Neutral Citation Number: [2014] EWHC 4189 (QB)

Case No: HQ14X03912

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2014

Before :

MR JUSTICE WARBY

- -

Between :

QRS (on behalf of himself and in a representative capacity for all the individuals identified in Confidential Annex 1 to the Amended Claim Form in these proceedings)	**Claimant**
- and -	
(1) DANIEL CHARLES BEACH **(2) RICK KORDOWSKI** (on behalf of himself and in a representative capacity for all other individuals who are involved with him in the operation and/or publication of the website identified as item 6 in Confidential Annex 2 to the Amended Claim Form in these proceedings)	**Defendants**

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MR GODWIN BUSUTTIL (instructed by **Brett Wilson LLP**) for the **Claimant**
The Second Defendant in person

Hearing date: 21 October 2014

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Judgment

Mr Justice Warby:

1. The second defendant, Rick Kordowski, applies to set aside a judgment entered in default of acknowledgment of service by order of Stuart-Smith J on 16 September 2014, and the final injunction granted by Stuart-Smith J at the same time, which restrains both defendants from further acts of harassment.

The proceedings

2. The action is brought by the claimant on his own behalf and in a representative capacity for others, described as Protected Parties, for an injunction to restrain the defendants from continuing a course of conduct involving harassment by the publication on websites of serious allegations. The claimant is a solicitor, and a partner in a firm. The Protected Parties are (a) solicitors in the claimant's firm identified on websites complained of ("the Listed Protected Parties"), (b) other solicitors and staff of the firm who are not so named, and (c) the lawyers and others acting for the claimant in these proceedings.

3. The first defendant, Mr Beach, is a former client of the claimant's firm, which acted for him in various matters between 2006 and 2010. Mr Kordowski, the second defendant, is best known as the former operator of a website using the domain name solicitorsfromhell.co.uk (sfh.uk) which he operated between about 2006 and 2011. The website was devoted to the public denunciation of legal professionals for alleged misconduct and impropriety. At its height over 466 firms were referred to on it in over 1,000 postings. Mr Kordowski was also the registrant in 2008 of another website which, for the purposes of avoiding identification in these proceedings has been called XYZ.net. Mr Kordowski has been the defendant in a very substantial number of civil claims arising from the operation of sfh.co.uk. The evidence put before the court by the claimant stated, without contradiction, that Mr Kordowski had been sued on 18 occasions in relation to sfh.co.uk, and that no case was known in which he had been successful.

4. One of the claims against Mr Kordowski was a libel action brought by the claimant's firm in 2011 in respect of the posting on the sfh.co.uk site of allegations made by Mr Beach. An interim injunction was granted by Sharp J on 23 May 2011. This later became otiose because the Law Society brought representative proceedings on behalf of the profession in which injunctions were granted. The initial injunction was granted by Langstaff J on 2 November 2011 on a without notice application, restraining the sale, transfer or disposal of any data from the sfh.co.uk site. On 15 November 2011 Tugendhat J entered judgment against Mr Kordowski and ordered him to remove the website from the world wide web, which was later done. A further final order was made by Tugendhat J on 7 December 2011 prohibiting Mr Kordowski from (among other things) harassing any individuals involved in the legal profession by naming or listing or identifying them on any website similar to sfh.uk, and from publishing or setting up any website with a similar name, or inviting members of the public to post negative comments about the legal profession so as to harass individuals. A final order prohibiting sale, transfer or disposal of data from sfh.co.uk was also made against him (*Law Society v Kordowski* [2011] EWHC 3185 (QB), [2014] EMLR 2).

5. XYZ.net was operational from about 12 January 2012 as a successor to sfh.co.uk. Its home page proclaimed it to be "*the successor in title to Rick Kordowski's solicitorsfromhell.co.uk.*" and that "*Normal service has resumed under new owners.*" From and after about March 2012 there appeared on XYZ.net and a number of other websites a substantial number of serious allegations of misconduct about the claimant and the Listed Protected Parties, and in particular their work on behalf of Mr Beach. The websites other than XYZ.net were registered by Mr Beach. They and other websites subsequently registered in his name have been referred to as "the Beach Websites". On 25 April 2012 the firm wrote to Mr Beach complaining of a wrongful use of the firm's name in the domain name of one of the Beach Websites. The letter demanded that the domain name be transferred to the firm, complained of trademark and copyright infringement, and reserved the right to bring a claim for defamation.

6. The letter of 25 April 2012 was sent by post and email. The response was an email from Mr Kordowski of the same day enclosing a letter from Mr Beach to the claimant's firm rejecting the complaint, inviting the firm to sue for defamation, and appointing Mr Kordowski to act as his agent in respect of these matters. In his covering email Mr Kordowski wrote that "*all further communications regarding Mr Danny Beach of* [address] *should be directed through me.*" Mr Kordowski thereafter engaged in correspondence on behalf of Mr Beach in and between April 2012 and late July 2013, dealing with the domain name complaint, in respect of which proceedings were later issued in the Patents County Court, and with other matters raised in the correspondence including the possibility of a settlement of the dispute between the firm and Mr Beach.

7. On 28 March 2013 the claimant's firm sent Mr Beach a pre-action letter complaining of the content of websites operated by Mr Beach. The letter complained that the website content was being published with the assistance of Mr Kordowski in breach of the *Law Society* injunction of 7 December 2011 and in some respects in breach of copyright. It demanded the removal of all content relating to the firm, its staff and partners within 7 days. A copy of the letter was emailed to Mr Beach and to Mr Kordowski. Neither made any reply.

8. On 30 July 2014 the claimant's solicitors sent by post and email to Mr Beach and Mr Kordowski detailed pre-action letters of claim complaining that by publishing on XYZ.co.uk and the Beach Websites offensive and vilifying content relating to the claimant and others each of them had pursued a course of conduct amounting to harassment against the claimant and others contrary to s 1(1) of the Protection from Harassment Act 1997, and that they threatened to pursue that course of action. The letters required, among other things, the removal from the websites of content relating to the claimant and others, the delivery up of off-line data, and undertakings not to harass in future, to cease publication of the websites and to be bound by an injunction accordingly. A deadline of 5 August 2014 was set. Neither Mr Beach nor Mr Kordowski replied.

9. On 6 August 2014 the claimant issued these proceedings. Mr Beach is sued in his personal capacity. Mr Kordowski is sued in his personal capacity and in a representative capacity on behalf of all others who may be involved with him in the operation and publication of XYZ.net. The principal remedy sought by the

claim form is injunctions to restrain harassment of the claimant and Protected Parties. There is no claim for damages.

10. The case pleaded by the claimant in the particulars of claim refers to Mr Kordowski's operation of sfh.uk including the posting on that website of Mr Beach's allegations. It is alleged that since June 2008 Mr Kordowski has been the operator and publisher of XYZ.net, and that prior to the injunction granted in the *Law Society* proceedings he operated XYZ.net as a mirror site to sfh.co.uk. The claimant alleges that Mr Beach and Mr Kordowski became acquainted by no later than December 2011. It is alleged that from about January 2012 Mr Kordowski operated XYZ.net as a successor site to sfh.co.uk, and published or caused or permitted to be published on it content similar to that which had previously appeared on sfh.co.uk. Mr Kordowski is said to have done this either alone, in concert with others or via agents. It is said that Mr Beach then registered or procured the registration in his name of the Beach Website complained of and that he and Mr Kordowski worked together to set up those sites, keep them functional and operational, and to optimise their searchability. Further and alternatively it is said that the defendants had reached a common understanding between about December 2011 and March 2012 that they would target the claimant and the Listed Protected Parties, and carried out acts of harassment pursuant to that common design such that they were joint tortfeasors.

11. The acts of harassment complained of are the publication since around March 2012 and the continued publication via XYZ.net and the Beach Websites of allegations of and concerning the claimant and the Listed Protected Parties, in juxtaposition with names and/or images of those persons, in circumstances whereby the websites are interlinked, and their searchability has been successfully optimised by the defendants. The allegations include corruption, dishonesty, lack of integrity, acting improperly and incompetently for Mr Beach, and a host of other allegations. It is alleged that such publication has caused and causes alarm and distress to the claimant and Listed Protected Parties and that the defendants knew or ought to have known that their conduct amounted to harassment. It is alleged that unless restrained by injunction Mr Beach and Mr Kordowski and those represented by Mr Kordowski will continue to pursue a course of conduct amounting to harassment of the claimant and Listed Protected Parties and will in the future pursue such a course of conduct against the other Protected Parties.

12. On 6 August 2014, at the same time as issuing proceedings the claimant issued an application notice seeking interim injunctions against both defendants. The principal evidence in support was a witness statement of the claimant running to 101 pages, with two lever arch files of exhibits. This gave a detailed account of the factual background to the claim setting out why it was that the claimant said that both defendants were acting wrongfully. This included evidence that Mr Kordowski but not Mr Beach has considerable IT and web/design development skills; that the set up and content of XYZ.net were remarkably similar to that of sfh.co.uk; that the Beach Websites shared a similar structure and imagery; and that there was significant cross-linking between the sites. In support of these assertions the claimant exhibited screen-shots taken from the various websites. These included the XYZ.net site's claim to be a successor to sfh.co.uk. The exhibits showed that the site followed very closely the format of sfh.co.uk, with distinctive

hellfire and devil imagery and derogatory content about solicitors and other lawyers, and that it included a substantial quantity of the former site's content, including in particular editorials. The exhibits to the claimant's statement also included the correspondence between April 2012 and July 2013 to which reference is made above, in which Mr Kordowski acted as agent for Mr Beach.

13. The claim documentation, including the supporting evidence, was served at Mr Beach's address at 15:05 on 6 August 2014, by handing it to a lady who answered the doorbell and confirmed that Mr Beach lived there and would receive anything left there for his attention. The claim documentation was delivered at an address believed to be Mr Kordowski's residential address at 14:55. The claim form, particulars of claim, response pack, application notice and draft order were emailed to each of Mr Beach and Mr Kordowski at 17:16 that day.

14. On 13 August 2014 the claimant's interim application came before Slade J. Neither defendant appeared at the hearing. It appeared that Mr Kordowski had not been properly served in accordance with Part 6, as the address to which the documents were delivered was a former residential address. Mr Beach had, however been duly served, as appears above. Slade J gave permission to amend the claim form and particulars of claim and granted injunctions contained in an order dated 14 August 2014 to restrain Mr Beach from further harassing the claimant and Protected Parties by continuing to publish, on the internet or otherwise, material which was already the subject of the proceedings or by publishing any further material relating to them. Mr Kordowski was made the subject of an injunction restraining publication or disclosure of the Litigation Papers as defined in the order, but not the subject of the main injunction.

15. At 18:55 on Friday 15 August 2014 Mr Kordowski was served personally with the amended claim form, amended particulars of claim, a response pack, and copies of Slade J's orders. Mr Beach was served personally on Saturday 16 August 2014 at 12:05. Both defendants were provided with copies of the documents by email on 18 August.

16. Following service, Mr Beach made no communication at all with the claimant's solicitors. However, on 17 August 2014 a new website was registered in his name with a domain name similar to one of those complained of. On 19 August a posting appeared on another of his websites referring to the present litigation in terms pejorative of the claimant's firm. Later the same day this and all the relevant websites other than the one registered on 17 August 2014 were removed from the worldwide web following cancellation of their domain name registrations. However, two websites with domain names similar to ones which had been cancelled were later registered in Mr Beach's name on 3 September 2014. Each contained a statement on the homepage purporting to be made by a Jim Bloomfield, stating that due to ill health Mr Beach was no longer able to continue updating the sites, but Mr Bloomfield was their new owner. On one of these sites a posting appeared over Mr Beach's name from 5 September 2014 which referred to the letter of claim dated 30 July 2014 and contained defiant statements about the claim and highly pejorative allegations about the claimant, other members of the firm, and the claimant's solicitors. It was accompanied by seven pdf files which, when clicked on, directed the reader to the original claim form and

particulars of claim, the draft order prepared for the hearing on 13 August, witness statements and other papers from this litigation.

17. As for Mr Kordowski, he responded to service of the proceedings with a two page letter of 18 August 2014. He acknowledged receipt of the claimant's solicitors' letter of 15 August and accompanying documents. He purported to "instruct" that Slade J's order be discharged or varied and that the claim be set aside. He admitted knowing Mr Beach and having acted as his agent in the past but said that he, Mr Kordowski, had had "*nothing to do with the construction or publication of any of the domains listed*" in the annexes to the particulars of claim and that the claimant had no evidence to substantiate the allegations that he had done so. He admitted being the previous owner of XYZ.net but said that "*the rights of the domain were transferred around December 2011*" after which he had "*nothing further to do with this domain*." He said that the claimant had no evidence to substantiate his allegations in this respect also. He said that if his request for discharge or variation of the order was not granted in an amicable way he would have no option but to instruct Counsel and the Police and said he expected confirmation by no later than 4pm that day. No such confirmation was forthcoming. Instead, the claimant's solicitors responded asking him to agree a final order, and posing questions about his role in events and asking him to explain who, if not he, had been operating XYZ.net. Mr Kordowski did not reply.

The application for judgment

18. Neither defendant filed an acknowledgment of service. The claimant decided to seek judgment in default of such acknowledgment. By CPR 12.4(2)(a) a claimant seeking default judgment on a claim such as this one which consists of a claim for a remedy other than money or delivery of goods must make an application in accordance with Part 23. Accordingly, on 8 September 2014 the claimant issued an application notice seeking:-

> "1. Judgment in default to be entered pursuant to Civil Procedure Rule Part 12.3(1) and 12.4(2) against both the First and Second Defendant ….
>
> 2. A final injunction in the attached form.
>
> 3. Costs of the action (including the costs of the instant application and the application heard on 13 September 2014.)" [1]

19. The form of injunction attached contained detailed provisions prohibiting each of the defendants and any person represented by Mr Kordowski from harassment of the claimant or Protected Parties.

20. By CPR 12.11(1) "*Where a claimant makes an application for a default judgment, judgment shall be such judgment as it appears to the court that the claimant is entitled to on his statement of case.*" In support of his application in this case however the claimant filed a substantial volume of evidence. This evidence

[1] Clearly a mistake for 13 August.

included the claimant's initial statement and exhibits to which I have referred above and eight other witness statements, several of which covered the merits as opposed to merely proving service of documents. Among the witness statements was a second witness statement of the claimant's solicitor, Mr Wilson, which among other things exhibited Mr Kordowski's letter of 18 August 2014.

21. By CPR 12.11(2) "*Any evidence relied on by the claimant in support of his application need not be served on a party who has failed to file an acknowledgment of service."* The application papers in this case were however served on both defendants by first class post and sent by email. Mr Kordowski was personally served with all the application papers at his home at 3.15pm on 8 September 2014. Papers were also handed that day to Mr Beach's wife at their home address. She accepted them saying that he would be returning home and she would give him the documents when he did.

22. Mr Beach made no response to service of the documentation. However on 10 September 2014 two new websites were registered with names similar to those closed down earlier. The registrant details were hidden, as the registrant had opted for privacy. The content of the websites duplicated content on sites which Mr Beach had registered earlier, with only minor modifications.

23. Mr Kordowski responded to service by email on 10 September 2014. He acknowledged receipt of documents and "threatening letters" sent to his home address and complained of consequent distress to his ill wife. He referred back to his letter of 18 August 2014 and asserted that he would be consulting Counsel and/or the Police to bring criminal proceedings against the claimant's solicitors. He asked for confirmation by the end of the next day, 11 September, that the claimant was refusing to omit his name from the claim against Mr Beach as requested by him.

24. The claimant's solicitors replied the same day making clear their view that Mr Kordowski's position as a defendant was of his own making. They repeated their request for confirmation that he would agree to be bound by a final injunction and their previous questions. He made no reply.

25. On 15 September 2014 the claimant's solicitors wrote to and emailed Mr Kordowski asking if he intended to appear or be represented. He made no reply.

The judgment and order of Stuart-Smith J

26. Neither defendant appeared at the hearing on 16 September 2014. Stuart-Smith J exercised his discretion under CPR 23.11(1) to direct that the hearing should proceed in their absence. He was satisfied that the defendants had been properly served with the proceedings, the order of Slade J, and the application for judgment, and that no reason for non-attendance was apparent. He held that the conditions for default judgment had been satisfied.

27. The judge stated at [6]: "*Because the nature of the relief claimed includes a permanent prohibitory injunction I have reviewed the merits of the application and give judgment on them.*" He proceeded to give a summary of the factual background "*based upon the evidence submitted by the claimants, which the court*

has read": [7]. He directed his attention specifically to the question of Mr Kordowski's role, addressing the denials of involvement contained in his correspondence as follows:

> "32 In correspondence the second defendant has denied any continuing involvement with the offending websites. He too has chosen not to engage with the court's process by appearing or providing evidence for the court to consider and evaluate. The court is left with two compelling pieces of evidence about the second defendant. The first is the fact that the manner of the attacks on the claimant and the protected parties is very similar to those previously orchestrated by the second defendant by the use of websites with similar generic names and the posting of derogatory comments on-line. The second is the second defendant's statement in April 2012 that he was writing on the first defendant's behalf as his agent and requesting that all future communications in relation to the matter should be directed to him, the second defendant. There is nothing in the evidence, apart from the letter to which I have referred, to suggest that his position has changed or, if it has, how and when it changed.
>
> 33 The evidence before the court strongly supports the inference that the second defendant remains involved and responsible just as he said he was in 2012. Had he wished to contest that inference the second defendant could and should have done so in these proceedings."

28. The letter mentioned in paragraph [32] is clearly Mr Kordowski's letter of 18 August 2014. Stuart-Smith J next considered the merits of the relief sought, asking himself "*should the orders be made"*? He concluded that they should, because there was *"a high degree of probability that unless restrained the defendants will continue to harass the claimant and the protected parties as they have done before and since the order of Mrs Justice Slade on 13 August 2014*". The order made by Stuart-Smith J was in substantially the terms sought by the claimant's application notice. It restrained both defendants from harassment in the terms sought, and ordered Mr Beach to delete data. The judge made an order that the defendants pay the claimant's costs of the claim including those of the hearing before Slade J, to be assessed on the standard basis if not agreed, with a payment of £90,000 on account of those costs to be made by 4pm on 7 October 2014, the liability to be joint and several.

29. On 17 September 2014 at18:52 the final order and Re-Amended Particulars of Claim for which Stuart-Smith J had given permission at the hearing were personally served on Mr Kordowski. They were also posted that day and emailed the following day. The order and Re-Amended Particulars of Claim were personally served on Mr Beach on 23 September 2014, having been posted and emailed earlier. Mr Beach made no response. Mr Kordowski did not take any action until 9 October 2014.

Mr Kordowski's application

30. On 9 October 2014 Mr Kordowski issued an application notice seeking to set aside the judgment and final injunction against him on grounds set out in a separate document, and attaching a copy of his letter of 18 August 2014. He signed a statement of truth verifying those grounds. On 15 October 2014 Mr Kordowski signed a witness statement with 8 exhibits, and a skeleton argument in support of the application.

31. Mr Kordowski makes no attempt in these documents to justify the website publications of which complaint is made as amounting to harassment. The key features of the case he advances via these documents and in his oral submissions at the hearing can be fairly summarised as follows.

32. He claims to have a real prospect of successfully defending the claim against him on the grounds that he had no involvement in the publications complained of. His account is that:-

    i) Although he was the original registrant of XYZ.net it had not, as alleged, operated as a "*mirror*" site of sfh.co.uk; it had been a "*blank (parked) stand alone website*"; he had given it away to a Mr John Angel on 3 November 2011 and transferred it via the domain registration agent on that day; he exhibits a document from the service provider supporting that claim; he denies "*the allegation that since January 2012 I have operated this website (in any shape or form)*".

    ii) He was approached in early 2012 by Mr Beach to see if he was interested in selling plots of Mr Beach's land online, and had agreed to do so on commission. In April 2012 he was told by Mr Beach that he had registered and created a website using the claimant's firm's name and asked if he minded the use of the sfh.co.uk demon logo "*which Mr Beach had copied from my website*". Mr Kordowski's statement says: "*I immediately told him it will never last – it's effectively cyber squatting which is no longer legitimate.*"

    iii) When Mr Beach received a complaint from the claimant's firm regarding his website he asked Mr Kordowski to act as his agent on this issue as well which, after initially resisting, Mr Kordowski agreed to do. Mr Kordowski acknowledges that the claimant's evidence includes copies of communications received or sent by him on behalf of Mr Beach during the course of approximately one year (the period was from April 2012 to 22 July 2013).

    iv) After he sent a letter on this matter to the claimant on 22 July 2013 on behalf of Mr Beach he had no contact with the claimant or Mr Beach on that matter and assumed the matter in which he had been engaged had settled, and had withdrawn from acting as a property agent. "*From August 2013 I have had very little contact with Mr Beach to date*".

    v) He disagrees with Stuart-Smith J's assertion in paragraph [32] of the judgment that "*by Mr Beach using a similar method of publication as I*

did, that this is compelling evidence that I am involved with the construction of Mr Beach's websites". He disagrees also with the conclusions drawn by Stuart-Smith J about his role as agent for Mr Beach in paragraph [33] of the judgment. In conducting this correspondence he was acting much like a solicitor representing their client, making "*efforts as arbitrator*", he says.

vi) He had made clear in his 18 August 2014 letter "*that I have nothing to do with Mr Beach's websites or* [XYZ.net] *which was a domain transferred to Mr John Angel three years earlier*", that there would never be evidence to suggest differently, and that "*it was inevitable that some who had previously relied on my own website would create their own website*".

33. Mr Kordowski addresses his failure to participate in the proceedings in this way:

i) He says he did not receive notice of the claim by way of letter of claim or otherwise. "*The first I heard of these proceedings was on the evening of Friday 15 August 2014. When a High Court Order was served*". Whilst the claimant's solicitor was maintaining that the letter of claim was sent to his email address the one used was "*my old hotmail account from years ago, which I now rarely use*."

ii) Having written to the claimant's solicitors on 18 August 2014 he was served with "*many bulky documents and letters*" but his wife is terminally ill and he is her sole carer. The last thing he wanted to do was to be reading documents "*on a matter that has little to do with me*".

iii) As to the default judgment hearing he says: "*I cannot afford representation nor did I have the spare time to represent myself during the hearing on 16 September 2014*". He says however he "*felt confident that the claim would be discharged and the order not made final if I relied on my letter dated 18 August 2014*."

34. Mr Kordowski says that he telephoned Mr Beach's home over the weekend of 16/17 August and was informed by his wife that he was in a bad way. It later transpired that Mr Beach had a serious heart condition requiring an operation for which he admitted to hospital on 11 September with a stay of 8 days and thus could not attend for the hearing. This account was supported by copy documentation which Mr Kordowski told me he had been sent by Mr Beach's wife. These evidenced a referral to a cardiology clinic in July, an angiogram in early August, a review on 20 August, and arrangements made on 26 August for urgent open heart surgery in September. There was the first page of an admission letter of 11 September addressed to Mr Beach and referring to an operation taking place the following day. In answer to questions from me Mr Kordowski said that he would have hoped to obtain from Mr Beach confirmation that Mr Kordowski had nothing to do with the websites registered by Mr Beach. He said he had not been in contact with Mr Beach since the operation.

35. In response to Mr Kordowski's application the claimant filed the evidence which had been before Stuart-Smith J on 16 September 2014, together with a further witness statement from the claimant's solicitor.

Law and Principles

36. Relevant provisions of the Protection from Harassment Act 1997 (PHA), under which the claims are made are as follows:-

> "**1.— Prohibition of harassment**.
> (1) A person must not pursue a course of conduct—
> (a) which amounts to harassment of another, and
> (b) which he knows or ought to know amounts to harassment of the other.
> (2) For the purposes of this section … the person whose course of conduct is in question ought to know that it amounts to … harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to … harassment of the other
> …
> (3) Subsection (1) … does not apply to a course of conduct if the person who pursued it shows—
> (a) that it was pursued for the purpose of preventing or detecting crime,
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.
> …
> **3.— Civil remedy.**
> (1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings
> …
>
> **7.— Interpretation of this group of sections.**
> ….
> (2) References to harassing a person include alarming the person or causing the person distress.
> ….
> (3A) A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another–
> (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and
> (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.
> (4) "*Conduct"* includes speech."

37. The law of harassment protects the right to be free from unjustifiable alarm and distress, which is an aspect of the right to respect for private life different from the

right to reputation which is protected by the law of defamation: *Law Society v Kordowski* [2014] EMLR 2, [74].

38. CPR 13.3 sets out the principles to be applied upon an application to set aside a default judgment entered under Part 12 in a case such as this, where the court is not obliged to set aside. In such a case

> "(1) ….. the court may set aside or vary a judgment entered under Part 12 if -
> (a) the defendant has a real prospect of successfully defending the claim; or
> (b) it appears to the court that there is some other good reason why –
> (i) the judgment should be set aside or varied; or
> (ii) the defendant should be allowed to defend the claim.
> (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.
> (Rule 3.1(3) provides that the court may attach conditions when it makes an order)"

39. These provisions place the burden on an applicant for an order setting aside a default judgment to satisfy the court that one of the conditions specified in CPR 13.3(1) is met and that the court's discretion should be exercised so as to set the judgment aside. In exercising the discretion, if it arises, the court is obliged to have regard to relevant matters which include but are not limited to whether the application was made promptly. The discretion must of course be exercised so as to give effect to the overriding objective in CPR 1.1.

40. A "real prospect" means, as it does in the context of summary judgment under CPR 24, a prospect that is more than fanciful. As Lord Hobhouse observed in the context of the Part 24 test in *Three Rivers DC v Bank of England (No 3)* [2001] 2 All ER 513, "*The criterion which the judge has to apply … is not one of probability; it is absence of reality*." The court should not conduct a mini-trial when assessing whether a party has a real prospect of success.

41. The word "promptly" in CPR 13.3(2) is to be construed as requiring "*all reasonable celerity in the circumstances*": *Khan v Edgbaston Holdings Ltd* [2007] EWHC 2444 (QB), [13] HHJ Peter Coulson QC, citing the words of Simon Brown LJ in *Regency Rolls Ltd v Murat Carnall* [2000] EWCA Civ 379, [45] with reference to the requirement of CPR 39.3(5)(a) that the applicant act promptly in applying to set aside judgment after a trial which the defendant had not attended. (The terms of CPR 39.3(5) are set out below).

42. It is submitted by Mr Busuttil for the claimant that it would not be enough for Mr Kordowski to satisfy the requirements of CPR 13.3. He argues that Stuart-Smith J granted the claimant not only a default judgment but also a final injunction. That he submits was an order on the merits quite separate from and additional to the default judgment, and it is therefore incumbent on Mr Kordowski to persuade me to revoke that order pursuant to the court's general case management powers

under CPR 3.1(7) which provides that "*A power of the court under these rules to make an order includes a power to vary or revoke the order*." Mr Busuttil then goes on to refer to a number of cases in which the court's approach to the exercise of this power has been considered. This jurisprudence distinguishes between interim or other procedural orders on the one hand and final orders on the other.

43. The authorities relating to interim or procedural orders begin with the decision of Patten J in *Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen* [2003] All ER (D) (Jul) where he held, without attempting an exhaustive definition, that for the High Court to revisit one of its own earlier orders the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way. Patten J's decision was approved by the Court of Appeal in *Collier v Williams* [2006] EWCA Civ 20, [2006] 1 WLR 1945. These and subsequent authorities were most recently reviewed by the Court of Appeal in *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 1591 where the court of first instance had relied on r 3.1(7) to vary a reallocation order. At [39] Rix LJ, with whom the other members of the court agreed, drew conclusions from the jurisprudence which included the following:

> "(i) … The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.
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> …
>
> (iii) … the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be exercised namely normally only (a) where there has been a material change of circumstances since the order was made or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated
>
> …
>
> (vii) The cases considered above suggest that successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word; however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation."

44. The applicability of r 3.1(7) to final orders was considered in *Roult v North West Strategic Health Authority* [2009] EWCA Civ 444, [2010] 1 WLR 487 where the Court of Appeal dismissed an appeal against a judge's refusal to re-open a final

order approving a settlement of a personal injury action which had been based on what turned out to be a false assumption as to the future living arrangements of the claimant. The court, having considered the *Ager-Hanssen* case and *Collier v Williams,* held that it would not be justifiable to exercise the power under r 3.1(7) merely because the earlier decision had been based on erroneous information, or subsequent events had destroyed the basis on which it was made, even if such circumstances might justify the revocation or variation of an interim order. Hughes LJ held that [15] *"The interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist."* Smith and Carnwath LJJ agreed.

45. In *Kojima v HSBC Bank plc* [2011] EWHC 611 (Ch), [2011] 3 All ER 359 the defendant was sued for recovery of sums due under an unsecured loan. Acting in person he made admissions, upon which the judge ordered that unless the defendant executed a charge for the admitted amount the claimant bank should be at liberty to enter judgment. The defendant was then advised that he had a defence and applied for, among other things, permission to withdraw his admissions and the revocation of the unless order pursuant to CPR 3.1(7). The application was dismissed. On appeal from the County Court Briggs J considered the authorities and, basing himself principally upon *Roult v North West Strategic Health Authority*, held that whilst there was no simple jurisdictional ban on the application of r 3.1(7) to final orders, any jurisdiction that did exist was severely curtailed. He said:

> "30 In my judgment once the court has finally determined a case, or part of a case, considerations of the type first identified by Patten LJ in *Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen* [2003] All ER (D) (Jul) will generally be displaced by the much larger, if not indeed overriding, public interest in finality, subject of course to the dissatisfied party's qualified right of appeal.
>
> …
>
> 33 Leaving aside default judgments, with their self-contained regime for setting aside, I consider that a line has to be drawn between orders for which revocation may be sought under Part 3.1(7) upon the alternative grounds first identified in *Lloyds v Ager-Hanssen* and approved in *Collier v Williams* on the one hand, and final orders, to which the public interest in finality applies, on the other. I consider that orders made by way of judgment on admissions fall clearly within the second of those categories. Once a party has admitted a claim, and judgment has been given against him on the claim, the other party is in principle entitled to assume that, barring any appeal, there is an end to the matter.
>
> 34 It is unnecessary for me to conclude whether exceptional circumstances may nonetheless justify the revocation or variation of a final order within that second category, still

less to prescribe in advance what those circumstances might be…"

46. Briggs J's decision in *Kojima* was appealed, but without affecting this point: [2011] EWCA Civ 1709; [2012] 1 All ER 1392. The decision was referred to by Rix LJ in *Tibbles* at [38] but as indicated by his paragraph [39](i) quoted above the court did not in that case address the application of r 3.1(7) to final orders.

47. In *Hackney London Borough Council v Findlay* [2011] EWCA Civ 8, [2011] PTSR 1356 the Court of Appeal considered the exercise of the discretion under r 3.1(7) in the context of an order for possession against a secure tenant of the claimant council, made at a hearing in the absence of the defendant. The court held that although the short hearing at which a decision is made whether to grant a possession order does not involve a trial for the purposes of CPR 39 (*Forcelux Ltd v Binnie* [2010] HLR 340, CA), in the absence of some unusual and highly compelling factor a court that is asked to set aside a possession under CPR 3.1(7) when the tenant has not appeared at the hearing should in general apply the requirements of CPR 39.3(5) by analogy. CPR 39.3(5) provides that where application is made to set aside a judgment or order made against the applicant at a trial held in his absence "*the court may grant the application only if the applicant (a) acted promptly when he found out that the court had entered judgment or made an order against him, (b) had a good reason for not attending the trial and (c) has a reasonable prospect of success at the trial.*"

48. Mr Busuttil's primary submission in the light of this jurisprudence is that the injunction in the present case is an order on the merits analogous to an order made by way of judgment on admissions. It therefore falls within the second category of cases referred to by Briggs J in *Kojima* at [33] and can only be challenged by way of appeal unless, perhaps, there are exceptional circumstances, which he submits there are not. What Briggs J had in mind when "*leaving aside default judgments and their self-contained regime for setting aside*" in his paragraph [33], submits Mr Busuttil, was "*simply the self-contained regime in CPR Pt 13 for setting aside default* judgments, *not the* orders *a Court might go on to make in favour of a claimant, e.g. an injunction, having decided to enter default judgment under CPR r.12.11(1) following an application by the claimant under CPR r.12.4(2)*". In parenthesis Mr Busuttil submits that even if the injunction had been an interim order the decision in *Tibbles* shows that to have it revoked under CPR 3.1(7) Mr Kordowski would have had to show a material change of circumstances or that Stuart-Smith J had been misled. Alternatively, he suggests, without actively advocating this course, that since the order under challenge was a final order made at a hearing which was not attended by Mr Kordowski the court may conclude that it is appropriate when considering whether to revoke the order pursuant to CPR 3.1(7) to adopt the approach prescribed in respect of possession orders in *Hackney LBC v Findlay*, and apply the principles set out in CPR 39.3(5) by analogy. (It could only be by analogy, as a default judgment is defined in CPR 12.1 as "judgment without trial".).

49. The submission that it is necessary for a party seeking to set aside a default judgment successfully to invoke CPR 3.1(7) if there is not merely a default judgment but also an order such as a final injunction is novel and I do not accept it. I can see no good reason for regarding the provisions of CPR 12 and 13 as

anything other than a self-contained regime governing the procedure for the grant, variation or setting aside of judgment and all such orders as the court considers the claimant is entitled to where the conditions prescribed by these rules are, or are alleged to be satisfied.

50. The distinction which Mr Busuttil seeks to draw between default judgments and orders is not a sound one, in my view. As noted in n 41.1.1 of volume 1 of Civil Procedure 2014 the terms "judgment" and "order" have been assigned a variety of meanings in different contexts over the years, neither is defined in the interpretation provisions of the CPR (r 2.3) or the CPR glossary, and they are used in many contexts in the rules, sometimes in conjunction and sometimes not. The meaning of either must be gathered from the context.

51. In the context of CPR 3.1(7) the court has been prepared to acknowledge that the term "order" could in principle include an order made as part of a final judgment: see, eg, the decision of Briggs J in *Kojima* as well as *Independent Trustee Services Ltd v GP Noble Trustees* [2010] EWHC 3275 (Ch). In the context of CPR 12 and 13 it seems to me that the term "judgment" should be read as including any order made by the court when it enters default judgment. This is plainly so when it comes to the words "*such judgment as it appears to the court that the claimant is entitled to on his statement of case*" in r 12.11(1). This wording contemplates that the court has options as to the form of judgment, which in turn implies that "judgment" means something beyond "judgment for the claimant". The fact that r 13.3(1) gives the court power to "vary" a default judgment is also an indication that these rules do not treat a default judgment and an order giving effect to it by granting particular relief as separate and distinct.

52. This being so, there is no need to look beyond CPR 13 for a power to set aside any orders made by the court under CPR 12 upon granting a default judgment. Nor would it be appropriate in my view for the court to import into the decision-making exercise under CPR 13 the principles developed in the context of r 3.1(7) for the revocation or variation of a previous order. Those principles have been developed by the court in order to set appropriate limits on an "omnibus" power of general application which on its face confers an open discretion. CPR 13, by contrast, contains specific provision governing applications of a particular kind, to vary or set aside default judgments.

53. Further, for the most part, the situation contemplated by the court in developing the principles under r 3.1(7) has been one in which, as in *Tibbles*, *Roult* and *Kojima*, the earlier order followed a decision made on the merits after hearing evidence and/or submissions from both sides. Judgments under CPR 12 will, in the nature of things, almost invariably have been granted in the absence of evidence or representations from the defendant. More than this, applications under Part 12 will normally be presented and decided on the basis of no evidence from the claimant other than the claim form, particulars of claim and proof of service. Evidence going to the merits is not required. The relief granted will normally be sought and granted as CPR 12.11 prescribes, on the basis of the claimant's statement of case. That procedure is efficient and proportionate. Such a judgment is final and, to the extent it involves consideration of what relief is justified on the basis of the facts alleged in the statements of case, it does have an element of merits assessment. However, the incorporation into the CPR 13 regime of the

approach laid down in *Kojima* would be at odds with the scheme of r 13.3 which clearly envisages that upon an application to set aside the court of first instance ordinarily will, as a primary step, assess the defendant's prospects of success.

54. An application to set aside a possession order made in the tenant's absence, as considered in *Hackney LBC v Findlay*, represents the closest analogy to an application under r 13 to be found in the r 3.1(7) jurisprudence. However, it is one thing to apply by analogy the principles set out in CPR 39.3(5) where an application is made to set aside a possession order under the general powers conferred by r 3.1(7) and another to apply those principles where application is made under the tailored regime contained in CPR 13 to set aside a default judgment entered in the defendant's absence. To take the latter course would amount to re-writing CPR 13.3 in at least two ways: by making prompt application a threshold requirement rather than a discretionary consideration, and by inserting an additional threshold requirement in the form of good reason for not attending the default judgment hearing. That would be wrong when on the face of it a deliberate decision has been taken to specify less demanding thresholds for setting aside a default judgment under r 13 than those prescribed for setting aside judgment after a trial in the defendant's absence under r 39. In those circumstances I need not consider whether the "*reasonable prospect of success*" required by CPR 39.3(5)(c) is something different from the "*real prospect of successfully defending the claim*" required by CPR 13.3(1)(a).

55. For these reasons I reject the submission that an applicant who seeks to set aside a final injunction granted upon the entry of default judgment needs to persuade the court that the requirements laid down by the r 3.1(7) jurisprudence are satisfied.

56. I would however accept that if unusually, as here, a defendant has put forward a defence in correspondence which the court has reviewed and reached adverse conclusions about in the process of granting a default judgment, those conclusions are not to be ignored if the defendant later makes an application under r 13.3. The defendant seeking to establish that he has a real prospect of success will need to persuade the court that this is so notwithstanding the court's previous conclusions, although the earlier judgment will not, and the judgment of Stuart-Smith J does not, foreclose the question of whether there is a real prospect of success.

57. I would also accept that whilst proof of a good reason for non-attendance at the default judgment hearing is not a pre-requisite for an order setting aside a default judgment the question of whether there was any good reason for the defendant's failure to participate, by failing to acknowledge service in the first instance or take steps after that, is relevant to the exercise of the court's discretion under r 13.3, if that discretion arises.

The claimant's submissions on the CPR 13 application

58. The 4th witness statement of the claimant's solicitor, Mr Wilson, asserts that Mr Kordowski's evidence does not meaningfully challenge the findings of Stuart-Smith J, and that in part it supports the case against Mr Kordowski. It is submitted by Mr Busuttil that Mr Kordowski has not established in his evidence, taken at its highest, that he has a real as opposed to a fanciful prospect of successfully defending the claim. Mr Busuttil, without prejudice to the generality of that

submission, makes a number of specific points. He focuses his attention on the evidence of Mr Kordowski's role as agent for Mr Beach and submits that Mr Kordowski's witness statement tends to support the claimant's pleaded case that the defendants were jointly embarked on a course of harassment with the result that Mr Kordowski is liable both for his own and Mr Beach's conduct as a joint tortfeasor. Mr Busuttil refers to the correspondence involving Mr Kordowski and submits that on his own evidence Mr Kordowski's liability on the basis of joint tortfeasorship is plain. In addition, Mr Busuttil relies on s 7(3A) of the PHA 1997 and submits that the correspondence evidences Mr Kordowski aiding and abetting Mr Beach in his harassment of the claimant and Listed Protected Parties.

59. Mr Busuttil observes that there is nothing in Mr Kordowski's witness statement to the effect that he "*renounced or repudiated his relationship with* [Mr Beach] *or his decision to aid and abet* [Mr Beach] *in his harassment of* [the claimant]" or "*that he made any effort to persuade* [Mr Beach] *to desist from his harassing activities*".

60. Mr Busuttil submits that Mr Kordowski has not established any other good reason why the judgment should be set aside or varied or why he should be allowed to defend the claim. Nor has he made his application to set aside the default judgment promptly, 21 days having gone by after he was served with Stuart-Smith J's Order before he issued his application to set it aside. Mr Busuttil points out that Mr Kordowski offers no explanation in his evidence for not issuing his application sooner.

61. It is further submitted by Mr Busuttil, as regards the court's discretion, as follows:

    i) The claimant has done everything "by the book" at considerable expense to obtain his injunction. Mr Kordowski, a seasoned litigant, has had his chance and chosen not to engage with the process. To permit him to set aside now would be unjust to the claimant and prejudicial to the administration of justice more generally.

    ii) The claimant has put the final injunction to use since it was granted, by providing it to various third parties to expedite the removal of content on the worldwide web, and by serving it on Mr Jim Bloomfield, the putative "owner" of some of the more recent websites complained of. This is said to have given the claimant and the Protected Parties peace of mind which it would be unfairly prejudicial to take away now.

    iii) There is good reason, submits Mr Busuttil, to believe that in making this application Mr Kordowski is deliberately making mischief and abusing the process, causing the claimant to incur further costs in the knowledge that he will be unable to recover those costs from him. In support of this submission Mr Busuttil refers to adverse findings about Mr Kordowski in *The Law Society v Kordowski*, ("*a public nuisance … in effect a vexatious litigant who is a defendant*": [183]); the designation by the Court of Appeal of two applications by him for permission to appeal as totally without merit (in *Mazzola v Kordowski* and *Philips v Kordowski* and *Farrall v Kordowski*: see the *Law Society* judgment at [16] and [19] respectively); and to findings that he was abusing the process in *Kordowski*

v Hudson [2011] EWHC 2667 (QB), [44] and *Awdry Bailey and Douglas v Kordowski* [2011] EWHC 785 (QB), [25].

Discussion

62. The evidence leaves me in no doubt that the publications relied on via XYZ.net and the various Beach Websites amounted to harassment of the claimant and Protected Parties contrary to s 1(1) of the PHA. Equally, there is no doubt that Mr Kordowski has a very bad record for engaging in precisely this kind of behaviour. For years he provided an outlet for the expression of his own and others' grudges against solicitors and other legal professionals in a form which involved the harassment of large numbers of individuals. His operation of the sfh.co.uk site was oppressive and unlawful and his conduct in proceedings which flowed from his operation of that site was clearly, on occasion at least, vexatious and abusive of the process.

63. However I have to assess the present case on its apparent merits to see whether Mr Kordowski has satisfied the criteria laid down by CPR 13.3. Whilst his litigation history means that I am entitled to be sceptical when examining his evidence and submissions, it would be wrong to find against him in this case merely or mainly on account of past findings of misconduct. I must be mindful also of the fact that in all the previous cases Mr Kordowski was the admitted publisher of the offending material; in the present case he claims he is not responsible for publication. I also have well in mind that the position before Stuart-Smith J was, as the claimant's skeleton argument for that hearing stated, that although Mr Kordowski had denied involvement by letter "*he has not done so on the basis of a statement of truth and nor has he been cross-examined on his denials.*" He has now put forward grounds of defence over signed statements of truth, principally in a witness statement.

64. I address first of all the question of Mr Kordowski's responsibility for the operation of XYZ.net. There is a conflict of evidence as to whether this was operated as a mirror site for sfh.co.uk during the period when Mr Kordowski was admittedly responsible for operating the latter site. The claimant produces two pages of historic impressions from XYZ.net dated 24 August 2010 which appear to support that view. Mr Kordowski produces what is said to be a printout from a web archive showing activity on XYZ.net which reflects publication on the site on 24 August 2010 but suggests that such use was a one-off and that otherwise the site was, as he claims, dormant until after the transfer to Mr Angel. I cannot resolve the conflict on this application, and do not consider it would be decisive in any event, given that the period of time in question predates the period complained of.

65. Mr Kordowski's claim to have had nothing to do with the XYZ.net site since the domain name transfer to Mr Angel seems to me a highly improbable assertion. It is true that there was a transfer of the domain name to a Mr Angel on 3 November 2011. A document evidencing this was provided by the registration service provider on 25 July 2014 in response to a *Norwich Pharmacal* disclosure order obtained by the claimant and the Law Society. It records Mr Angel of an address in Panama as the current registrant, having renewed the name on 15 June 2012. But no explanation is given of who Mr Angel is. Nor is there an explanation of

why he wished to take over the domain name, other than Mr Kordowski's assertion that it was inevitable that those who relied on his site would inevitably "create their own". The site that was created does not appear to be one created as "their own" by someone else.

66. The similarities between XYZ.net and sfh.co.uk are as Stuart-Smith J found, striking, and it has not been explained how, if Mr Kordowski was not responsible for its operation or at least for assisting in its operation, it came to include so much material drawn from sfh.co.uk both in terms of imagery and wording. Although the website professes on its face to be "owned" by someone other than Mr Kordowski there is no evidence on the website as to who this is, even though Mr Kordowski refers to it as "Mr Angel's website". It is an obvious possibility that Mr Angel is a pseudonym and/or a front for Mr Kordowski or associates. Neither Mr Kordowski nor Mr Beach denied allegations when made in the letter of claim, that Mr Kordowski was responsible for setting up, construction or publication of the part of XYZ.net that relates to the claimant's firm. Mr Kordowski denies having received that letter, but Mr Beach does not and it is inherently likely that he drew it to Mr Kordowski's attention.

67. Against this, however, I bear in mind that this allegation inescapably involves the assertion that Mr Kordowski has been acting in breach of the injunctions granted against him in the *Law Society* case. The claimant does not shrink from making that allegation, which was clearly set out in the letter of claim. It is however a serious one, and whilst the standard of proof always remains the balance of probabilities the inherent probability of this misconduct being perpetrated by this individual needs to be considered. Mr Kordowski has been found guilty of serious wrongdoing in the past but not so far, on the evidence, contempt by breach of an injunction.

68. Mr Kordowski has now stated his position clearly in a witness statement. The evidence against him is inferential and I have not been directed to nor have I identified in the evidence any material which persuades me that the evidence of Mr Kordowski's involvement with XYZ.net is so powerful that what he now says in his witness statement must be disbelieved on this application, without the need for cross-examination. Mr Kordowski has not been cross-examined on his statement. My conclusion is that though Mr Kordowski's case on this issue is highly improbable it is not fanciful to envisage that it could succeed.

69. I have reached a similar conclusion in respect of Mr Kordowski's alleged involvement in creating the Beach Websites and publishing their content. The circumstantial evidence points strongly towards the likelihood that he was so involved. The claimant's evidence is that Mr Beach was not, to the claimant's knowledge, experienced in IT, whereas Mr Kordowski is highly skilled. This is not denied. There are strong similarities between the get up of the sfh.co.uk site and XYZ.net and that of the Beach Websites, and there were links between XYZ.net and the Beach Websites. Again, allegations made in correspondence that Mr Kordowski was involved have not been denied by him or by Mr Beach. Nobody has ever explained who, if not Mr Kordowski, created these sites unless it be Mr Beach who is – as on one occasion Mr Kordowski stressed – a chicken farmer.

70. Mr Kordowski's evidence on the question of his responsibility is decidedly thin, consisting of a reiteration of his 18 August letter and an expression of disagreement with Stuart-Smith J's conclusions. Further, although he has produced evidence that shows on its face that Mr Beach, whom he says could give evidence corroborating his claims, was seriously ill for some of the August to September period and hospitalised for some 8 days, the evidence does not suggest that he was wholly disabled throughout that period. Nor has Mr Kordowski shown that evidence could not have been obtained from Mr Beach after he left hospital on or about 19 September, which was over a month before the hearing.

71. However, Mr Kordowski's denial of involvement is again now made in a witness statement over a statement of truth, and the case against him on the evidence as it presently stands is not in my judgment so overwhelming as to compel rejection of what he says as unreal. The claimant states in paragraph 39 of his witness statement that "*I understand that Mr Kordowski has constructed the websites*", but the source of that understanding is not identified. The particulars of claim allege in paragraph 12 that "*Mr Kordowski worked together with Mr Beach to set up and develop the Beach Websites, to keep them functional and operational, and to optimise their searchability*." However, the claimant's case in this respect appears to be an entirely inferential one with three main elements to it: Mr Kordowski's IT and web design skills similarity of the Beach Websites to the sfh.co.uk and XYZ.net sites; and Mr Kordowski's role as agent for Mr Beach after complaint was made by the claimant's firm in April 2012.

72. On the skills front, I not aware of any evidence which serves to exclude as a real possibility resort by Mr Beach to someone adequately skilled in IT other than Mr Kordowski. As to similarity, I can well understand why Stuart-Smith J found the evidence of similarity sufficiently compelling for the purposes of determining whether default judgment should be granted, in the absence of any evidence at all from Mr Kordowski. However, the similarities in this context are less striking than those between sfh.co.uk and XYZ.net, and the claimant's evidence does not include anything to establish that the similarities may not be due to some factor other than Mr Kordowski's involvement such as, for example, simple copying by Mr Beach or some agent of his other than Mr Kordowski of the get up and arrangement of XYZ.net.

73. Mr Kordowski's role as Mr Beach's agent for the purposes of correspondence with the claimant's firm from April 2012 does tend to make it more likely that Mr Kordowski was also involved in the setting up of the Beach Websites, or some of them. However, the correspondence itself is neutral on that point; it neither supports nor contradicts that view. The evidence is not in my judgment so strong as to make it unreal for Mr Kordowski to deny having anything to do with the construction or publication of any of the Beach Websites. There is a circumstantial case of some weight, I agree, but I must be cautious of inferring guilt by association. My conclusion is again that whilst Mr Kordowski's case as to his lack of involvement in creating or publishing the Beach Websites appears an improbable one it is not one that is apt for summary dismissal as having no real prospect of success.

74. I turn to the case of joint tortfeasorship on which Mr Busuttil focuses his submissions. This is a case that depends on Mr Kordowski's conduct of

correspondence on behalf of Mr Beach between April 2012 and July 2013. The essence of the case is that there was a common design to perform acts that were harassing, and that Mr Kordowski's correspondence was undertaken in furtherance of that common design. The case of aiding and abetting that is advanced by Mr Busuttil in reliance on s 7(3A) of the PHA is another way of putting the case in reliance on the correspondence.

75. This is not the case pleaded in the particulars of claim. The particulars plead a case of common design to harass but not a case of aiding and abetting. The pleaded case of common design identifies the "*overt acts carried out by each of* [the defendants] *in furtherance of the common design*" as the acts of harassment detailed subsequently in the particulars, namely publishing or causing or permitting the publication from March 2012 of the offending allegations with the requisite state of mind. No reference is made here to any of the correspondence in which Mr Kordowski engaged as agent for Mr Beach in and after April 2012. It appears that this way of putting the case is one that has occurred to the claimant's team more recently. It is not a way of putting the case that was advanced before Stuart-Smith J on 16 September 2014.

76. In addition, the submissions advanced on this application are somewhat broad brush. They do not involve any examination of the authorities on joint tortfeasorship or aiding and abetting or how the law applies to the facts of this case. Mr Busuttil has not entered into the correspondence in detail. Mr Kordowski's role involved passing on letters ostensibly written by Mr Beach, making representations himself against the complaints and claims advanced by the claimant's firm, and proposing settlement discussions. This clearly did not involve arbitration as he claims. However his case that his role was similar to that of a solicitor is not manifestly misconceived, and it is not really addressed by the claimant's evidence or submissions.

77. Moreover, some of the correspondence relied on by the claimant was marked "Without prejudice as to costs". It is said in the evidence that this heading should be ignored as the content was not put forward as a good faith attempt to settle but no argument was addressed to that point which involves a notoriously difficult area of the law. The position is also different now from how it stood before Stuart-Smith J, in that Mr Kordowski has given evidence the effect of which is that he ceased acting as Mr Beach's agent in about August 2013. Mr Kordowski's statement that he had very little contact with Mr Beach after August 2013 is not contradicted, merely criticised as not involving an unequivocal assertion of no involvement or of disengagement.

78. Against this background I have concluded that the issue of Mr Kordowski's liability as a joint tortfeasor or an aider and abettor on the basis of his role in correspondence as agent for Mr Beach is not one suitable for summary resolution on this application. For Mr Kordowski to be held liable on this basis there should first be a clear statement of the claimant's case in this respect, identifying the conduct of Mr Kordowski that is said to amount to furtherance of the common design to harass. There would then need to be a more thorough analysis of the correspondence than it was possible to undertake for the purposes of this hearing, considering first whether it is right for the court to ignore the "without prejudice save as to costs" markings, secondly whether and if so to what extent the

correspondence can properly be said to involve conduct by Mr Kordowski in furtherance of a common design and thirdly, if so, whether there is any potential defence available to him, under s 1(3) PHA or otherwise.

79. For these reasons I am persuaded, albeit by a narrow margin, that Mr Kordowski has a real prospect of successfully defending the claim based on assertions that he was not responsible for making, causing or permitting the publications complained of on XYZ.net and the Beach Websites. As for the case of joint tortfeasorship based on his conduct of correspondence I consider that that there are reasons for allowing him to defend it. This is an unpleaded basis for asserting his liability which requires fuller evidential and legal analysis. Nor have the potential defences to it or their application to the facts of this case been adequately addressed.

80. I turn to the question of discretion. There is much to be said against Mr Kordowski on this issue. Whatever may be the position as regards his receipt or notice of the pre-action correspondence, there is no doubt that Mr Kordowski was aware of these proceedings by no later than 15 August 2014, by which time he was in possession of the claim documents, including a response pack. Besides the fact that this documentation spells it out Mr Kordowski, as an experienced litigant, must have been well aware that if he wanted to defend the claim he needed to file a Defence, or an acknowledgment of service stating an intention to defend, followed by a Defence. He did neither and has offered no excuse for failing to do so. This is a significant default and I conclude that it was deliberate.

81. Mr Kordowski's "lack of spare time" excuse for not dealing with the application for default judgment is unacceptable. It is not credible that he needs to be with his wife at all times; he has managed for example to attend the hearing of this application. He made no attempt to ask for an adjournment of the default judgment hearing to accommodate any difficulties he might have had. Mr Kordowski chose to take his chance on the court concluding on the basis of his letter that he had a viable defence.

82. His application to set aside judgment, 21 days after service of the final order, was not prompt and the delay is unexplained. It is understandable for the claimant to complain that this application comes too late and that it would be unjust to him and those he represents to grant it. The need for efficiency and proportionate cost in litigation and the need to ensure that rules are complied with count against Mr Kordowski.

83. I must however take account of all the circumstances of the case in exercising my discretion. There are six matters which can be set against the factors considered above and in favour of the exercise of the court's discretion in Mr Kordowski's favour. The first is that the judgment imposes on him a very large costs liability when he may have a meritorious defence. I add that Mr Busuttil's submission that the claimant's costs may be irrecoverable appears to assume that Mr Kordowski will be bankrupted by them. This seems plausible, since he was made bankrupt in 2011 (as recorded in the judgment of Tugendhat J in the *Law Society* case).

84. Secondly, the default judgment application would have proceeded against Mr Beach in any event, even if Mr Kordowski had put in an acknowledgment of

service or Defence. The costs of that application have not, therefore, been wasted. Thirdly, and contrary to one of Mr Busuttil's submissions, even if the judgment is set aside against Mr Kordowski the claimant and those he represents have and will retain the comfort of the injunction against Mr Beach. The reliance so far placed on the order of Stuart-Smith J will not be undermined. Fourth, the *Law Society* injunctions remain in force against Mr Kordowski as they have throughout these proceedings and, in principle, protect the claimant and Protected Parties among others. Fifthly, Mr Kordowski's delay in applying to set aside has not itself disrupted the course of this or other litigation. Finally, the only issues that have been raised as to Mr Kordowski's liability for the course of conduct complained of in this action are issues as to his responsibility for publication; those issues are or should be relatively confined issues capable of resolution without enormous expenditure.

85. In the end these six matters in combination are just enough to persuade me that, despite Mr Kordowski's serious default and unwarranted delay and the improbability of his answers to the claims, it would be just in principle to exercise my discretion to set aside the default judgment and final injunction as against Mr Kordowski, and to allow him to defend, subject to appropriate conditions. I shall hear the parties on the appropriate form of order including, if sought, any interim remedy. I make clear, however, that I have in mind tight conditions, which must include as a first step the production by Mr Kordowski of a properly pleaded Defence. I also propose to impose a strict timetable for the progress of the case to a trial in the most cost effective way. I imagine that the claimant may seek costs orders against Mr Kordowski. If so, and if he is to maintain that he is unable to pay, or unable to pay promptly, he will need to produce supporting evidence.