defendant would have to follow in order to conclude a contract which included the ticking of the box to confirm acceptance of the Terms and Conditions; the print out supplied to the first defendant by Mrs Galvin in August 2012 containing the usage statistics; the fact that the first defendant did not challenge the accuracy of these statistics in questioning Mrs Galvin; the fact that the customer and not the claimant was able to track the progress of the hits; the statement by the first defendant that he was told by Mr Tuffrey that he could "expect 25 leads a month, not guaranteed". It was clear by the close of the evidence that the first defendant's allegation of failure to deliver on the claimants

"promise" and/or of a false representation was based on his claim that he had not received a single enquiry.

47. The proposed plea of justification amounts to an attempt to relitigate the issues raised by the Counterclaim in the County Court. An embellished version of the case now seeks to introduce an e-mail from Mr Tuffrey in June 2011 as being an operative factor in the duping notwithstanding the absence of reference to it in the County Court. Whether the matter is approached on the basis of issue estoppel or abuse of process the answer is the same: the issues raised by the proposed defence in the libel action are in substance the same issues that were determined adversely to the second defendant in the County Court. It matters not that the proposed defence is an embellished version, such matters could and should have been raised in the previous litigation.

Article 10 ECHR

48. The first defendant has indicated through his solicitor that he has no intention of repeating the words complained of. Article 10 does not preclude the first defendant from defending his case, the issues are confined to those it is fair to try. It is for the court to assess the issue of abuse in terms of all the facts including the County Court action and correspondence. Abuse of process is fact sensitive not area specific. The plea of fair comment relies on the same facts.

Usage Statistics

49. The assertion by the defendants that the statistics are in some way fabricated led to the claimant spending time and money investigating the allegations. A witness statement of David Ovington, Vice President of Technology and Architecture at Causeway Technology Limited is before this court. Mr Ovington explained in detail the tests which he had run on the software, the version of which had not apparently changed since August 2012. He answered, insofar as he was able, any points of criticism. No evidence has been filed by the defendants to rebut or in any way deal with the evidence of Mr Ovington. It was open to the first defendant in the County Court proceedings to cross-examine Mrs Galvin as to the accuracy of the data, he did not. The defendants' case amounts to an allegation of inherent probability, the defendant has produced no evidence to substantiate an allegation of falsity.

50. The allegation that enquiries came through the Causeway server is met by the fact that in searching companies would be accessing through the Building Register server and this would be described as emanating from Causeway.

51. A suggestion that the data is misleading fails to take account of the fact that on any one day a specific company is recorded as having made only one hit. Included in the companies are nationwide construction companies who are carrying out many projects thus personnel within the companies could search on the same day. It follows that the number of recorded hits is likely to be an under representation.

52. Objection is taken to the fact that the defendants' case is based upon selective use of just four companies when the number of approved contractors amounted to 1500-2000. At paragraph 17.2 of its Reply the following is pleaded on behalf of the claimant:

> "The renewal rate for approved contractor customers of the Claimant (of which there are typically in the region of 1,500 to 2,000) is currently running at around 90% in terms of the number of customers renewing. Of this figure, well over two thirds are customers whose contract has been in place for 2 or more years. Self – evidently, this is impossible to reconcile with the picture portrayed by the Defendants, is based on their own false and distorted account of their own experience."

53. An allegation that these statistics were employed by Mrs Galvin in a sinister manner is negated by the fact that at all times it was open to the first defendant to take advantage of the facility provided by the contract to generate a request for and download the usage statistics which would show which companies or other entities had clicked onto his company's details on the Building Register and when. This was a document which the first defendant could have generated in order to maximise the benefits which could be derived from the service provided by the claimant. An assertion that the statistics were produced "out of a hat" to bully customers has no credibility. The detail generated in the statistics namely the company, location, and date and what is viewed by the company would provide ample information for a person in the position of the first defendant to follow up any hits. In his witness statement Mr Ovington deals with the issue of access to the usage statistics and states "… the usage reports are core to the service offered to customers of Building Register. They are accessible by the registered customer 24 hours a day, 7 days a week so that they can see daily if their record has been viewed, when viewed and by whom." In the same paragraph Mr Ovington reprints the screenshot of the "homepage" of a user who logs into their account under the heading "services" is included "View Usage Statistics".

54. The effect of the usage statistics is not to represent that 100 people per month would make contact. However, as an estimate such figures would not be unreasonable. Placed in its correct context the representation made by Mr Tuffrey is neither unreasonable or false. The use of the statistics cannot amount to an implicit representation.

55. The claimant relies on paragraphs 3 and 4 in the District Judge's judgment as representing two limbs of the findings made by her. The first deals with any promises made and the second rejects any allegation made or not of falsity. Whatever representation was made it cannot be said to have been false as the Judge accepted that it was reasonable to identify in the order of 100 hits a month. The same could not have been understood by the first defendant as anything being more than an estimate.

56. The absence of any challenge in April 2013 to the accuracy of the data has led to prejudice to the claimant in these proceedings. Evidence which would have been available in April 2013 is no longer. In the ordinary course of its business Causeway cleans down its logs with the result that the data is not available. It is no longer possible to reconstruct information that would have been available to Mr Tuffrey at the time he was in communication with the first defendant. This would encompass both the allegation that in the first contact Mr Tuffrey is said to have made reference to a project in Warwick, near to the second defendant's business and the allegation that demand exceeded supply. The Building Register includes thousands of verified and unverified contractors of which 1500 -2000 were verified.

Conclusion
Meaning.
Paragraph 4.1 Duping.

57. I have set out the factual background of this case in some detail as it demonstrates the way in which Mr Weston has developed his complaints against the claimant. At the outset and prior to the County Court proceedings he maintained that he had not seen or ticked the box indicating that he had read the terms and conditions. A year later, in 2012, he contended in correspondence that he had inadvertently 'clicked a tab'. This contention was repeated in the 'Defence and reason for counterclaim' filed in the County Court proceedings.

58. In those proceedings Mr Weston stated that he had "clicked the button to say that I accepted the terms and conditions. I cannot deny that…. The basis of my defence and counterclaim is that I was completely mis-sold the product". The judge clarified the defendant's position as being that the claimant was in breach of that contract because it did not perform as was represented to Mr Weston. He agreed with the formulation. Mr Weston did, however, accept that no guarantee was given by Mr Tuffrey, he was told 'you can expect 25 leads a month'.

59. The meaning found by Dingemans J is described by him as 'a nearly literal use of the words' in the second paragraph of the web page which contained the words complained of. Namely: (the courts' emphasis in bold)

> "During the sales process they introduced me to their website and in order to **gain more information I inadvertently clicked a tab which they then claimed was an electronic signature…… I was annoyed that I had been duped like this."**

The words are clear. I find that what is factually meant is that Mr Weston inadvertently clicked on a tab, the claimant claimed it was an electronic signature as a result Mr Weston was duped into placing an order i.e. entering a contract online. As a matter of fact that allegation is false. By the time of the County Court hearing Mr Weston appears to have resiled from that proposition given his answer to a query from the judge identified in paragraph 56 above. In these proceedings it is no part of the pleaded Defence that this allegation is true. Further the Particulars upon which the claimant seeks to rely in paragraphs 4.7 and 4.8 do not relate to the specifics of the allegation of online duping at 4.1. They do not engage with the particular sting alleged and cannot provide justification for it. In my view the plea has no reasonable prospect of success. For the reasons identified I do not allow the amendments sought in paragraphs 4.1, 4.7-4.8 of the Draft Re-Amended Defence.

Paragraph 4.5 The Claimant mis-sold to the Second Defendant a service which it knew did not deliver the substantial benefits that it provided.

60. In my view the essence of the defendants' case is described by Mr Weston in the 'Building Register Sales Process' which he signed for the County Court proceedings where he stated: 'The crux of the matter is that we were assured at least 25 leads/enquiries a month, a promise that was more than misleading as not a single enquiry to date has resulted from the BR website.' Underlying this allegation is one

premise: we received no enquiries therefore what we were told was a misrepresentation.

61. As a matter of fact Mr Weston accepted in the County Court proceedings that Mr Tuffrey did not guarantee this number, it was an expectation. It is clear from the transcript of the proceedings that Mr Weston was given a proper opportunity to put his case as to what he was told by Mr Tuffrey and what he expected as a result. This was his Counterclaim which the judge identified as the focus of the evidence. At paragraph 3 of her judgment the Judge specifically dealt with expectations stated by Mr Tuffrey and in paragraph 4 with the usage statistics. There is nothing in paragraph 4 to suggest that the representation or material upon which it was based was false. There can be no dispute that Mr Weston acting for All Clean Ltd raised the representation in evidence and the Judge dealt with the making of it and the material upon which it was based in paragraphs 3 and 4 of her judgment.

62. In these proceedings the defendants now seek to rely upon an earlier email of Mr Tuffrey dated 10 June 2011 in which Mr Tuffrey stated that there is 'too much for the approved supply chain to handle' (paragraph 4.7) and an allegation (paragraph 4.8) that Mr Tuffrey stated that if the second defendant became a registered supplier it could expect at least 25 sales enquiries a month and would quickly and easily recoup the subscription cost. These are matters which could have been raised in the County Court proceedings but were not. Had this been done prior to the hearing the claimant would not have been prejudiced in dealing with the allegations in 4.7 as data, since destroyed, was available.

63. I accept the claimant's description of the defence now relied upon an embellished version of what was run in the County Court. The reality of this plea is that it does amount to an attempt to re-litigate the issue raised by the Counterclaim in the County Court. I do not accept the defendants' submission that the only determination made by the District Judge was in respect of Clause 19 of the Terms and Conditions. The judge heard from Mr Weston as to what he said he had been told by Mr Tuffrey which is at the core of the allegation at 4.5.

64. As to the defendants' submission that in the County Court proceedings the defendant was All Clean whereas in these proceedings Mr Weston is the first defendant and All Clean the second defendant, this ignores the reality of the situation. Mr Weston is the Managing Director of All Clean. He acted for the company in all its dealings with the claimant company and on its behalf in the County Court. He is the company, there is an identity of interest between Mr Weston and All Clean.

65. Any assessment of a submission based upon abuse of process has to be fact specific. I am grateful to both parties for referring me to the authority of *Tanner* above, however, each case has to be assessed upon its own facts. My findings on these facts are that at the core of the meaning pleaded at paragraph 4.5 of the Re-Amended Defence is the allegation of Mr Tuffrey's expectation of 25 leads/enquiries a month. This was raised by Mr Weston and dealt with, in the County Court proceedings. The proposed amendment does seek to re-litigate issues that were raised by Mr Weston in the County Court. In so doing I find that it amounts to an abuse of process of this court. Accordingly I do not allow the amendment sought at 4.5 together with the Particulars, thereafter set out. In my view to permit continuance of issues that were litigated in the County Court would be oppressive to the claimant.

66. My rulings do not mean that the defendants are precluded from defending their case. The effect is to permit continuance of the proceedings upon those matters, which in the opinion of the court, it is fair to try. The defendants, at trial, will be given their opportunity to prove the truth of and justify the remainder of the words of which complaint is made. The proceedings will permit, if appropriate, the vindication of reputation. The rulings which I have made do not deprive the defendants of their rights pursuant to Articles 6 and 10 of the ECHR.

Usage Statistics

67. The defence case comes to this; that by reason of the matters identified in paragraphs 29-32 above the statistics are not genuine. It was no part of the defendants' case in the County Court that the statistics were false. The claimant has filed evidence in these proceedings to support its case that the statistics are valid. The defence has relied upon its pleaded case verified by a statement of truth. It has filed no evidence. The essence of the defence case is set out at paragraph 4.26 in the Re-Amended Defence namely that Mrs Galvin was using the statistics in order to obtain payment of all or part of the second year's subscriptions.

68. The fundamental difficulty which the defendants face in contending that the usage statistics are not genuine is that the report which contains all the statistical information was at all times available to the defendants when registered with the claimant. The first defendant would have seen from his earliest registration that by utilising his username and password he could access details of all hits received by the company. Unchallenged was the evidence of Mrs Galvin that it was the customer not the claimant who had the ability to 'track' the companies making the inquiries.

69. Before the County Court were 4 pages of the usage statistics supplied to Mr Weston by Mrs Galvin in 2012. Mrs Galvin, Mr Weston and the judge all dealt with the statistics. Mr Weston was not suggesting that the statistics were false, his point was that they were 'meaningless' because he had received no enquiries. It was the judge who asked Mr Weston why he had not accessed the hits and made enquiries of the relevant companies. His response, that he did not do so because in big companies it is difficult to identify the correct person, is less than satisfactory. In her judgment the judge identified as the 'focus of the evidence' the Counterclaim of the defendant. It is difficult to avoid the impression that, once again at the core of the defendant's case is the fact that no inquiries were received, therefore any material suggesting that there was a likelihood of some enquiries cannot be valid.

70. The reliance by the defendants upon statistics relating to four other companies cannot provide a fair basis for drawing any conclusions of fact as to falsity. In the Reply the claimant pleads that at the relevant time it had 1500-2000 verified customers. An attempt to extract any propositions from reliance upon just four fails to provide a sound evidential basis upon which to proceed.

71. Allegations that figures are 'inherently improbable' and not 'genuine' require more than emotive descriptions. The defendants had ample opportunity prior to the County Court proceedings and in the course of them to raise any issues as to the genuine nature of these statistics. Mr Weston in person and the company represented by him did not suggest the statistics were false. What the court is now being asked to do is 'infer'. Upon a serious allegation of falsity the defendant has not come near to

providing a sound basis for such an inference. Accordingly the claimant's objection to paragraphs 4.25-4.27 is upheld.