



Neutral Citation Number: [2021] EWHC 2370 (QB)

HQ17M04570 ('The Privacy Claim')

HQ18M02371 ('The Libel Claim')

QB2018000465 ('The Second Libel Claim')

QA2019000028 (Appeal of the Order of Master McCloud dated 10 January 2019 ('the Appeal'))

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/08/2021

Before :

MR JUSTICE JULIAN KNOWLES

Between :

DONNA DESPORTE

Defendant (The Privacy Claim)

Claimant (The Libel Claim)

Claimant/Respondent (The Second Libel Claim)

Appellant (The Appeal)

- and -

GARETH BULL

Claimant (The Privacy Claim)

Defendant (The Libel Claim)

Defendant/Applicant (The Second Libel Claim)

Respondent (The Appeal)

Donna Desporte appeared in person
Chloe Strong (instructed by Howes Percival) for Gareth Bull

Hearing dates: **9 February 2021**

Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. As will be clear from the front page of this judgment, the litigation with which it is concerned is extensive. It has also become procedurally convoluted. The papers for this hearing are substantial. After several years of litigation, there has been a lot of detail to go through. Even determining what was before me at the hearing took some working out.
2. The litigation involves several claims between Donna Desporte (DD) and Gareth Bull (GB). The litigation began in 2017. For convenience, I will refer to the various claims according to the nomenclature suggested by Ms Strong in her Skeleton Argument. Before explaining what matters I have to decide, it is necessary to sketch out the history. I emphasise the word 'sketch'. At my request Ms Strong prepared a Chronology of the litigation; it runs to seven pages and has many entries. What follows is what I judge necessary for an understanding of the issues now before me.
3. In late 2016 and early 2017 DD and GB were in a relationship. A few years earlier GB had been the subject of media publicity when he and his then wife won several tens of millions of pounds on the National Lottery. In due course GB separated from his wife and they subsequently divorced. The relationship between DD and GB also came to an end, and later in 2017 she wrote and self-published a book (in paperback and ebook) on Amazon whose full captioned title was *Google Me - No Lies: The True Incredible Heartbreaking Amazing Story of a Survivor Featuring the Relationship with £41 Million Lottery Millionaire Gareth Bull*, focussing very largely on their relationship. I will refer to the original edition of the book as 'the Book' or 'the original Book'.
4. The Book contained private information about GB, including details of his sexual relationship with DD and details about his divorce, as well as other matters. Accordingly, on 20 December 2017 he applied for, and was granted, an interim non-disclosure order (INDO) from His Honour Judge Moloney QC sitting as a High Court judge to prevent DD from disclosing four categories of private information in the Book.
5. Amazon were notified of the making of the INDO and removed the print and digital editions of the Book from sale on its website shortly afterwards.
6. In late December 2017 GB began proceedings for breach of privacy and breach of copyright, the latter in relation to photographs he had taken and which DD had included in the paperback version of the Book (but not in the ebook). This is the Privacy Claim. In January 2018 DD served a defence and counterclaim.
7. It is important to emphasise that the INDO only restrained the publication or communication of the four categories of private information specified in the order. It was not concerned with copyright at all.
8. On or about 3 January 2018 DD produced a second version of the book, *Google Me No Lies Redacted: Redacted Version*, which was again sold by Amazon as a paperback and an ebook. Neither version contained the photographs. GB's name was changed to 'Gary Ball', and there were other minimal name changes, but the private information was still contained in the book. I will refer to this as 'the Redacted Version'.

9. On 3 January 2018 James Howarth, the partner with conduct of the case at Howes Percival, GB's solicitors, wrote to Amazon to inform it that the Redacted Version was being sold and that it was in breach of the INDO. Shortly afterwards Amazon removed the Redacted Version from sale.
10. On 5 January 2018 Howes Percival submitted standard DMCA notices to remove the original paperback version of the Book from sale on the following Amazon websites: Amazon US, Amazon Italy, Amazon Japan and Amazon Germany (Amazon required separate notices for each jurisdiction). The notices referred to the original paperback version of the Book (for which the unique ISBN number was given) and stated that the Book contained three photographs which infringed GB's copyright. The photographs were described and their page numbers in the Book were given. (DMCA stands for Digital Millennium Copyright Act, a 1998 United States copyright law. In simple terms, a DMCA notice informs a company, web host, search engine, or internet service provider that they are hosting or linking to material that infringes copyright and requires them to take it down.)
11. On 12 January 2018 DD received an email from Amazon saying that the original Book and the Redacted Version had been removed from sale because of 'defamatory content'.
12. Also on 12 January 2018, DD served a defence and counterclaim.
13. In a witness statement dated 26 January 2018 Mr Howarth explained that Amazon's assertion about defamation had been wrong, and that no complaint of defamation had ever been made by his firm on behalf of GB. Mr Howarth's witness statement is exhibited as Ex VKH2 to the witness statement of Victoria Howe of 17 April 2019 for this hearing. Ms Howe is an Associate with Howes Percival. What appears to have happened is that on 19 December 2017 Howes Percival emailed Amazon at the email address defamation-notice@amazon.co.uk to notify it of the INDO application the following day. Mr Howarth said that this appeared to be the only remotely relevant email address. It would appear that through an automated process, or otherwise, this led eventually to Amazon sending DD an email saying (wrongly) that the Book contained defamatory content. Howes Percival clarified the position with Amazon.
14. Mr Howarth's witness statement was produced in response to an injunction application begun by DD on 23 January 2018 to restrain GB from making 'false and malicious statements', which she particularised in proposed amendments to her counterclaim. This application appears to have been prompted by Amazon's 'defamation email' to her.
15. Mr Howarth's witness statement contained a number of exhibits, including Howes Percival's correspondence with Amazon in early January 2018 about the Redacted Version (Ex JEH5), and this was served on DD.
16. On 23 January 2018 DD sought to amend her counterclaim to include complaints about false and malicious claims of defamation to Amazon on or before 12 January 2018.
17. On 30 January 2018 Rowena Collins Rice (sitting as a deputy High Court judge) refused DD's application for an injunction and ordered her to pay £14 000 plus VAT in costs.

18. Later in 2018 Howes Percival discovered that the paperback version of the Book was being sold by an American publisher Lulu Press Inc (Lulu), based in North Carolina, but the Book could be purchased from the UK (and it carried out a test purchase). On 31 May 2018 Howes Percival wrote to Lulu informing it of the INDO.
19. On 13 June 2018 a CCMC took place in the Privacy Claim before Master McCloud. Paragraph 1 of the Master's order provided that unless before 4pm on 11 July 2018 either DD provided security to the satisfaction of GB Claimant for the costs ordered by Rowena Collins Rice on 30 January 2018 and the costs awarded in her Order at [21], or discharged at least half of the total sum of those costs and then discharged the remaining amount by 4pm on Wednesday 8 August 2018, the counterclaim would be struck out.
20. DD did not comply with this order. She did not provide security and did not pay any costs.
21. On 18 June 2018 DD made a number of applications in the Privacy Claim. These were either refused, or held not necessary for determination, by Whipple J on 2 July 2018. Three of them were certified as having been totally without merit (TWM).
22. On 3 July 2018 DD issued the Libel Claim against GB in respect of the letter sent by Howes Percival to Lulu in May 2018.
23. Later in 2018 DD then produced a third version of the book, *Google Me No Lies USA Edition* (the USA Edition) which, despite its name, was still published within this jurisdiction as an ebook on Amazon's website. It did not contain any photographs. In that edition GB was re-named as 'John Smith', but again it contained the private information. Howes Percival became aware of the USA Edition on or about 22 October 2018. I will refer to the Redacted Version and the USA Edition collectively as 'the Redacted Versions'.
24. On 13 November 2018 Howes Percival sent a letter to Amazon UK about the USA Edition requesting that it be removed from sale because it breached the INDO. They also pointed out that despite the name change, GB was still identifiable (Ex VKH10).
25. On 30 November 2018 DD sent a letter before claim by email to Howes Percival in respect of supposed false and malicious allegations of breach of copyright in its letter of 13 November 2018 to Amazon (Ex VKH11). DD's complaint was that Howes Percival had falsely and maliciously claimed that GB held the copyright in the text of the USA Edition (sic):

“It is expressly denied that the said work Google Me- No Lies USA Edition contained any copy written material belonging to your client Gareth Bull or otherwise, and that accordingly the comments were made in malice to induce the entity to withdraw the title, which they consequently did. Whilst immediate efforts have been made with the organisation to correct this malicious defamatory comment and mitigate the damage that has been caused to both the work & the writers credibility. Damage, (possibly long term) distress, inconvenience and loss as occurred as a direct consequence.”

26. On 5 December 2018 Howes Percival responded to DD's letter before claim:

“This is our client's formal response to your threat to bring a claim over allegations that this firm has asserted to Amazon that Google Me - No Lies USA Edition (the "November Version") contains material for which our client owns copyright.

We can confirm that, as you have already been informed on several occasions, no such assertions have been made to Amazon (whether orally or in writing). The communication with Amazon concerning the November Version was limited to a letter dated 13 November 2018 sent by recorded post and email and then a follow up email on 21 November 2018 ("the Correspondence"). Both of these items are attached to the email containing this letter. As regards the image cited in your claim letter (the "photograph of [you] with an ex boyfriend[']s parents"), this was not mentioned in the Correspondence and indeed has not been raised with Amazon (or any other third party) at any time (whether orally or in writing).

Further to the above, there is no basis on which Amazon should be contacted as no "false and malicious claim" regarding copyright in the November Version has been made. It also follows that there is no question of payment to you. Finally, our client and this firm have no intention of making any false claims as to copyright ownership to Amazon or any third party.”

27. DD replied the same day, expanding her complaint to allege that on 4 January 2018 Howes Percival had written to Amazon claiming that the Redacted Edition breached GB's copyright in the text.
28. On 12 December 2018 DD applied for permission to amend her counterclaim in the Privacy Claim to add claims for defamation and malicious falsehood in relation to Howes Percival's communications with Amazon in early January 2018.
29. Also on 12 December 2018, DD began the Second Libel Claim alleging defamation and malicious falsehoods by Howes Percival arising out of her claim that it had wrongly asserted copyright in respect of the Redacted Version and the USA Edition in early January 2018. The complaints in the Second Libel Claim are very similar to those in the proposed amended counterclaim of the same day.
30. Both the Libel Claim and the Privacy Claim came before Master McCloud on 10 January 2019 following applications by both parties in the two claims. The Master made an order (which is dated 14 January 2019 but for consistency I shall use the date of the 10 January 2019 for it, which was the date of the hearing and the date for the order given in Ms Strong's Skeleton Argument), the relevant parts of which were as follows:
- a. Paragraph 1 provided that DD's counterclaim in the Privacy Claim stood struck out from 11 July 2018 pursuant to [1] of the 13 June 2018 unless order (see above);

- b. Paragraph 2 ordered DD to pay GB's costs of that counterclaim;
 - c. Paragraph 3 ordered DD to pay GB's costs of his application to strike out her counterclaim;
 - d. Paragraph 4 dismissed DD's application to amend her counterclaim and declared it to be TWM. Permission to appeal against the TWM determination was refused;
 - e. Paragraph 5 ordered DD to pay GB's costs of her application to amend the counterclaim;
 - f. Paragraph 10 provided that unless by 4pm on 21 January 2019 DD provided a draft form of charge on her property in Verwood, Dorset, acceptable to GB to cover the totality of the costs orders that had been made against her, or within 14 days paid those costs, then the Libel Claim would be struck out.
 - g. Paragraph 11 imposed a Limited Civil Restraint Order (LCRO) against DD, limited to the Privacy Claim, for its duration.
 - h. Paragraph 12 contained further detailed provisions about the operation of the LCRO.
31. DD then sought permission to appeal against the Master's order. This is the Appeal. That application came before Dingemans J (as he then was) as part of a pre-trial review in the Privacy Claim on 5 March 2019. The learned judge made the following orders (*inter alia*):
- a. He gave permission to appeal in relation to [10], [11] and [12] of the Master's order.
 - b. In [6] of his order he ordered that the application for permission to appeal in respect of [1], [2], [3], [4] and [5] of the Master's order be referred to the Master in accordance with [12(a)] of her order. Paragraph 6 of Dingemans J's order was in the following terms:

“6. The Defendant's application for permission to appeal against paragraphs 1, 2, 3, 4 and 5 of the order dated 10 January 2019 is, in accordance with [12(a)] of that order, referred to Master McCloud to determine whether such application should be permitted.”
32. Paragraph 12(a) of the Master's order was as follows:
- ‘(a) [DD] may not make any further application in the Privacy Claim without first obtaining the permission of Master McCloud, such permission to be sought by way of letter to Master McCloud.’
33. Paragraph 12(b) provided:

“(b) the Defendant may apply for the amendment or discharge of the Limited Civil Restraint Order provided she has first obtained the permission of Master McCloud, such permission to be sought by way of letter to Master McCloud;”

34. Paragraph 12(i) provided:

“(i) where the Defendant makes an application for permission under paragraphs 12(a) or 12(b) above and permission is refused any application for permission to appeal must be made in writing to any judge of the High court (not being a Deputy or s.9 Circuit judge) and will be determined without a hearing;”

35. The judge’s order did not require DD to re-file her application with the Master because he said it appeared she had already sent it. However, in his reasons, he said that if the application had not been sent to the correct email address then the parties had to liaise to ensure that the relevant documents were sent to the correct email address, which he specified.

36. In his witness statement of 5 February 2021 for this hearing, Mr Howarth said that his firm sought to comply with that direction by way of an email to DD on 11 March 2019 to which she never replied.

37. I heard the trial of the Privacy Claim in March 2019, and in a judgment handed down on 26 June 2019 I found in favour of GB in both privacy and copyright and awarded him damages and a permanent injunction. The rest of the background, which I will not repeat, is summarised in that judgment: *Bull v Desporte* [2019] EWHC 1650 (QB).

38. DD’s application to the Court of Appeal for permission to appeal my judgment was dismissed as TWM by Simon LJ in an order sealed on 19 December 2019.

39. The Appeal came before me on 17 May 2019. I handed down judgment dismissing it on 26 June 2019: [2019] EWHC 1952 (QB). At the hearing GB’s counsel conceded that the Master had been wrong to require as part of [10] of her order that DD pay GB’s costs as a condition of being permitted to continue with the Libel Claim (see [25] of my judgment). However, he said that DD had made no attempt to provide a draft charge, despite being given the opportunity to do so, and so the Libel Claim had properly been struck out. I upheld that submission and dismissed the appeal.

40. DD sought permission to appeal from the Court of Appeal against my judgment, however that application was also dismissed as TWM by Simon LJ in an order sealed on 19 December 2019.

41. By an application notice dated 17 April 2019, GB sought to have the Second Libel claim struck out and for an extended civil restraint order (ECRO).

42. As I have said, this is not a complete account of this litigation. There have been a number of other applications, mainly by DD, most - if not all - of which have been unsuccessful. Hence, there are in the bundle orders made by (inter alia) Rafferty LJ, Asplin LJ, and Irwin LJ following applications for permission to appeal by DD

describing them, variously, as having ‘no real prospects of success’; having ‘no merit’; being ‘hopeless’; and being ‘doomed to fail’.

43. Returning to the history, in December 2020 the court office sent me a sealed application notice from DD in the Second Libel Claim dated 3 December 2020. In it, DD sought an order striking out GB’s application to strike out the Second Libel Claim. She accused him of an abuse of process and ‘playing the system’. She also said that his application had been filed as a way of blocking her application for default judgment; as to that, I have not seen any such application. I directed that DD’s application should be listed for hearing on notice to GB’s solicitors.
44. At the hearing on the 9 February 2021 DD confirmed she was no longer pursuing her strike out application because GB’s strike out application had been listed (for hearing on that day). She said she had so informed the court and GB’s solicitors. There is an email in the bundle from DD to GB’s solicitors on 4 February 2021 saying (*sic*):

“It should be noted that the claimants ex-party application dated 2nd December 2020 requiring the matter to be listed, was formally withdrawn in December 2020, (save on the issue of costs), upon the court listing of the matter on 4th December 2020.”

45. Ms Strong said her solicitors had never received this application, but as DD is not pursuing the application, I need say no more about it.
46. In early January 2021 I was sent further documents by the court office emanating from DD. They bore the case number of the Appeal. There was an unsealed application notice dated 4 December 2020 and various accompanying documents. The application notice stated as follows:

“Lord Justice Dingemans sitting in the High Court on the said application for permission to appeal ordered that points 1-5, revert back to Master McCloud, & in default of any decision, revert back to the Lord. There has been no decision by Master McCloud, thus the appellant asks that the matter revert back to the Lord

...

1. On the 5th March 2019, Lord Justice Dingemans sitting in the High Court made the attached order date stamped 7th March 2019. Requiring Master McCloud to make a decision in relation to the permission of appeal application dated 28th January 2019 points 1-5. In default of any decision, or if permission was refused by from Master McCloud, points 1-5 would revert back to Lord Dingemans.

2. The appellant has sent numerous requests by email, post and in person to Master McCloud over the past 18 months, to no avail.

3. The application for permission to appeal in relation to points 1-5 of said appeal QA-2019-000028, remains outstanding, over 18 months since Master McCloud was originally submitted the application for permission to appeal. It is not known why Master McCloud has repeatedly failed to answer the application.

4. It is in these circumstances that the appellant, asks for the said matter to revert back to Lord Justice Dingemans in accordance with his directions on the 5th March 2019.- Order and transcript attached.”

47. There was a witness statement dated 8 December 2020 from DD which asserted as follows:

“1. On the 5th March 2019, Lord Justice Dingemans sitting in the High Court made the attached order date stamped 7th March 2019. Requiring Master McCloud to make a decision in relation to the permission of appeal application dated 28th January 2019 points 1-5. In default of any decision, or if permission was refused by Master McCloud, points 1-5, (in relation to the counterclaim in Bull v Desporte), would revert back to Lord Dingemans.

2. The appellant has sent numerous requests by email, post and in person to Master McCloud over the past 18 months, to no avail. Please see the original submission and one of many other subsequent submissions that followed ; Exhibits 1 & Exhibit 2.

3. The application for permission to appeal in relation to points 1-5 of said appeal QA-2019-000028, remains outstanding, over 18 months since Master McCloud was originally submitted with the application for permission to appeal. It is not known why Master McCloud has repeatedly failed to answer the application. It is contended that this continuing action, unlawfully blocks the appellant access to justice, in violation of Article 6, ECHR 1998, The Access to Justice Act 1999, and the Rules of Natural Justice.

4. It is in these circumstances that the appellant asks for the said matter to revert back to Lord Justice Dingemans in accordance with his directions on the 5th March 2019.- Order Exhibit 3 and transcript Exhibit 4 attached.”

48. From this I understood DD to be saying that she had been trying without success to have her application for permission to appeal [1]-[5] of Master McCloud’s order remitted to the Master for a decision; that she had emailed the court a number of times; that no decision had been taken by the Master; and that she now wanted the matter to be re-listed before Dingemans LJ.

49. It appeared DD believed that Dingemans LJ had ordered the matter return to him if Master McCloud did not take a decision, or refused permission. In fact, Dingemans LJ made no such order or give any directions that the matter should ‘revert’ to him, as claimed by DD. Unsurprisingly, nor did he make any order as to what was to happen if the Master failed to make a decision. I quoted his order earlier. In his judgment at the hearing he said:

“That leaves outstanding the applications for permission to appeal that part of the order which related to the Part 20 counterclaim. I accept that, from the information provided in the course of the hearing, Ms Desporte has applied to Master McCloud for permission to appeal in relation to those matters. If, which is at least arguable, the civil restraint order requires Master McCloud to consider those applications for permission to appeal and grant Ms Desporte permission to make the application for permission to appeal to the High Court Judge, then Master McCloud should consider those applications. Therefore, I will adjourn that application for permission to appeal in respect of those parts of the order until Master McCloud has had an opportunity to consider those. That means that someone is going to have to draft an order so that Master McCloud is alerted to the need to consider those aspects of it.”

50. Again, it does not appear that this application was sent to GB’s solicitors. There is an email in the bundle from them to DD in late January 2021 asking for a copy, however she refused to provide it. In his witness statement of 5 February 2021 at [14] Mr Howarth said:

“Ms Desporte has made various references to ‘applications’ dated 2 and 4 Dec 2020 within the recent paperwork she has emailed to my firm. I do not know what these applications are as my firm has never been supplied with them, nor do I know if she has in fact issued any of the documents that she labels as being ‘applications’. Just as she refused to provide me with copies of the 15 emails she claims to have sent to Master McCloud over the course of the past two years, Ms Desporte also refused to provide copies of these most recent ‘applications’ to me upon request. I am therefore none the wiser as to what they may or may not have contained or if they should even be treated by the court or by us as valid applications.”

51. On 20 January 2021 I made an order under CPR r 23.8(c) in the exercise of my case management powers following on from DD’s 4 December 2020 application, remitting [1]-[5] of Master McCloud’s order of 10 January 2019 to her for a permission decision. My order was intended to do no more than assist the parties by regularising the position. My intention was to ensure the matter was quickly brought back before Master McCloud so she could consider permission, as envisaged in the order of Dingemans J of 5 March 2019. The matter had languished for some considerable time because of what I understood, having made enquiries, to have been administrative difficulties in the filing process (broadly speaking), and I was anxious to ensure that progress was now made. For the avoidance of doubt, and to ensure the application was received in the right place, I also specified that it should be (re-) emailed to two specified court email addresses and also served on GB’s solicitors.
52. My order prompted further documents from DD. First, she sent the court what purported to be an application dated 21 January 2021 to amend my order to ‘remit’ the matter to Dingemans LJ. There was no N244 application notice, but a self-composed document from DD captioned:

“Permission to Appeal Oral application - Part Heard 5th March 2019

Re: Application 4/12 / 2020 - to Renew Application to Lord Justice Dingemans

Witness Statement In support of the amendment of the order dated 20th January 2021”

53. In it, DD asserted, inter alia:

“5. Pursuant to the above the appellant had a legitimate expectation, that there would be no mandatory requirement to again serve Master McCloud with another copy of the permission to appeal application, before the matter reverted back to Lord Justice Dingemans for his ruling on the said permission to appeal application. (Although it should be noted that in any event the appellant did again email both qbmasterslisting and qbjudgeslisting , 15 times over a period of 2 years further copies of the said application for permission to appeal.)

6. The order of the 20th January 2021, ignores the above facts and attempts to send the process already 2 years old back to square one!! Justice delayed is justice denied, it is contended that these actions violate the appellants Right to a Fair Trial under Article 6 and Freedom of Expression under Article 10 ECHR 1998, the Rules of Natural Justice and The Access to Justice Act 1999.

It is in these circumstances that the appellant seeks to vary the order made to allow for the urgent renewal of the part heard application, back to Lord Justice Dingemans, or in the alternate that the matter is listed for a telephone hearing as set out formally in the attached application dated 4th December 2020.”

54. This application was sent to GB’s solicitors. It was also sent to GB directly via a friend of DD’s on Facebook Messenger. The friend also offered to mediate between DD and GB. In his witness statement of 5 February 2021 Mr Howarth explained that GB does not wish to have anything to do with DD and has blocked her from communicating with him on all channels that he uses, including Messenger, email and text.

55. DD also made an application that I recuse myself from the Appeal. She said that my order of 20 January 2021 included ‘directions which went behind the judgement and findings of Dingemans LJ’. She also alleged that in my June 2019 appeal ruling I had ‘completely dissented against many of the findings made by Lord Dingemans (sic)’ some of which, she said, ‘were absolutely crucial to the outcome of the entire appeal, which was in any event partially successful’. She went on at [10]-[12]:

“10. For example in the permission to appeal judgement of Lord Dingemans dated 5th March 2019 in relation to paragraph 10 of the

order dated 10th January 2019 by Master McCloud. The Lord finds as follows;

‘Permission to appeal in relation to paragraph 10 of the order That then leaves me with the application in relation to paragraph 10 of the order which provided that, unless the defendant provided a draft form of charge over her property acceptable to the claimant to cover the totality of the costs orders made against her, or paid the full sum, the libel claim should be struck out. In my judgement, that part of the order isn’t caught by the limited civil restraint order because it relates to the libel claim. The libel claim is defined to be different from the privacy claim. In my judgement it is arguable that in these circumstances the imposition of this condition impermissibly infringed Ms Desporte’s rights of access to the courts by imposing a condition with which Ms Desporte could not comply. I therefore grant permission to appeal to Ms Desporte in relation to para 10 of the order of the 10th of January 2019.’

11. Pursuant to the above in granting permission to appeal the Lord clearly cited that crucial fact that any property charge had to be one that was ‘acceptable’, to the respondent’s lawyers, whom had already rejected the only property the appellant owned, and thus complying with the order was an impossible task, hence this requirement violated the appellant's right to a fair trial, and access to justice contrary to Article 6 (1). *Harb v Prince Fahd Bin Abdul Aziz* [2017] EWCA Civ 2215, [2018] 1 WLR 2709.”

12. However in dismissing this part of the appeal HHJ Julian Knowles (sic), failed to take into account the important finding made by Dingemans LJ, that any property charge offered had to be a property ‘acceptable’ to the respondent, as set out in paragraph 37 of HHJ Julian Knowles judgement of the first part of the application given permission to appeal in QB-2019-000028. Bull v Desporte-2019-EWHC-1952-QB - Paragraph 37

“Following the hearing before me, Ms Desporte sent me a copy of an email which she sent on 21 January 2019 to Mr Bull’s solicitors about costs in which she proposed, ‘That at the conclusion of this claim and any reciprocal claim any outstanding costs be offset against the said property [address given]’. All of this, taken together, shows that she can provide a charging order but has simply chosen not to do so”.

13. Thus it is clear that pursuant to the above if HHJ Julian Knowles were to hear an application in relation to this particular matter of permission to appeal points 1-5 of the Part heard oral application in appeal QA-2019-000028, that he would be a judge in his own

cause. This being contrary to the doctrine of judicial recusal and common law applying the bias test in *Porter v Magill* [2002] 2 AC 357 at [102], and reiterated by Arden LJ in case of *Mulugeta Guadie Mengiste and Other v Endowment Fund for the Rehabilitation of Tigray and Others* [2013] EWCA Civ 1003, ‘to maintain society’s trust and confidence, justice must not only be done but be seen to be done’.

It is in these circumstances that I am formally requesting that the HHJ Julian Knowles recuse himself from the hearing of the said part heard oral application for permission to appeal. in QA-2019-000028 - *Bull v Desporte*.”

56. Along the same lines, at the hearing DD said to me that Howes Percival should not be acting for GB; that they had a conflict of interest; that she had spoken to, and sent documents to, the SRA who were investigating; and that the SRA had also told her that Howes Percival should not be acting for GB. She also maintained that in December 2020 they had not been ‘on the record’ for GB. In his evidence, Mr Howarth said that earlier in the litigation DD had made complaints to the Bar Standards Board of allegedly improper conduct by GB’s then counsel (not Ms Strong). DD confirmed that she had made a complaint about counsel, but had not in the event pursued it.

Matters before me on 9 February 2021

57. DD sought an adjournment of the hearing, which I refused. I will give my reasons for so doing in a moment. After discussions with the parties in an attempt to clarify what matters were before me for determination, it was agreed that the substantive matters I had to decide were as follows:
- a. DD’s application of 21 January 2021 that I recuse myself from the Appeal.
 - b. DD’s application that I vary my order of 19 January 2021 (sealed on 20 January 2021) and remit the Appeal to Dingemans LJ;
 - c. GB’s application of 17 April 2019 to strike out the Second Libel Claim;
 - d. GB’s application of the same date for an ECRO.
58. DD confirmed that her December 2020 application to strike out GB’s strike out application was no longer pursued.

Discussion

Adjournment

59. At the beginning of the hearing DD complained that documents had only been sent to her shortly before the hearing. She said she had not been given proper notice. She asked for an adjournment, which I refused. That was for the following reasons. Firstly, the hearing had been listed for some time. Second, the principal matter before me, namely GB’s strike out application, had been lodged in April 2019, nearly two years earlier.

DD had been well aware of that because in December 2020 she applied to have it struck out. The basis of the strike out application had been set out in correspondence and in Ms Howe's witness statement of 17 April 2019, and so DD was well aware of the arguments. Third, this litigation has been ongoing for many years; DD has generated much of it; and she is well familiar with the documents. Fourth, DD has had a number of costs orders made against her which remain unsatisfied, and adjourning the hearing would have generated further costs. Fifth, DD had refused to cooperate with Howes Percival in preparing for the hearing, including in relation to the bundles. It hardly lay in her mouth, therefore, to complain about late service or about not having had documents. Instead, she had adopted an inappropriately hostile and aggressive stance. She had insisted, for example, that there had to be separate bundles for the Privacy Claim and the Libel Claim. Further, she alleged that Howes Percival's proposal for a single hearing bundle had been made to somehow cover-up alleged wrongdoing by them.

60. For example, on 4 February 2021 she wrote in an email:

"My documentation and representations will not be rolled into one bundle. They will presented separately. I am in the process of collating documents for the "two separate matters", there should clearly be "two separate" bundles one for each case. You reply seems to suggest that you are attempting to roll it into one ?

...

Further to the above please confirm the following;

1) That you will be producing "two separate bundles" one for each of the entirely separate cases.

2) I have been advised by the court that there is no one on record as acting in the Libel matter, Desporte v Bull - claim number QB-2018- 000465, please urgently advice whether or not any firm of solicitors will be representing the defendant in this matter as you are only on record as acting in one matter - Bull v Desporte - Appeal -QA-2019-000028. 1253

Please urgently provide me with the above information so that I can accordingly supply the appropriate documents to the right sources."

61. In the event, DD did not prepare any bundles for the hearing.

62. In another email the same day she wrote:

"I write with regards to your communication with some surprise how and what on lawful basis do consider yourselves able to act in this or indeed any of the matters which overlap the Libel Claim - QB-2018-000465 for false claims of copyright which "you" made in your clients name, there is clearly a conflict of interest, as such you should not been still acting for your client, its against the rules of practice as you well know!!

It would seem to appear that you have attempted to roll the Libel and permission to appeal matters together to hide the fact that you still inappropriately acting in QB-2018-000465 for false claims of copyright, not to mention the fees!!

Pursuant to the SRA rules you should immediately remove yourselves from the court record, as you are in clear violation of the same !!”

63. It is clear from this that DD had access to the ‘appropriate documents’. This was demonstrated at the hearing when she was able to take me to some of them (eg, the transcript of the hearing before Master McCloud). Further, as I remarked, I knew from the Privacy trial in 2019 that DD has a habit of claiming not to have received documents which have, in fact, been sent to her. When she initially said to me that she had not received documents and I pressed her about emails, she admitted that there was at least one email in her inbox from Howes Percival that she had not read. As I will describe later, DD was active on her email shortly before the hearing and there is no reason why she could not have accessed this email.

Recusal

64. DD submitted that I should recuse myself on the grounds, broadly speaking, of my earlier involvement in the case and because I had made findings she regarded as being adverse to her. She made clear orally that her application related solely to the Appeal. She did not object to me hearing the strike out application or the application for an ECRO. Ms Strong on behalf of GB resisted the application in her Skeleton Argument at [20]-[21].
65. After hearing from DD, I refused the application on the grounds that there was no proper reason why I should recuse myself. I was (and am) not a ‘judge in my own cause’ on the Appeal (or at all), as she claimed. She said I should not hear ‘an application in relation to this particular matter of permission to appeal points 1-5 of the Part heard oral application in appeal’. But I was not proposing to hear any substantive matter on the Appeal, and DD knew or should have known this (and at one point in her oral submissions I understood her to acknowledge this). By my January 2021 order I had reconfirmed Dingemans LJ’s order remitting the outstanding matters to Master McCloud for the reasons I explained earlier. Although DD had sought an amendment to my order, as I said at the hearing, if she was dissatisfied with it, she should have sought permission to appeal, but she did not do so (as far as I am aware). My involvement in the Appeal had therefore ended. I refused the application to amend my order. The order therefore stood.
66. Further, although DD complained about my June 2019 appeal judgment, and said that it impermissibly went behind Dingemans LJ’s permission decision, she failed to acknowledge that her attempt to appeal my judgment had been dismissed as TWM. In any event, despite ruling against her in the Privacy Claim as well as on the Appeal, that did not provide any reason why I should not hear the case: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [25] (‘Nor, at any rate ordinarily, could an objection be soundly based on the judge’s ... previous judicial decisions ...’). In neither of those decisions did I express any view about DD or any on issue which could have thrown doubt on my ability to decide any aspects of the case fairly.

67. For these reasons, I certify this application as having been TWM. In so determining I have applied the test of 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 ...”

Application to remit the Appeal to Dingemans LJ

68. I also refused this application. As I explained earlier, all my order of 19 January 2021 did was, as a matter of case management, to regularise the position by ensuring that DD’s application came before Master McCloud as Dingemans LJ had ordered, but which had not happened. DD was completely mistaken in her belief that he had ordered the matter should come back before him if the Master did not take a decision. As I have said, if DD thought my order was wrong, she should have sought permission to appeal.
69. At the hearing DD told me she had re-mailed her application to Master McCloud in accordance with my order. Shortly after the hearing I learned that Master McCloud had determined DD’s application for permission to appeal in accordance with Dingemans LJ’s order.
70. I also certify this application to have been TWM. It was based on assertions about what Dingemans LJ had supposedly ordered which had no basis in reality and were unreasonable.

GB’s application to strike out the Second Libel Claim

71. I turn to GB’s application of April 2019 to strike out DD’s Second Libel Claim. Ms Strong submitted that I should strike it out pursuant to CPR r 3.4 on the grounds that the statement of case: (a) discloses no reasonable grounds for bringing the claim (CPR r 3.4(2)(a)); and/or (b) because it is an abuse of process (CPR r 3.4(2)(b)). A ‘statement of case’ includes a claim form and particulars of claim where these are not included in the claim form: see CPR r 2.3(1).
72. The Second Libel Claim is described in the Claim Form sealed on 12 December 2018 as follows:

“Libel & Malicious Falsehood

That on the 4th January 2018, the defendant through his lawyers expressly falsely and or recklessly claimed to Amzon (sic) that he was the owner of the copy[right] to the “copy” within the claimant’s work Google Me- No Lies (Redacted) and again on 13th November 2018 with regards to the USA Edition – also redacted. It is also averred that the said defendant also made a number of false and malicious and libellous claims to Amazon by publishing

a witness statement containing the same on the 19th December 2017.”

73. The Particulars of Claim allege in relevant part:

“1. The Facts False allegations of ownership of copy-written text within Google Me- No Lies (Redacted), and Google Me- No Lies, (USA Version)

2. It is alleged that the claimant wrote to the publishing organisation "Amazon" on the 4th January 2018, maliciously & falsely making allegations of Copyright against the said Redacted works, knowing that in all circumstances they had no claim whatsoever in copyright against the Redacted versions of the said titles "Google Me - No Lies" and or "Google Me - No Lies- USA Edition".

Malice

3. Instead it is averred that the same false allegations of Copyright were maliciously and or recklessly used to induce and cause the recipient "Amazon" to withdraw the said work(s), as it did, on the sole basis of alleged "Copyright infringement" as propounded by the defendant and set out in points 1- 1g of "Exhibit 1", with the defendant also resisting the claimants formal requests made pre-action in November 2018, to make an express statement of correction to the said entity "Amazon"

False Allegations of Copyright - "Google Me - No Lies Redacted " and or "Google Me - No Lies- USA Edition" (as set out in Exhibit 1 - attached)

1.) That claimant was the owner or agent of copy-written material being used in the Redacted Version (s) of the said work "Google Me - No Lies"

1a.) The primary complaint pertained to copyright concerns - use of unauthorized copyrighted material.

1b.) The specific concern is - the physical product or its packaging includes unauthorized copy.

1c.) Name of brand mark- original photographs

1d.) A written description of the copy-written work -The unauthorized use of copywritten work

1e.) Additional Information

-. The photograph at the end of Chapter 5, page 39 of the paginated hard copy of the book featuring a fireplace

- The photograph of our client at the end of Chapter 16 page 115 of the paginated hard copy of the book

- The photograph of the claimant at the end of chapter 28, page 208 of the paginated hard copy of the book

1f) ASIN/ISBN- Blank

1g.) Name & Company - Victoria Howes- Howes Percival

4. It is contended that the above report clearly expressly claims the claimant had ownership rights over “copy” within the defendants work (s) Google Me- No Lies , Google Me- No Lies (Redacted), Google Me- No Lies, (USA Version), by virtue of the following specific references as cited above and repeated below in points 1,1a,1b,1c. (The said specific words are accordingly pleaded in Libel and repeated in malicious falsehood)

...

7. On the 13 November 2018 the Claimant's lawyers sought to attack the new redacted book for the USA market. Google Me- No Lies, (USA Version), doing so by once again writing to Amazon and cross referencing the said work and making the same fa [text missing] stating that it was the same but with different names to the previous Redacted version, which they had claimed to have copyright over on 4th January 2018 ...

8. Further to above it is also contended that a fresh submission of the said same allegations of ownership of copyright within the work, originally made on 4th January 2018, against the first Reacted book Google Me -No Lies Redacted, was submitted by James Howarth of the said firm Howes Percival in November 2018, specifically against Google Me- No Lies, (USA Version) as set out in the letter from Amazon dated 26th November 2018 Exhibit 3. Although this was of no consequence as the two versions had already been linking pursuant to the claimant's letter of the 13th November 2018

...”

74. At [9] under the heading ‘Innuendo Meanings’ (in fact, as Ms Strong rightly observed, no innuendo facts are pleaded and this is not an innuendo case), DD asserts:

“Further to the above it is claimed that the claimant's misrepresentations of ownership of the copy within the said works, portray the claimant to be a dishonest thief that had stolen the work from another and thus could not be trusted to be hold a commercial relationship with. The same unlawfully causing damage to the reputation of both the work (s) and the claimant as an author of books”

75. It would therefore appear, in fact, that this paragraph reflects DD's case on the defamatory meaning of the publications she complains about.
76. Paragraph 10 alleges the damage which DD says she has suffered.
77. I should explain that sub-paragraphs 1a – 1g in [3] of the Particulars of Claim are a reference to the entries which Ms Howe made on the DCMA notices she sent to the various Amazon entities.
78. In support of her December 2018 application to amend her counterclaim, DD supplied draft 'Particulars of Claim' which stated in part (sic):

“Particulars of Claim

The Facts

False allegations of ownership of copy-written text within Google Me- No Lies Google Me- No Lies (Redacted), Google Me- No Lies, (USA Version)

It is alleged that the claimant wrote to the publishing organisation Amazon on the 4th January 2018, falsely and maliciously claiming the following, (Please see Exhibit 1) 1. That claimant was the owner or agent of copy-written material being used in the Redacted Version of the said work 'Google Me - No Lies'”

79. Ms Strong said that putting aside any procedural defects in the way the Claim Form/Particulars of Claim in the Second Libel Claim had been pleaded, and the lack of clarity in the pleadings, there was no viable underlying claim that DD could successfully advance at trial in respect of the matters about which she complains, and/or the claim is an abuse of process, and so should be struck out. That was for the following reasons.
80. In summary, Ms Strong said there had never been any claim of copyright ownership by GB in the text of *any* of the editions of the Book. The only copyright claim that had been made was in relation to the photographs in the original paperback version, and I had upheld that claim in the Privacy Claim. She therefore said the Second Libel Claim was fundamentally misconceived.
81. More generally, the complaints by Howes Percival to Amazon apart from copyright had been in respect of the private information in the various editions, including the Redacted Versions, from which GB was still identifiable even with the names changed. All that GB's solicitors had done was to alert Amazon to the fact that it was still selling the Book in its various editions and that they infringed the INDO by the inclusion of private information, in conjunction with the fact that GB remained identifiable despite the changes of name. She therefore said GB (and Howes Percival, were it to be sued) would have an unanswerable defence of truth and/or honest opinion (see ss 2 and 3 of the Defamation Act 2013 (DA 2013)).
82. Further and in any event, she said that the communications with Amazon were covered by qualified privilege (she tentatively suggested the communication of the witness

statement to Amazon on 19 December 2017 might be covered by absolute privilege, but I need not decide that) and that DD's statements of case disclosed no credible case of malice capable either of defeating the defence of qualified privilege, or of establishing malice for the purposes of the tort of malicious falsehood. She said DD's case, badly pleaded and not in conformity with the CPR though it was, could not be cured by amendment, that it was fundamentally flawed, and so should be struck out.

83. In relation to abuse of process, Ms Strong said that for the same reasons, DD's case was an abuse of process. Further, she said the matters complained of in the Second Libel Claim were known to DD at the time she commenced the initial Libel Claim in July 2018 and should have been included in it. Hence, she said the Second Libel Claim was an abuse of process as a breach of the principle in *Henderson v Henderson* (1843) 3 Hare 100, 115.
84. She also argued that the Second Libel Claim was in large part if not wholly a repetition of the proposed amended counterclaim which had been struck out by the Master in January 2019 (with effect from July 2018) because of DD's intentional failure to comply with the Master's unless order of June 2018. She said DD had chosen not to comply with that order by providing security for costs, when she could have done. Thus, Ms Strong said to allow the Second Libel Claim to continue would effectively undo the striking out of the proposed amended counterclaim and so was an abuse of process.
85. Finally, she said the Second Libel Claim was 'pointless and wasteful' litigation which engaged the *Jameel* abuse jurisdiction (see *Jameel v Dow Jones and Co* [2005] QB 946, [54], [70]) because of the very limited nature of the communications (only to Amazon) and therefore even if DD had a viable claim (which she did not) any damages would be minimal and 'not worth the candle'.
86. DD did not submit a Skeleton Argument for the hearing although she did submit a document dated 10 December 2020 entitled 'Reply to Application dated 17 April 2019, and other points', in which she described the strike out application and the application for an ECRO (see below) as 'vexatious' and 'misconceived' and asserted that they are 'yet again a clear concerted attempt to evade liability for torts patently committed by your client'. I have read this document and noted the various points made within it, as well as by DD orally. These were to the following effect.
87. DD said her claim had been brought in good faith. She said she had received a communication from Amazon on 12 January 2018 saying there had been an allegation of defamation. She said she had asked Howes Percival to write to Amazon to correct the position, which they did eventually. She maintained the 13 November 2018 letter to Amazon had claimed breach of copyright in the text and relied on the communication to her from Amazon which she exhibited as Exhibit 3 to her Particulars of Claim. She said this was categorical and in no uncertain terms. She then went to Exhibit 1 to her Particulars of Claim in the Second Libel Claim (the DMCA notice) and maintained that this related to the text of the book and not just the photographs. She emphasised the entry of 'the physical product or its packaging includes authorised copy' under the heading, 'The specific concern is ...' She said 'copy' meant text. She said that meant the notice went 'way beyond' photographs. She also maintained that it related to the Redacted Version which contained no photographs, and referred to an email from Ms Howe of 4 January 2018 to 'Jenny' at Amazon which referred expressly to the Redacted

Version (and to an email from James Howarth of 3 January 2018). She said this was a malicious complaint because Howes Percival knew there was no copyright material in that edition (or the USA Edition) (as she said counsel for GB had admitted during the Privacy Claim trial before me). She said they wanted to ‘damn the book and damn the author’ and ‘gag the book’. She said the complaints to Amazon were clear, and there was no room for misunderstanding. She said her case was ‘black and white’ and ‘clear’. DD also submitted that there were triable issues and it was not a case for strike out. She emphasised that it was genuine claim that had been properly pleaded.

88. In relation to abuse of process, she said the only ones guilty of abuse had been Howes Percival. She said she had tried to find amicable solutions but they had engineered court hearings because of their well-resourced client. She said she had only acted to defend herself. She said she had been ‘forced down a route to seek redress’ by Howes Percival’s actions. She said there had been two libel actions because the situation was ‘liquid’ and the facts were emerging. She made a number of other points, all of which I have taken into account.
89. I turn to my conclusions on this issue. I begin by considering the proper approach to a strike out application under CPR r 3.4(2)(a).
90. Paragraph 1.7 of CPR PD3A (Striking out a statement of case) states that a party may believe he can show without a trial that an opponent’s case has no real prospect of success on the facts, in which case an application under CPR r 3.4(2) can be made. Paragraph 1.4(2) gives as an example where the court may conclude that particulars of claim fall within that provision, namely, those which ‘are incoherent and make no sense.’
91. The commentary in the *White Book 2021* explains that statements of case which are suitable for striking out under that provision include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides: *Harris v Bolt Burdon* [2000] CP Rep 70. However, an application to strike out should not be granted unless the court is *certain* that the claim is bound to fail: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, [22]. Unless the court is certain, the case is inappropriate for striking out: *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 557.
92. A cautious approach is therefore necessary. Nonetheless, even adopting that approach, in this case I am certain that the Second Libel Claim is bound to fail and accordingly should be struck out.
93. I begin by observing that in her Particulars of Claim DD has not clearly pleaded the words complained of, nor clearly pleaded their alleged defamatory meaning, as required by CPR PD53. She has not even clearly identified the publication(s) within which the offending words were contained. Although DD is a litigant in person, she is still bound by the CPR in the same way that a represented party is: *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, [18].
94. DD’s Particulars of Claim refer in [2] to false and malicious allegations having been made on 4 January 2018. However, as Mr Howarth explained in [19]-[20] of his witness statement of 26 January 2018 (Ex VKH2), the only correspondence on that date was routine and was as follows:

“19. ... on 4 January 2018, my colleague, Victoria Howe, emailed Jenny at Amazon UK at 11.31 requesting the email addresses of the Legal Departments for the other Amazon entities which were showing the Amended Publication on their website and requesting Amazon to inform the entities of the Order of 20 December 2017. This email is found at JEK5, p49.

20. These emails were responded to by Jenny at 16.31 on 4 January 2018, confirming that the paperback and Kindle versions of the Amended Publication had been removed. However, she informed us that we would need to follow the appropriate reporting process for each separate Amazon website. This email is appended at JEH.5, page 5.”

95. That said, although DD’s Particulars of Claim are hard to follow in places, it is fairly clear that her central complaint is that GB through Howes Percival falsely claimed to Amazon on various occasions that GB owned the copyright to the text in the various versions of the Book, which caused Amazon to withdraw the various editions from sale, thereby causing her damage. She says this was a malicious falsehood which had also defamed her by implying she had passed someone else’s work off as her own.

96. In response, in her witness statement of 17 April 2019 Ms Howe said at [15]:

“Contrary to the Respondent’s submission at paragraph 8 of her Particulars of Claim, I can confirm that neither I nor James Howarth has ever asserted that the Applicant owns the copyright to the text of the Original Book and/or Redacted Version and/or USA Edition.”

97. I agree. The meaning of the various communications from Howes Percival to Amazon is clear. Howes Percival never alleged that GB owned the copyright to the text in any of the editions of the Book. The complaint which was made was that the editions contained private information about GB in breach of the INDO, and that he was still identifiable notwithstanding the changes of name in the Redacted Versions. The DCMA notices only reported a breach of copyright in the *photographs* in the original edition, and *not* in relation to the text. Indeed, given that Howes Percival are reputable and experienced lawyers, it would have been a remarkable thing if they had asserted copyright ownership in the text on behalf of GB when they knew that that could not be the case because he was not the author. That would unarguably have been a false claim, and I reject out of hand any suggestion that Howes Percival would have made it.

98. The principles relating to meaning are not controversial and were summarised by Nicklin J in *Koutsogiannis v Random House Group* [2019] 4 WLR 25, [12].

99. Although, as I have noted, DD’s Particulars of Claim at [2] refer to 4 January 2018, I think the first pertinent communication is the email from Mr Howarth to Amazon of 3 January 2018 (in Ex VKH6) which was as follows:

“It has come to our attention that Amazon is still offering for sale in the United Kingdom the work that is subject to an injunction by

way of at least the website at the domain name. Please can you forward this email as a matter of urgency to all other Amazon entities in order to prevent further breaches of the injunction.

It has also come to our attention that the Defendant in these proceedings has republished the book in a form which still contains the prohibited information through Amazon UK:

[URL given of the Redacted Version]

While the names have been changed, the identity of the Claimant is still obvious - not least because it is clearly the same book as the version cited in the interim injunction proceedings - and it clearly breaches the terms of the injunctive order.

Please can you remove all access to the material being published on your website (some of the prohibited information is included in the free sample that you have made available) and suspend all sales of this new supposedly redacted version ?

This is a very serious and urgent matter. Please can you call me on ***** any time if you have any queries.”

100. Thus, this email referred to Amazon still offering for sale a work (the Redacted Version) which contained information that was subject to an injunction (which was true); that the book had been republished in an electronic form (I have not reproduced the URL – it is in the original email and it plainly refers to the Redacted Version) which contained ‘the prohibited information’ (which was also true), and that although the names had been changed, GB was still identifiable. This was also true. As I observed during the hearing, a Google search would have quickly resulted in the jigsaw identification of GB as the multi-million pound lottery winner whose private details were still in the Redacted Version, even though he was now called ‘Gary Ball’. One would not need to be Alan Turing to decrypt ‘Gary Ball’ as Gareth Bull.
101. Mr Howarth’s reference to ‘prohibited information’ was plainly a reference to [5] of the INDO, which identified four categories of private information (called in the order ‘the Information’) which it prohibited DD and others from publishing or communicating.
102. Importantly, there was no allegation by Mr Howarth that GB owned the copyright to the text of the Redacted Version, and no reasonable reader could have concluded that that is what he was alleging. This email was all about the confidential information which the INDO restrained from publication, and the fact GB could still be easily identified.
103. In [3] of her Particulars of Claim DD complains about the DMCA notices, the particulars of which she reproduces. Ms Howe completed the notices on 5 January 2018. As she explained in [14]-[15] of her witness statement, the notices only referred to the original paperback version of the Book. That that is so is proved by the ISBN number Ms Howe entered on the notice, which is the ISBN for the original paperback

Book, as she explained at [15.3] of her witness statement. The International Standard Book Number (ISBN) is a numeric commercial book identifier which is unique and assigned to the work by the publisher. An ISBN is assigned to each separate edition and variation (except reprintings) of a publication. For example, an e-book, a paperback and a hardcover edition of the same book will each have a different ISBN.

104. DD is therefore in error in her Particulars of Claim ([3], 1f) when she says this was left blank. Ms Howe clearly filled in the relevant 10-digit ISBN number for the original paperback edition of the Book. That number was 1973379856.
105. It follows that I reject DD's assertion in the Particulars of Claim that the DCMA notices referred to the Redacted Version or the USA Edition. They did not and the contrary is not arguable.
106. I should make clear, as Ms Howe explains, that although one notice was sent to each Amazon jurisdiction selling the Book per Amazon's requirements, Howes Percival has only retained the one sent to Amazon Germany. However, Ms Strong told me on instructions, and I accept, that each notice was identical to the German notice exhibited by Ms Howe as Ex VKH8.
107. DD is also wrong to claim that the notices complained of a copyright violation in the text of the original paperback Book. Under the heading 'Brand, mark or protected element' Ms Howe entered, 'Original photographs' and, as I have said, she gave the specific page numbers containing the photographs and she described them. The notices therefore complained about breach of copyright in the photographs and *not* the text. I reject DD's submissions to the contrary. I upheld GB's copyright claim in my judgment in the Privacy Claim. So, the claim of breach of copyright made in the notices relating to the photographs was true.
108. It follows that I accept what Ms Howe said in [14] of her witness statement:

“14. On 5 January 2018, I submitted standard DMCA notices for reporting infringements in order to remove the paperback version of the Original Book from being sold into England & Wales from the following Amazon websites: Amazon US; Amazon Italy; Amazon Japan and Amazon Germany. On this standard form, we reported that the paperback of the Original Book infringed the Applicant's copyright because it contained four photographs which are original artistic works and of which the Applicant is the copyright owner.”
109. Hence, DD's case that these notices alleged a breach of copyright in the text of any of the editions of the Book is misconceived.
110. Turning to Howes Percival's letter of 13 November 2018 (Ex VKH10), the position is equally clear. This complained about the two Redacted Versions of the Book containing the information the publication of which was prohibited by the INDO (which they did). It said nothing whatsoever about any claim to copyright.

111. Ms Howe also made the point in [16] of her witness statement that although part of DD's complaint seems to be that Howes Percival wrote to Amazon on 4 January 2018 asserting copyright over the USA Edition (see her Particulars of Claim at [2]), neither she nor Mr Howarth was aware of that edition until October 2018, when they were sent a copy of it. Indeed, it would seem that edition was not produced until later in 2018.
112. I now need to deal with one discrete point which may have sowed some confusion. Exhibited to DD's Particulars of Claim as Exhibit 3 is an email she received from Amazon:

"A third party contacted us claiming that the distribution of the following title you submitted for sale through Amazon may not be properly authorized by the appropriate rights holder:

Google Me - No Lies - USA Edition: The Incredible, heartbreaking true story of a survivor by Donna Desporte (ASIN: B07HLF7MVP)

As a result, we've suspended sales of this title. We will consider reinstatement if you provide valid documentation proving you have rights to publish this title or the claimant contacts us at ipinquiries@amazon.com and confirms that you have the necessary rights to sell the disputed book on Amazon.

Below is the contact information of the third party who claims rights to the title in question.

We expect that you'll compensate this party appropriately for any infringing copies sold:

Howes Percival LLP
[Mr Howarth's email address is then given]

We take violations of intellectual property rights very seriously. The submission of titles that violate third-party rights is a violation of our agreement and may lead to suspension or termination of your account, among other remedies such as access to optional services being revoked. Please ensure that you own sufficient rights for all your titles to publish them on Amazon."

113. Ms Strong said that it appeared that this email may have been prompted by Howes Percival's complaint on 13 November 2018 about the USA Edition still containing prohibited information about GB. I think that is probably right. As I said during the hearing, what appears to me to have happened is that in this complex, multi-stranded saga, someone at Amazon misunderstood the position and, against the backdrop earlier in the year of a complaint via the DMCA notices of copyright violations in the original Book, assumed that the 13 November 2018 complaint was also about copyright violations in the USA Edition, when in fact it was about that Edition still containing private information in breach of the INDO. DD's letter before action of 30 November 2018 references this email from Amazon. It therefore may go some way towards

explaining why DD (wrongly, but perhaps understandably) believed that a complaint had been made by Howes Percival about breach of copyright in the text of the USA Edition when that was not the case.

114. Be that as it may, and even bearing in mind that this is a strike out application and that no defence has yet been pleaded, I am quite clear that DD's claim is certain to fail because she would be bound to fail to prove the communications of which she complains (whatever they are) bear the meaning she alleges because, self-evidently, they do not; and/or because GB would have an unanswerable defence of truth (DA 2013, s 2), and/or honest opinion (DA 2013, s 3).
115. Furthermore, given the ambiguities in the Particulars of Claim and DD's failure to clearly identify what communications it is that she is complaining about; and given that so far as relevant communications *can* be identified, they plainly do not make the allegations about which DD complains, I consider that her Particulars of Claim can properly be described as ones which are 'incoherent and make no sense' (CPR PD3A, [1.4(2)]) and fall to be struck out on that basis.
116. In relation to the witness statement referred to on the Claim Form, this is GB's witness statement in support of the INDO dated 15 December 2017. Whilst this is referred to on the Claim Form, nothing appears to have been pleaded about it in the Particulars of Claim and so it is impossible to know what DD's complaint about it is. In any event, it said nothing about copyright in any editions of the Book and its entire focus was on the private information.
117. I turn to the question of qualified privilege. In my judgment the January and November 2018 correspondence with Amazon is covered by qualified privilege, as is the communication of GB's December 2017 statement to Amazon on 19 December 2017. This defence focuses not so much on the *content* of the words complained as on the *occasion* on which they were published. The question is: were the circumstances such that the publisher had a legal, social or moral duty or interest to make the publication, and the publishee a corresponding duty or interest to receive it? If so, the publication took place on an occasion of qualified privilege, the qualification being that the publisher must not be actuated by express malice: see eg *David v Hosany* [2017] EWHC 2787 (Admin), [4.2]. Specifically, if a communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client, the occasion is privileged: *Boxsius v Goblet Freres* [1894] 1 QB 842, 846; *Baker v Carrick* [1894] 1 QB 838, 840-841; and see more recently, *Khader v Aziz* [2009] EWHC 2027 (QB), [16]; and *Gatley on Libel and Slander* (12th Edn), [14.57].
118. Here, Howes Percival were under a duty to act on GB's behalf and draw the INDO (and the evidence in support of it, namely GB's witness statement) to the attention of Amazon and to the fact that they were selling versions of the Book (including the Redacted Versions) which breached the INDO by containing prohibited information. DD had chosen to self-publish her book through Amazon. Amazon therefore had a legitimate interest in receiving this correspondence otherwise it would have been unaware that it was unwittingly breaching a court order by selling a book containing information the publication of which had been prohibited by that order. Subject to the question of malice, therefore, the communications referred to on the Claim Form were all privileged communications.

119. Turning to malice, in the context of qualified privilege and malicious falsehood, malice means acting not out of a sense of duty giving rise to the privilege, but from some improper motive: *Gatley*, supra, [32.34]. DD's statement of case does not even begin to demonstrate an arguable case of malice sufficient to defeat the *prima facie* case of qualified privilege, or as an element of the tort of malicious falsehood. As I have said, Howes Percival is a reputable law firm which was acting in good faith on behalf of its client in order to protect his rights under the INDO. The suggestion they were acting from any other motive is simply not arguable. DD's pleaded case on malice in [3] of her Particulars of Claim, that the 'same false allegations of Copyright were maliciously and or recklessly used to induce and cause the recipient 'Amazon' to withdraw the said work(s), as it did, on the sole basis of alleged 'Copyright infringement'' is wrong in its basic premise, as I have explained. Further, simply incanting that word several times in a pleading does not amount to an arguable case.
120. It follows that the claim for malicious falsehood would be bound to fail for absence of malice; the defence of qualified privilege would be bound to succeed for the same reason; and hence the Second Libel Claim falls to be struck out for these additional reasons.
121. Overall, on the first limb of the strike out jurisdiction under CPR r 3.4(2)(a), this is not a case where DD's statements of case could be cured of their defects by better pleading. Her case is fundamentally and irredeemably flawed for the reasons I have given and I am certain it would be bound to fail. It is struck out accordingly.
122. Strictly speaking, this conclusion makes it unnecessary to consider GB's submissions on abuse of process (CPR 3.4(2)(b)), however I shall deal with them for completeness.
123. The proper approach where a court is invited to strike a case out as an abuse of process was conveniently summarised by the Court of Appeal in *Harbour Castle Ltd v David Wilson Homes Ltd* [2019] EWCA Civ 505, [6]:

“6. The burden of showing that the second action is an abuse lies on the party asserting it, in this case DWHL, and it must be clearly shown to be an abuse. Whether an action is an abuse is not a question of discretion, but an evaluative assessment to which there can be only one answer. These propositions are established by several decisions of this court, including *Stuart v Goldberg Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823 and *Atkas v Adepta* [2010] EWCA Civ 1170, [2011] QB 894. If it is an abuse, the court has a discretion whether to strike it out, but, as Rix LJ said in *Atkas v Adepta* at [53], once satisfied that the second action is an abuse of process it is likely that the court will strike it out, but it does not necessarily follow. The Judge had these principles well in mind, as appears from his judgment.”

124. The Court went on at [8]-[10]:

“8. The inherent power to strike out proceedings as an abuse of process is one 'which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent

with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people’: *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536 per Lord Diplock. Lord Diplock went on to observe that ‘the circumstances in which abuse of process can arise are very varied’.

125. The commentary in the *White Book 2021* to CPR r 3.4 comments that CPR r 3.4(2)(a) and (b) cover statements of case ‘which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence.’ DD’s case fits a number of these descriptions. Hence, for the reasons already given, DD’s case also falls to be struck out as an abuse of process on that basis.
126. Ms Strong submitted in her Skeleton Argument at [28] that the matters in DD’s Second Libel Claim could have been included in the Libel Claim issued on 3 July 2018 because DD had been in possession of the relevant correspondence from January 2018, ever since Mr Howarth served his witness statement and exhibits in response to her injunction application in the Privacy Claim in January 2018. Ms Strong therefore said this was an example of *Henderson v Henderson* abuse: DD had brought her libel claims piecemeal when she should have brought them all together in July 2018.
127. In a celebrated passage in *Henderson v Henderson* (1843) 3 Hare 100, 115, Wigram VC said:

“In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and *prima facie*, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule.”
128. In *Barrow v Bankside Agency Limited* [1996] 1 WLR 257, 260, Sir Thomas Bingham MR said:

“The rule in *Henderson v. Henderson* (1843) 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 be finally 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 any 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 drag 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.”

129. The principle and the cases were fully examined by the Supreme Court in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited)* [2014] AC 160, [17]-[26]. I need not repeat that analysis because the principle is well-established and, in my judgment, its application to the facts of this case produces a clear answer.
130. If DD wished to complain about communications from Howes Percival to Amazon in December 2017 and January 2018 then the time to do it was as part of her initial Libel Claim of 3 July 2018. There is no reason why she could not have done so: as I have said, she had had all the material since January 2018 (and indeed had argued some of it before Ms Collins Rice in her injunction application in January 2018). It was a plain abuse of process for her to begin proceedings in July 2018 about one communication in May 2018, and then begin a second set of libel proceedings in December 2018 about communications in January 2018 and earlier which had been in her possession all along. The Second Libel Claim falls to be struck out as an abuse of process for this reason alone.
131. I also have concluded that DD’s claim is an abuse of process for additional reasons arising out of the striking out of DD’s counterclaim in the Privacy Claim, and the Master’s refusal to allow it to be amended.
132. First, as I have said the Second Libel Claim is, in substance, very similar to the counterclaim in the Privacy Claim would have been had it been allowed to proceed and had the Master allowed it to be amended. In her witness statement at [23] Ms Howe said:

“This Respondent’s Application to Amend included the same claim against the Applicant in malicious falsehood and libel in reliance upon the DMCA Notice submitted to Amazon in January 2018 and the Letter in respect to the USA Edition. On comparing the Application to Amend and the Respondent’s Particulars of Claim,

it is evident that the majority of her Particulars of Claim has merely been copied and pasted from her Application to Amend.”

133. As of 12 December 2018, therefore, when both actions were issued, GB was being taxed with the same or very similar subject matter in two separate actions (or potential actions) at the same time. That, of itself, I regard as being abusive. In *Horton v Sadler* [2007] 1 AC 307, [37], Lord Bingham said:

“It was argued below and in the House that it was an abuse for the appellant to bring a second action while his first action was still extant. The judge accepted that in the ordinary way it is an abuse to pursue two actions against the same defendants in respect of the same subject matter and indicated that if he were giving permission for the second action to continue he would require the first to be discontinued. This was, I think, the correct response. As it was, he dismissed both actions.”

134. Secondly, I have concluded the Second Libel Claim is abusive in accordance with the principles in *Harbour Castle Limited*, supra, [9]-[10]. There, the Court said:

9. Where, as in the present case, the question is whether to strike out a second set of proceedings raising the same issues as in the first, the authorities establish that a proper basis for finding the second action to be an abuse will be shown if (but this is not intended to be an exhaustive list) the first action was struck out for a deliberate failure to comply with a peremptory order or for inordinate and inexcusable delay in its prosecution or for a wholesale disregard of the rules: see *Janov v Morris* [1981] 1 WLR 1389, *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, *Securum Finance Ltd v Ashton* [2001] Ch 291, and *Aktas v Adepta*.

10. In the present case, the first action was struck out for failure to comply with a peremptory order for the provision of security for costs. Such an order will not normally be made if security cannot be provided and the order would stifle a legitimate claim. On that basis, one would expect HCL’s second action to be regarded as an abuse of the process.”

135. Ms Strong also referred me to number of other cases including *Securum Finance Ltd v Ashton* [2000] 3 WLR 1400; *DC v CPS Fuels Ltd* [2001] EWCA 1597 Civ; *Aktas v Adepta* [2010] EWCA Civ 1170; and *Davies v Carillion Energy Services Ltd* [2018] 1 WLR 1734.

136. In the *CPS Fuels Ltd* case at [25], where a second action had been struck out following the striking out of a first action in relation to the same subject matter because of failures by the claimant’s solicitor, the Court of Appeal approved of the approach of the judge at first instance, which was as follows (see at [24]):

“It is an abuse of the process for the Claimant to seek to litigate in the present action the same issues as were raised, but not

adjudicated upon, in the First Action which was struck out as a result of inexcusable failures to comply with the rules and court orders.

In order to exercise my discretion so as not to strike out the present action, some special reason needs to be identified which, having regard to the overriding objective, would mean that it was just to allow the present action to proceed."

137. In *Davies*, supra, [52], [55], Morris J considered the authorities and held (inter alia, citations omitted): (a) where a first action has been struck out as itself being an abuse of process, a second action covering the same subject matter will be struck out as an abuse of process, unless there is special reason; (b) in this context, abuse of process in the first action comprises: intentional and contumelious conduct; or want of prosecution; or wholesale disregard of rules of court.
138. In this case the counterclaim was struck out for the 'deliberate failure to comply with a peremptory order' (in the language of *Harbour Castle Limited*, supra, [9]). That is because DD could have provided security for costs in the form of a charge over her property had she chosen to, but she deliberately chose not to, and so the counterclaim was struck out in accordance with the Master's unless order of June 2018. Her deliberate choice was recorded in my judgment on the Appeal in June 2019 at [37] as follows:

"37. I am satisfied that the requirement for a charging order will not stifle Ms Desporte's claim. She can provide a charge on her property. In fact, as I have already explained, the suggestion of a charging order came from Ms Desporte herself after she had been rebuked by the Master for glibly suggesting that further costs could be added to be 'tab'. In fact, earlier in the hearing, Ms Desporte made reference to the possibility of a charging order being made (see at p26 of the Transcript). Following the hearing before me, Ms Desporte sent me a copy of an email which she sent on 21 January 2019 to Mr Bull's solicitors about costs in which she proposed, 'That at the conclusion of this claim and any reciprocal claim any outstanding costs be offset against the said property [address given]'. All of this, taken together, shows that she can provide a charging order but has simply chosen not to do so."

139. In his order refusing permission to appeal of 19 December 2019 Simon LJ said:

"As noted by Julian Knowles J, it was within the court's jurisdiction to impose conditions on the applicant and to specify the consequences in default of those conditions, in accordance with CPR 3.1(3). The applicant had originally proposed the charge herself, which undermines any assertion that she was not in a position to comply with such a condition."

140. To allow DD, now, to continue with the Second Libel Claim would be to allow her effectively to escape the proper consequences of her earlier actions. In my judgment,

that would be an abuse of process. There is no special reason why her claim should be allowed to proceed.

141. I turn to the final head of abuse of process relied on by Ms Strong, namely that this litigation is pointless and wasteful given – even if it were viable, which obviously she did not accept - any damages would be minimal.
142. I agree with the thrust of Ms Strong’s submissions in [36]-[39] of her Skeleton Argument. The test is whether ‘there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources’: *Ames v Spamhaus Project Ltd* [2015] 1 WLR 3409, [29].
143. In this case any benefit to DD would be minimal and out of all proportion to the costs of a libel trial in the High Court.
144. The Second Libel Claim has been brought in respect of publications to Amazon UK. This is the commercial entity that was publishing the original Book (and subsequent versions) and to which Howes Percival was obligated to write in order to inform it of the INDO application was being made, and then that it had been granted. By virtue of the provision of the INDO (and the application) to Amazon UK, it seems to me that DD’s reputation would inevitably have been compromised to that extent by virtue of the INDO having been granted against her. Even if there had somehow been a case that Howes Percival had wrongly made a claim of copyright infringement by DD over and above the infringement in relation to the photographs (which infringement was true, as I found in June 2019), and so tangentially defamed DD, it seems to me that DD would clearly struggle to argue in those circumstances that the publication of any additional wording caused her to suffer serious harm within the meaning of DA 2013, s 1 over and above that which she would inevitably have suffered as a result of provision of the INDO application and order in any event. Further and in any event, whilst I am well familiar with the authorities that the question of serious harm is a not a ‘numbers game’, the fact here is that the publication was to a single entity, whose human agents dealt with in the course of their work during which, no doubt, they receive many complaints each week so that each probably barely registers. The notion that even if serious harm could be established, it would result in an award of anything significant to DD is far-fetched.
145. Further, provided that DD does not republish the private information or reuse photographs in respect of which GB is the copyright holder, GB (whether through Howes Percival or otherwise) will have no need to publish any further statements about DD whatsoever. In those circumstances, there is no risk of the repetition of the words complained of (whatever precisely those may be) and therefore no reason for any injunction to be granted, even if a court believed there was any merit in DD’s underlying claim.
146. I have clearly concluded that there is no genuine benefit to be served by the continuation of these proceedings, when any potential benefit to DD is weighed against the cost and resource implications of them continuing. They are struck out accordingly as an abuse of process.

147. For all of these different reasons, the Second Libel Claim is an abuse of process and so is struck out under CPR r 3.4(2)(b) as well as, for the reasons already given, under CPR r 3.4(2)(a). I also certify the claim as being TWM.

The application for an ECRO

148. GB seeks an ECRO against DD pursuant to CPR r 3.11 and CPR PD3C, [3.1]. Paragraph 3.1 provides:

“3.1 An extended civil restraint order may be made by –

(1) a judge of the Court of Appeal;

(2) a judge of the High Court; or

(3) a Designated Civil Judge or their appointed deputy in the County Court,

where a party has persistently issued claims or made applications which are totally without merit.”

149. Paragraph 3.2 provides:

“3.2 Unless the court otherwise orders, where the court makes an extended civil restraint order, the party against whom the order is made –

(1) will be restrained from issuing claims or making applications in –

(a) any court if the order has been made by a judge of the Court of Appeal;

(b) the High Court or the County Court if the order has been made by a judge of the High Court; or

(c) the County Court identified in the order if the order has been made by a designated civil judge or their appointed deputy,

concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order;

(2) may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order; and

(3) may apply for permission to appeal the order and if permission is granted, may appeal the order.”

150. CPR PD3C, [3], contains other provisions about the operation of ECROs which I need not set out, save to note that [3.9(1)] provides that an ECRO must be made for a specified period not exceeding two years.

151. The threshold requirement for an ECRO is therefore proof that the party against whom it is sought has *persistently* issued claims or has made applications which are totally without merit. In *CFC 26 Ltd v Brown Shipley & Co Ltd* [2017] 1 WLR 4589, [13], Newey J considered what was meant by 'persistently' in this context and held, in agreement with previous first instance authority, that persistence requires at least three TWM claims or applications. This was approved by the Court of Appeal in *Sartipy*, supra, [28].

152. In *MB v RGB* [2020] EWHC 3022 (QB), [61], Choudhury J said:

“There [in *Sartipy*] it was held that although at least three totally without merit claims or applications are the minimum, the question remains whether the party concerned is acting 'persistently'. That will require an evaluation of the parties' overall conduct. In deciding to make a CRO, the Court is entitled to take into account any previous claims or applications that were found to be totally without merit.”

153. In this case, Ms Strong said that DD's conduct during the course of the litigation between her and GB since 2017 – which, as I pointed out at the beginning of this judgment, is extensive and has become procedurally convoluted - satisfied the test of 'persistence' in making meritless applications. In her Skeleton Argument at [42] she said DD had 'issued numerous misguided and wholly unmeritorious claims and applications', and that in some instances she had made the same arguments in an unjustifiably repetitious fashion, in some cases had sought to have 'not one, not two, but, in certain instances, four bites at the cherry'.

154. Prior to this hearing, Ms Strong said there had been at least six applications by DD of which GB and his solicitors are aware have been classified as TWM. She caveated this number in a footnote to her Skeleton Argument at [42], as follows:

“There may be more – the sheer volume of documents produced by DD since this litigation has begun and the convoluted and non-rule compliant way in which she routinely progresses such legal challenges at every step of the way makes it difficult even for the legal representatives involved to be sure they can identify every application/challenge that has been made and the outcome (for example – Simon LJ's Order referred to in sub-para 4[2].3 [ie, his order refusing permission to appeal against my judgment in the Privacy Claim] refers to PTA “applications” (plural), but it is not entirely clear precisely what applications were made (due to decisions taken on proportionality grounds about the document searches that would be undertaken for the purposes of the preparation of the bundle for this hearing, the underlying application documents produced by DD in respect of this PTA application have not been identified/included).”

155. The six identified applications are as follows:

- a. Three applications that were made to Whipple J on 2 July 2018 in the Privacy Claim for (a) an interim injunction to restrain publication of allegedly false and defamatory statements; (b) disclosure against the police; and (c) permission to issue a witness summons requiring GB to attend to give evidence. It would appear that even after this DD continued to dispute the outcome and would not take ‘no’ for an answer. There is an email from the learned judge’s clerk dated 4 July 2018 in which she wrote:

“The Judge has been shown a copy of Ms Desporte’s email of 3 July 2018 sent at 16.41.

The Judge confirms that three of the applications determined at the hearing on 2 July 2018 were dismissed as being totally without merit. The draft order prepared by Mr Dean is correct.

Ms Desporte should be aware that if she makes any further applications which the Court considers to lack merit, she may be made the subject of a civil restraint order, see CPR 3.11 and CPR Practice Direction 3C.”

- b. Her application to Master McCloud to amend her counterclaim in the Privacy Claim. As I noted earlier, at [4] of her order the Master refused permission to appeal against the certification of this application as TWM.
- c. An application for permission to appeal against my judgment in the Privacy Claim which was considered on paper and refused as TWM by Simon LJ in an order sealed on 19 December 2019. Simon LJ noted at the bottom of that order that:

“In light of this decision, there is no reason for the Court of Appeal office to further engage in correspondence with the applicant in relation to this appeal”

- d. An application for permission to appeal against my judgment on the Appeal which was also certified as TWM by Simon LJ in an order sealed on 19 December 2019, in which the learned judge again indicated there was no further need for correspondence with DD.

156. Added to this list can be the two applications by DD which I dealt with at this hearing and deemed to be TWM, and the Second Libel Claim which I have also certified as having been TWM.

157. Also, as I pointed out earlier, other applications by DD for permission to appeal have been rejected as ‘hopeless’ and ‘doomed to fail’ or otherwise lacking in merit.

158. Ms Strong relied on other aspects of DD’s conduct of this litigation in support of her application for an ECRO. These are set out primarily in Mr Howarth’s witness statement of 5 February 2021 for this hearing. In deciding whether to make a civil

restraint order, a party's overall conduct can be taken into account: *Sartipy*, supra, [30]-[31]; *MB*, supra, [61].

159. Matters relied by Ms Strong included: DD's allegations about the conduct of GB's legal team, which Ms Strong said had been made to try and pressurise them from ceasing to act. DD alleged, for example, that there had been an attempt to get a potential witness to change her evidence in the Privacy Claim but when she was challenged to produce evidence, she failed to do so. Ms Strong also pointed to DD's threats to report Howes Percival and previous counsel to their professional regulators for alleged misconduct. Further, in the lead up to the hearing, DD claimed Howes Percival were not on record, when she knew perfectly well that they were – or if she was genuinely in doubt, a quick call or email to Mr Howarth or Ms Howe would have clarified the matter. Further, following that, DD claimed that they should not be acting for GB and accused them of further wrongdoing. Indeed, on the weekend before this hearing I received via my clerk an email from DD alleging that the SRA had said Howes Percival were 'in breach of the rules' and that she was 'seeking directions'. As I said at the hearing, I declined to intervene, it not being a matter for me. Howes Percival are well aware of their obligations and if they had found they had a conflict of interest they would have acted accordingly.
160. Ms Strong also pointed out that DD has paid no costs or damages, despite all of the orders that have been made against her. GB's costs now run into the hundreds of thousands of pounds.
161. Next, Ms Strong pointed to DD's habit, post-hearing, of querying the orders drawn up by GB's legal team and disputing their terms and, when challenged to make a formal application, fails to do so. I was shown an example of this following the hearing before Master McCloud in June 2018, when DD disputed the draft order drawn up by GB's counsel, and the Master said if there was a dispute about the order then a proper application would have to be made (with the losing party at risk on costs). DD did not follow through with her objections, but then tried to re-open them at the hearing before the Master in January 2019. The same thing seems to have happened after the hearing before Whipple J (see the email above, from which it appears DD had queried the order drawn up by Mr Dean).
162. Added to this list can be DD's overall stance in this litigation, which I described earlier as inappropriately hostile and aggressive. In addition to those matters I referred to, on occasion DD has made or issued applications which she intentionally did not serve on Howes Percival, causing confusion and uncertainty in the conduct of the litigation. Sometimes she refused to send them documents even when specifically asked to do so. This attitude did not assist the court in its task of fairly and justly resolving the issues between the parties.
163. As I have said, DD lodged a document dated 10 December 2020 in which she described this application as 'vexatious' and 'misconceived'. I take account of that and I also take account all of the points she made orally. She said some of her earlier applications had failed because of missing documents. She said she had been entitled to make complaints to regulators about lawyers if she felt they had not behaved properly, although she made clear her complaint about GB's previous counsel had been made but not pursued. She also attacked the merits of some of the earlier decisions saying that

they were wrong for various reasons (notwithstanding all of her attempts to appeal them have been rejected). She said her previous applications had had 'a clear foundation in law'. She also said GB had chosen to prolong the litigation. She said she had always acted in good faith.

164. I turn to my conclusions on this application.
165. I readily acknowledge that making an ECRO infringes, to a degree, the subject's right of access to a court and therefore such applications are to be scrutinised carefully.
166. However, this is one of those cases in which, I think, the history of the litigation speaks for itself. DD has persistently made TWM applications in a number of different actions over an extended period of time. They have been certified as TWM by experienced judges at every level from the Master up to the Court of Appeal. These totally meritless applications have occupied a large amount of court time and resources, as well as GB's resources, over a number of years. The test in CPR PD3C, [3.1] is, in my judgment, obviously satisfied in this case. I nonetheless retain a discretion whether to make an ECRO.
167. I make every allowance for the fact that DD is a litigant in person whereas GB is well-resourced. I also take account of the fact that she plainly feels very strongly. But even allowing for the exigencies of litigation, DD's conduct has been totally unacceptable. I find that all of Ms Strong's complaints about DD's conduct of the litigation are made out.
168. In my judgment the time has come to restrain DD by way of an ECRO and that such an order is necessary because of the nature and scale of DD's persistence in bringing meritless applications and the way in which she has conducted the litigation overall, which has driven up costs, as well as causing needless confusion, anxiety and distress. The Second Libel Claim was misconceived from the outset, as I have said.
169. In all the circumstances, I consider that an ECRO is fair, just and proportionate. It is not as if DD has not been given ample warning that such an order might be made. She was specifically warned by Whipple J in July 2018, as I have said, and then she was made subject to an LCRO by Master McCloud in January 2019. Even then; (a) she began the Second Libel Claim in December 2018 which was TWM; (b) she made two TWM applications for permission to appeal in December 2019; (c) she made two further TWM applications at this hearing.
170. Although there is a draft order in the Supplementary Bundle, I invite GB's legal advisers to draw up an order reflecting the terms of this judgment and to send it to DD for her agreement. In the event that no agreement is forthcoming, or any matters are raised which require determination, the matter is to be placed before me and I will deal with any such matters on the papers.