IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Case No.

2016 EWHC 154 (QB)

HQ15D02245

Royal Courts of Justice

Friday, 8th January 2016

Before:

MASTER McCLOUD

B E T W E E N :

Dr Adel Abdel-Bari

Claimant

- and -

Nottingham University Hospitals NHS Trust

Defendant

For the Claimant: Mr Adam Speker of counsel instructed by Simon Burn Solicitors.

For the Defendant: Ms Lorna Skinner of counsel instructed by Browne Jacobson Solicitors.

Hearing: 8 January 2016
Judgment in Draft: 18 January 2016
Handed down: 29 January 2016

JUDGMENT

1. This is my judgment in respect of two applications in the course of these libel proceedings brought by Dr Abdel-Bari against Nottingham University Hospitals Trust (the 'Trust'). The first in time is the application by the Defendants to strike out the claim on the basis that it is out of time, having been issued more than one year from the date of the alleged libel, under s. 4A Limitation Act 1980.

2. The second application is that of the Claimant, to amend (effectively by substitution) his Particulars of Claim and for an order disapplying the Limitation Act period. Dr Abdel-Bari was acting in person at the time he issued his claim and served his Particulars but is now represented.

3. The amended Particulars would, if allowed, also include additional causes of action arising from the same facts namely a claim under the Data Protection Act 1998 and a claim in malicious falsehood.

4. There was initial argument before me, before we embarked on the main hearing, as to the order in which the applications should be heard. The Trust argued that their application (first in time) should be heard first because if it was granted they took the position that there would, in that event, be no claim capable of amendment so as to plead the additional causes of action (the Trust referred mainly to the Data Protection Act claim in this regard) and hence the Claimant's application would fall away. As a matter of practical reality on the existing causes of action however it was common ground that I should look at the merits of the proposed amended claim as part of the discretionary exercise under the Limitation Act.

5. Whilst I do not necessarily accept the proposition that I would have no jurisdiction to allow an amendment to substitute a new cause of action even after striking out a pleading, which was the gist of the point, I nonetheless decided to hear the limitation point first but invited the parties to make their other submissions in the course of that, on the basis that the merits of the case as amended were a relevant factor. I 'parked' the Data Protection Act aspects until I had heard submissions on the other aspects.

The background

6. The Claimant (C) is a doctor. Starting on what by now must be a date permanently etched in his mind, he worked for three nights as a locum registrar in the Trust's Obstetrics and Gynaecology department. He had been booked to work 4 nights but his work was terminated early. He was at the Trust from 6 May 2013 for three nights.

7. The Trust declined to authorise his pay for the fourth night, and ended his placement. The Trust, apparently concerned that there might be an Employment Tribunal case arising from the above, sent an email to staff on 9/5/13 as follows, in part (tab 5 p16 of the bundle). The author was Dr Alec McEwen, a consultant Obstetrician and also the Director of the Obs. and Gyn. Training programme at the Trust (therefore on any basis a senior professional) : "*... [the Claimant] was meant to be working tonight but due to widespread complaints and concerns .... He was told not to return tonight. ... I haven't really been involved in making this decision today for another locum, however apparently it had to fall on me to explain to him why we were only signing off three nights ... He feels very aggrieved and may take this further .... This was very difficult for me because I haven't witnessed any of the problems that you have all raised. Please reply to me, and explain to me what the specifics were of the concerns you had. I need to collect these and save them for the future. It is my signature on the claim form (for three nights) and I do not want to be left alone if he takes this further. Please encourage any other staff who had problems with him to let me know in writing ...*"

8. A senior midwife named Ms Sue Brydon responded to the request from Dr McEwan on 13/5/13 [tab 5 p17]. The email makes several allegations but the one which is directly relevant to this claim is as follows: "*I came on duty on the 8th to be told that the night staff had experienced several problems with this doctor … He had just examined a muslim woman in room 3 who was SROM and was contracting irregularly. The woman had been very traumatised by this as it was very painful and also upsetting for her as a muslim – she was refusing all further intervention and this seemed to be based on her experience during this examination. There was actually no clinical reason for her to have a vaginal examination at all given her history of SROM …when I arrived on the labour suite Dr Bari was asking the night coordinator to arrange for this woman to be put in lithotomy in order that another vaginal examination could be undertaken […]"*

9. On 21/5/13 Dr Fowlie, the Trust's medical director, referred the Claimant to the GMC. He did so on the basis, in part, of what he understood to be the allegation of an unnecessary vaginal examination on the patient referred to above (Patient AK). The GMC opened a fitness to practice investigation and imposed some interim restrictions on his practicing certificate.

10. The Trust provided patient AK's medical notes to the GMC. The covering letter enclosing them is dated 15 October 2013 and refers to the medical notes being enclosed and that they were *"identified by Susan Brydon as requested, relating to one of the patients highlighted in her account*"

11. At the relevant location in the notes, but on different paper, there is a handwritten note ("the Note") from Ms Brydon which is lengthy but the relevant gist is clear from this extract which I have put in bold text since it is the Note which is the central document in the libel claim: **"*8/5/13. Written .. 08.30 – re event 0700hrs. On arrival on duty Dr Bari was performing a vaginal examination. The woman was screaming loudly. I attended to assist as the noise was alarming and the woman was distressed and crying. Dr Bari had stopped the examination and was giving instructions to the midwife that he needed the woman to be put into lithotomy…*"**

12. The GMC proceedings went ahead (The Trust had referred him to the GMC on 13 May 2013), but it was not until 29 December 2013 that Dr Abdel-Bari became aware of the content of the Note above about his conduct towards patient AK apparently recorded as being witnessed by Ms Brydon, the picture being that of the patient screaming and Ms Brydon deciding to go to assist in view of the distress being caused.

13. Ms Brydon refused to make a statement for the GMC. She emailed the Claimant on 6 September 2014 saying [tab5 p14] *"I only met you for a short period of time and did not feel that anything I witnessed merited such action … when I looked again at my diary note sometime in the middle of October, when asked if I would write a statement, I was not able to recall all of the events it described".*

14. Fortunately as it turns out for Dr Abdel-Bari, patient AK was willing to provide a statement as to what did or did not take place, and she did so on 17/1/14. Her account did **not** corroborate The Note.

15. As will be clear from the quotation in bold which I have given from the Note, the Note supplied by Ms Brydon to the Trust in and which was included in the file (ostensibly of medical notes) sent to the GMC is to the effect that (1) The event alleged took place at 7am; (2) that Dr Bari was performing a vaginal examination when Ms Brydon arrived on duty; (3) the woman was screaming loudly; (4) Ms Brydon attended to assist because the noise was alarming and the patient (AK) was distressed and crying; and (5) Dr Bari "had" stopped the examination (it is unclear whether this might mean, from the perspective of the reader of the Note 'stopped when I attended' or 'had stopped by the time I arrived').

16. Patient AK's statement is very different. Following it, the GMC investigation of the 'event' was ended. I have highlighted certain parts in bold. She says *"**At around midnight on 7 May 2013 Dr Abdel-Bari came to see me** and he told me that there was a complication with the baby's heart and that he could not leave it too long before breaking my waters. He stated that he wanted to do the procedure himself. He attempted to break my water bag but because I was in a lot of pain and was shouting, I asked him to stop the examination. I let him attempt the examination for a few minutes before I asked him to stop. …*

I have been asked if I saw Dr Abdel-Bari again and I am sure that I did not see him after that point. I was examined again to check how dilated I was, but not by Dr Abdel-Bari, only by the midwives."

It will be clear therefore that the patient's evidence is that she did not have any contact with Dr Abdel-Bari after that first examination at around midnight, which contrasts markedly with Ms Brydon's note about an event at 7am involving him and her attending to help because of the screaming.

17. The GMC case was concluded with advice to Dr Abdel-Bari on other matters, in a decision communicated by letter dated 15/6/15.

18. They concluded that as regards the allegation pertinent to this case the test of a reasonable prospect of success was not met and noted that the statement of patient AK and one by her husband did not support the allegation that Dr Abdel-Bari had performed a second vaginal investigation as alleged. The GMC therefore did not pursue the matter further. An expert advising the GMC advised that if Dr Abdel-Bari did not perform a second vaginal examination then his overall standard of care did not fall below the requisite standard for a doctor.

19. The Claimant sues for libel in relation to the Note by Ms Brydon which she supplied to the Trust and which the Trust passed to the GMC as part of the medical notes. He has

maintained throughout, including during the GMC case, that the alleged event did not happen and that the Note was false.

20. Just before the hearing of this application the Trust served an important statement from Ms Brydon which I shall return to in due course.

21. Resuming this tale chronologically, the Claimant issued his claim on 27 April 2015. It will be clear therefore that the claim was issued about one year and 4 months after the date on which Dr Abdel-Bari became aware of the Note in the course of the GMC proceedings which were then underway and which did not conclude until June 2015. His position throughout the GMC case was that the allegation as to the morning of 8/5/13 was entirely false, but the first mention, specifically, of a possible claim in libel was on 1 March 2015.

22. Having obtained pro bono advice from counsel via the Bar Pro Bono Unit, Mr Abdel-Bari sought to issue an application to waive the Limitation Act period in July or early August 2015 but he was refused, on 26 August 2015, the opportunity to issue his application because he had not completed a Private Room Appointment form, which is a pre-requisite on the Masters' corridor for any application to be listed for more than 30 minutes.

23. The refusal was at my direction on paper, and would be a standard order, but a practitioner would know that in a case where it is necessary for whatever reason to issue an application

without a return date it is perfectly acceptable to attend the Master in Practice and the Master then typically waives the requirement for a PRA in advance of issuing the application. A hearing date is then only listed once the PRA form is later provided.

24. Dr Adel-Bari faced some criticism by the Defendants for not issuing his application to waive the Limitation period until 14 December 2014 and I was encouraged to take that delay into account, however it seems to me equitable to take the approach that but for his absence of knowledge of the PRA procedure he would have issued it in July or early August 2015.

25. The intervening delay from the date when the application was returned to him unissued on 26 August 2015, until 14 December 2015, appears to me from correspondence provided, to have been occupied mostly with him seeking in good faith to discuss agreed dates for the purposes of the hearing of his application and, latterly the Defendant's application. The Defendant did not at any stage as far as I can see think to tell him that he could if he wished obtain a waiver from the Practice Master at any time so as to enable the application to be issued at once without a PRA. I therefore do not regard it as appropriate or equitable for me to hold the period of delay from July 2015 to December 2015 against him strongly.

Limitation Act 1980 jurisdiction to waive the 12 month time limit

26. s.32A of the Limitation Act 1980 provides that:

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –

(a) the operation of section 4A of this Act prejudices the Plaintiff or any person whom he represents; and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specific specified cause of action to which the action relates.

(2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to –

(a) the length of and reasons for the delay on the part of the plaintiff;

(b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A-

(i) the date on which any such facts did become known to him, and

(ii) the extent to which he acted promptly and reasonably once he knew whether

or not the facts in question might be capable of giving rise to an action; and

(c) the extent to which, having regard to the delay, relevant evidence is likely –

(i) to be unavailable; or

(ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.

27. The discretion to disapply is largely unfettered (Steedman v BBC [2002] EMLR 17, however (also per the same case) a direction under this section is said to be 'always highly prejudicial to the defendant' (it means he faces a claim to which he otherwise has a good limitation defence). Equally, per the same authority there is always some degree of prejudice to the Claimant from the expiry of the Limitation period. The extent of prejudice to either side depends substantially on the strength or otherwise of the claim or the defence as the case may be.

28. Libel cases concern the vindication of reputation and generally swiftness is required (as is evidenced by the short limitation period). Such actions do need to be pursued with some vigour. Necessarily the disapplication of a Limitation period is an exception to the usual rule and is therefore exceptional. See Bewry v Elsevier UKL Limited and Anor [2015] EWCA Civ 2565.

29. It is I think self- evident though also reiterated in *Steedman* supra, that the burden is on the Claimant to demonstrate that the Limitation period should be disapplied and that the quality of the evidence in support is essential to that. That includes of course the explanation for any delay. If no complaint was made at all (short of proceedings) during the time period of 12 months then a claimant may expect less sympathy than otherwise.

30. The merits of the claim (and in this case the merits of the claim as proposed to be amended) are of course very relevant. That naturally includes consideration of whether even in the event of success much would be achieved or whether the action is not worth the candle.

Relative prejudice under s.32A

31. The allegation in the Note can reasonably be understood as a very serious one. It led or contributed to the bringing of GMC proceedings which could have terminated or harmed the Claimant's career, and it is entirely arguable that such an allegation would damage the reputation of the Claimant. The loss of this claim through the operation of the Limitation period would be a serious prejudice to the Claimant in my judgment because it would deprive him of the potential to vindicate his reputation.

32. Authority as presented to me (*Steedman* (Court of Appeal), Thompson v Brown [1981] 1 WLR 744 (mentioned in *Steedman*) binds me to approach matters from the perspective

that there is always a high degree of prejudice to the Defendant if the power to disapply the limitation period is used.

33. That said, the extent of prejudice in my judgment to either side is closely connected to the merits of the claim and to the extent that any delay has caused evidential or forensic prejudice.

Merits of the claim (as proposed in the amendments).

34. It is here that I must resume my description of the way in which this case has developed. It will be recalled that Ms Brydon declined to provide a witness statement and that she commented to Dr Abdel-Bari by email that: "*when I looked again at my diary note sometime in the middle of October, when asked if I would write a statement, I was not able to recall all of the events it described".*

35. Leaving it there, which is where this case stood until 7th January 2016, one would have the impression that the contemporaneous (or near contemporaneous) notes on file recorded what took place on 8/5/13 but that, by the time Ms Brydon came to be asked to comment, she could not recall the detail of the events in the notes. A case, therefore, of testing the quality of the evidence based on a contemporaneous note.

36. However on 7 January 2016 Ms Brydon produced a witness statement for the Defendants. I believe I was told it was served on the Claimant's representatives at about the same date, ie just prior to this hearing. It is a very striking document.

37. In the statement Ms Brydon among other things says: [in September 2014] (my emphasis in text)*" .... I recall that I was telephoned by someone at the GMC who asked if I would write a statement in relation to my experiences with Dr Bari. I declined to make such a statement on the basis that I did not think I had had enough contact with Dr Bari ,,, to contribute...*

... at around that time, I was asked by the Medical Director Dr Stephen Fowlie, (or possibly his PA) to provide a statement concerning Dr Bari's time in the labour ward. I declined to make a statement but I said I would think about whether I wanted to provide any information ... I did recall clearly the conversation I had had with him and ***by this time I had found a short diary note that I had written at the time. I agreed to let the Medical Director see this note for information only*** *but for the reasons set out above, I was still not prepared to write a formal statement for the GMC.*

... ***I felt that it was necessary to re-write my personal diary note in more legible handwriting,*** *and in prose, so that it could be understood by Dr Fowlie....* ***I was not informed, and did not intend, for this recollection to be understood as a contemporaneous note or form any part of AK's medical records. I understood the note to be required solely for the Trust's internal purposes. I did not include it in the patient's notes at any time.***

… it was written only when I retrieved the notes and not at the time of my interaction with Dr Bari. I accept that the Note and

Email written months before are somewhat inconsistent. This was not intentional.

[…] ***I can confirm that although I distinctly recall a woman screaming in an alarming way, when I came on duty I did not witness Dr Bari performing an examination*** *but on looking at my diary note months later,* ***this is what I interpreted it to be describing****. I reasonably thought this, as he was asking for the woman to be placed in lithotomy so that he could repeat an examination.* ***I accept now that he may not have done an examination at around 0700hrs****…*

… Had I known [that the Note had been sent to the GMC] I would have been able to clarify that it was a diary note, not a medical record and that my memory of whether a vaginal examination had been performed at the time I came on duty was not clear…"

38. When one recalls the following facts, the extent to which the new statement served for this hearing is a departure becomes clear:

    (1) The covering letter from the Trust to the GMC indicates that the medical notes were enclosed and had been "*identified by Susan Brydon as requested, relating to one of the patients highlighted in her account*".

    (2) The Note sued upon states "***Written .. 08.30 – re event 0700hrs. On arrival on duty Dr Bari was performing a vaginal examination. The woman was screaming loudly. I attended to assist as the***

noise was alarming and the woman was distressed and crying."

(3) The patient herself says "*I have been asked if I saw Dr Abdel-Bari again and I am sure that I did not see him after that point"* (meaning about midnight 7/5/13)

39. Charitably, it is extremely difficult to reconcile the statements in the Note with Ms Brydon's recent statement. She says that when she came on duty she did **not** witness Dr Abdel-Bari doing a vaginal examination. In the Note provided by the Trust to the GMC, and by Ms Brydon to the Trust, she states in terms that not only was Dr Bari performing an examination but that the screaming by that patient was such that Ms Brydon attended to assist. It does not help, to my mind, that Ms Brydon says that she would have clarified to the Trust that her recollection was not clear if she had been told the Note was for the GMC, when she was apparently willing to provide the same Note to the Trust for its own internal purposes 'as is' without that qualification.

40. In my judgment the obvious likelihood is that the Note cannot be sustainable as being a true account, and that the content of the Note was known by Ms Brydon, at the time it was produced, <u>not</u> to be reliable enough a recollection for use for an official purpose. It also appears likely (and certainly arguable with reasonable prospects) to be found that the Note was represented to the GMC by the Trust as being part of the contemporaneous medical notes. The document plainly gives every appearance of

being contemporaneous in and of itself and was included in the Medical notes.

41. The allegation in the Note is in my judgment a disturbing account of a doctor performing an unnecessary procedure and causing extreme distress to a patient who screams and cries, and where Ms Brydon came to help because of the screams. I do not need to say more than that there is a real prospect of success for this Claimant in establishing that it is the sort of material which is capable of being defamatory but it will be plain that I regard the probable merits on that issue as far higher than that threshold may imply.

42. I should add a caveat: I am not here to try the case on this occasion, though it would be within my jurisdiction to do so: the documents I have are just that: statements and documents untested in cross examination. I can only form a summary view of the merits of the case on the papers at this stage, and the documents are not all "one way", in particular Ms Brydon says that she has a contemporaneous diary entry which she has found, and it is <u>that</u> document which was, in effect, the aide memoire which enabled her to create the more 'prose' style Note later, for Dr Fowlie.

43. If a court were to accept that the diary entry now produced (exhibited to Ms Brydon's statement) was indeed written by her at the time, more or less, then it is not fanciful to suppose that a court may see how Ms Brydon later writing in good faith and referring back to the diary might have been misled by her own

record. The note starts "*On arrival – screaming. Dr AB doing VE – stopped and told me he needed to ARM on lithotomy"*. That note, if contemporaneous, appears to be inaccurate or at least open to misinterpretation, and implies that the patient was screaming on her arrival and that Dr Bari was indeed performing a vaginal examination at that time.

44. It is not beyond reasonableness to suppose that the inaccurate diary entry led to an even more inaccurate longhand prose note, without it necessarily being a case of malice when the longhand Note was created but rather a matter of mistake, regrettably caused by an inaccurate original account in the diary of Ms Brydon. If so then it highlights the importance of proper and accurate notes being taken at the time and properly recorded in the medical notes of the patient, not least for the protection of the patient, the Trust, and the staff involved.

The potential defences of Absolute and Qualified Privilege

45. The Defendant relies on the availability of a plea of qualified privilege in respect of communications within the Trust. The Trust relies on Absolute privilege as regards its communication with the GMC.

Absolute Privilege

46. As to Absolute Privilege the Trust relies principally on Vaidya v GMC and others [2010] EQHC 984 (QB) at 51 and 52. That was a first instance decision where Sir Charles Gray held that letters to and from the GMC were protected by Absolute Privilege, being a privilege *"required because any inhibition on*

the freedom to complain would seriously erode the rigours of the investigation". I was also referred to a decision of Eady J in White v Southampton University Hospitals NHS Trust [2011] EWHC 825 to the same effect. Neither decision is binding on me but both are of course treated as persuasive. Both decisions were cases where the Claimant was acting in person and in neither case were the arguments put forward by the (represented) Claimant in this case raised or considered.

47. The Claimant referred me to Royal Aquarium and Summer and Winter Garden Society v Parkinson [1892] 1 QB 431 (a Court of Appeal case) where Fry LJ said "*Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General medical Council when considering questions affecting the position of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not."* The learned Lord Justice held that sufficient protection was afforded by 'the ordinary law of privilege' which in context is a reference to Qualified Privilege. The comment in *Royal Aquarium* cannot be seen as part of the ratio of the case but if I am to treat first instance decisions as persuasive then I must accord the same respect, at the very least, to the observation of Fry LJ.

48. The implication of the first instance cases, albeit perhaps weakened by the absence of representation for the Claimant in both cases, is that at first instance level there is an emerging view that GMC cases benefit from Absolute Privilege. However neither *Royal Aquarium* nor the argument to which I shall turn shortly was considered in either case.

49. In my judgment it is not at present settled law that Absolute Privilege rather than Qualified Privilege applies to letters to the GMC in all cases, in an unmodified form.

50. The Claimant argued, citing Clift v Slough BC [2011] 1 WLR 1774 CA that where a defendant is a public authority, Article 8 of the ECHR is superimposed, and ill-considered and indiscriminate disclosure was bound to be disproportionate, and that administrative difficulties of verifying the information contained in the disclosure and limiting extent of disclosure of an allegation (in this instance the placing of the Claimant on a list of violent people, and sending the list to employees and organisations which provided services to the Defendant council) could not outweigh the substantial interference with the right to protect reputations. The defendants lost the foundation of a plea of Qualified Privilege.

51. The case of *Clift* is on different facts of course but the implication, it was argued, was that the law on the impact of the Human Rights Act and Art. 8 on the use and scope of privilege was not as yet settled law. *Gatley* at 13.3 expresses the view that the same outcome as in *Clift* may have applied if the

argument had concerned Absolute Privilege rather than its Qualified sibling. In the circumstances I am led to the conclusion that there is a real prospect of success in establishing that Absolute Privilege does not apply, based on the potential for an Art 8 argument stemming from the (to my mind clear, on the papers which I have at least) inaccurate, Note which the Trust represented to the GMC as part of patient AK's medical notes (apparently without administratively verifying the correctness of the information in the Note, or its contemporaneity, or even that the Note itself was properly a part of the medical notes for this patient at all).

Qualified Privilege

52. Qualified Privilege can be defeated by malice and the burden of proof falls on the Claimant. It appears to be common ground that if Absolute Privilege is not available then the Trust may be able to seek to rely on Qualified Privilege. The Defendant argues that the material (essentially that Ms Brydon's note was false and that she must have known it to be false) does not suffice to establish malice and that in any event even if Ms Brydon acted with malice then the Trust can only be fixed with the extent of publication which Ms Brydon contemplated or must have contemplated. Ms Brydon's statement is to the effect that she did <u>not</u> contemplate publication to the GMC but provided the note for Trust use internally.

53. As to malice, in my judgment there is a real prospect of showing that malice may be inferred. Ms Brydon's Note is likely to give any reader a false impression and there is a real

prospect of showing that Ms Brydon knew the true facts at the time (that is not a finding: I decide this on the basis of reasonable prospect, without the benefit of hearing the witnesses, and I have discussed above the inaccurate diary note and the role it may have played). It is not fanciful to suppose that the approach in Spencer v Sillitoe [2003] EMLR 10 would apply such that the decision on malice would be influenced and perhaps determined by the decision on whether the Note was false *and known by Ms Brydon to be false*. That is a matter for cross examination .

54. As to the question whether in this instance Ms Brydon can be fixed with the requisite knowledge of the potential use of the Note, such that the Trust can be held responsible, I note that the letter enclosing the purported medical notes of patient AK sent to the GMC stated that they were *"identified by Susan Brydon as requested, relating to one of the patients highlighted in her account*".

55. At the very least that letter leaves scope for questioning her statement that she did not know of the use to which they would be put. It is also clear that she prepared the Note for Trust use by the Medical Director, a very senior person in the Trust, and there is a question which is only apt for a trial, as to whether she therefore must be taken to have foreseen some official use of the letter for which accuracy was necessary.

56. In my judgment therefore this is not a case where a defence of either Absolute Privilege or Qualified Privilege is bound to succeed and where the Claim is only fanciful.

Proportionality and value of the case

57. The publication to the GMC and within the Trust appears modest in scope though it is fair to suppose that as the claim were to develop, the extent of any disclosure especially within the Trust may be clarified further. The Defendant's argument was that these proceedings are disproportionate to any damages or other benefit which the Claimant might achieve if he wins.

58. If I agree with that view then it is right I dismiss the case. However I consider that the GMC decision merely terminated the investigation on the basis of no real prospect of success because the patient did not recall seeing Dr Abdel-Bari after midnight, and that did not amount by itself to a public vindication of the Claimant's position that the Note was wholly false, indeed the GMC as far as I can tell were not informed of the matters now put forward by Ms Brydon in her statement and could not therefore have ruled on them. In my judgment this is a case where it is vindication of reputation and any ancillary relief in the form of an injunction which are the key remedies and given the seriousness of the content of the Note I do not consider that vindication in a public form and the restraint of further publication would be an immaterial remedy but rather would be substantial benefits to Dr Abdel-Bari.

Cogency (etc) of the evidence

59. The medical notes, the Note and the parties accounts are all in writing. If the Trust intends to argue that the incident on 8 May at 7am nonetheless happened, despite Ms Brydon's evidence, then such an event would be striking and memorable, and it led to such well recorded steps, that I do not take the view that the delay before issue and the slight delay before making this application for waiver of the time limited can be said to have made evidence less cogent, or unavailable.

60. If on the other hand the Trust intends to proceed on the basis that it accepts the event never occurred at all then there is no issue over the cogency or availability of evidence of the event. Ms Brydon's evidence as to her actions was served very recently and appears clear and unaffected by passage of time on the relevant aspects, and I shall not hold against the Claimant the fact that her account has only just been produced by the Defendant in circumstances when (during the GMC case) she refused to provide evidence and when the Defendant knowing that Dr Abdel-Bari was maintaining that the Note was false, did not obtain evidence from her, whether for the GMC or this case.

Reasons for the delay

61. Dr Abdel-Bari became aware of the Note on about 29/12/13. His position in the GMC case was that the Note was false. He did not threaten a civil suit until 1 March 2015 and he issued the claim on 27 April 2015 acting in person.

62. Given that the delay between the date when he became aware of the Note and the threat of a claim is about 3 months more than one year from date of knowledge, and that the period was in the midst of a GMC case where the same matters were in issue I accept that he has an adequate explanation for the delay and that it is in context modest and adequately explained, namely that he was dealing with the GMC case and to that extent waiting to see where that went, rather than launch litigation in parallel. There was a period between 1 March and 27 April 2015 before issue of the claim but in view of his unrepresented status at the time, and the fact that the GMC case was ongoing, I do not consider that the delay is such as to weigh heavily in exercise of my discretion, though it is something I do take into account.

63. The period after issue, up to the point where Dr Abdel-Bari sought to apply to dispense with the Limitation period is 28 April 2014 to 26 August 2014. I do have to take that period into account and it is fair to say he could have applied earlier (I do not hold the period after 26 August 2014 against him for reasons already given). But in my judgment the period after issue is of considerably less significance once the claim has been issued and the Defendant knows it is facing a claim and what the basis for it is so that there is no increase in any prejudice which there might have been in terms of ability to gather evidence, or cogency of evidence (which in any event I have regarded as not a significant factor in this case).

64. Considering all the circumstances including the specific matters set out in the Act, I shall dispense with the Limitation period in this case on the basis that it is equitable to do so.

The scope of the claim

65. The introduction of a claim in malicious falsehood by way of amendment was opposed by the Defendant on the basis of the hopelessness of the malice plea. I have expressed my views on malice and need say no more. It is a matter for trial on the facts and state of knowledge of the key actors. I consider that allowing that aspect of the amendments is appropriate to ensure that all the issues are before the court and the true matters in dispute can be resolved.

66. The proposed Data Protection Act 1998 claim relies on treating the Note as being personal data relating to the Claimant and being subject to the protections in the Act. The Defendant argued that the data was not that of the doctor but that of the patient, relying on Durrant v FSA [2003] EWCA Civ 1746.

67. Is the Data Protection Act claim fanciful? The Note arguably amounts to data. It arguably is about at least one identifiable person (Dr Abdel-Bari) and probably also the patient albeit AK is not named. It relates to the giving and receiving of medical treatment and to the conduct of a named medical professional. It was said in *Durrant* that the putative 'personal data' should have as its focus the putative data subject rather than some other person or transaction with which the putative data subject has been involved.

68. In this case the position of Ms Brydon is that the Note was not a part of the medical notes of patient AK and that, if true, is very relevant to the purpose of and manner of processing the data. The Claimant's case at present is that the Note was included in AK's medical notes though I think it is foreseeable that the statement of Ms Brydon may lead to a plea in the alternative by the Claimant. However even if forming part of the medical notes, the Note is at least reasonably arguably, and not fancifully capable of being seen in my judgment as, in substance actually a note about Dr Abdel-Bari and his alleged treatment of a patient. It is not fanciful to argue that it is therefore personal data about him and that he is the focus, and in respect of which he is a data subject. I will permit the amendment to include that claim.

Other points

69. The skeleton of the Defendant at 13, 68(a) 3rd sentence and 64(b)(i)(2) takes points on the exact form of the amendments, suggesting corrections or improvements. I will leave the parties to discuss such minor matters at this stage because I do not consider that I heard argument on those sufficiently at this stage and they may not be matters which realistically require oral argument.

70. The Defendant's skeleton at 64(b)(ii) in my judgment is too close to being a ruling on meaning to be a matter for me to decide and I adjourn that argument to the trial judge.

71. The argument as to inadequate scope of pleading of publication I reject on the basis that it is sufficiently clear to enable the Defendant to know the case against it and that it may reasonably be expected that scope of publication is within the Defendant's knowledge and will be clearer as the action proceeds.

MASTER VICTORIA MCCLOUD
29/1/16