**IN THE HIGH COURT OF JUSTICE** **Claim No HQ15 DX 05040**

**QUEEN'S BENCH DIVISION**

**HHJ MOLONEY QC sitting as a Judge of the High Court**

**ZIPPORAH LISLE-MAINWARING** **Claimant**

**And**

**ASSOCIATED NEWSPAPERS LIMITED** **Defendant**

Hugh Tomlinson QC and Sara Mansoori, instructed by DLA Piper, for the Claimant

Andrew Caldecott QC and Christina Michalos, instructed by RPC, for the Defendant

**APPROVED JUDGMENT**

*Handed down in open court at the Royal Courts of Justice on Friday 21 July 2017*

## A. INTRODUCTORY MATTERS

1. INTRODUCTION AND OUTLINE CHRONOLOGY

1.1 This action is a claim in respect of harassment, with an ancillary claim for infringement of copyright with which I am not at present directly concerned. (There was also a related defamation action, not before me, but which is considered below.) This judgment deals with an application by the Defendant to strike out the harassment claim or enter summary judgment dismissing it, the essential grounds being that the matters complained of are either incapable of constituting harassment at all or are of insufficient gravity to render the claim actionable. (By way of fall-back there is also an application to strike the claim out as an abuse of process under the Jameel principle.) In such an application it is the general rule that if there are disputed matters of fact the Court must proceed on the basis that the Respondent's version is correct (unless it is demonstrably false). The outline of the factual background, set out below, is prepared on that basis and should not be treated as findings of fact for any other purpose.

1.2 The Claimant (C) is a wealthy woman with some experience of property, though she would not describe herself as a property developer. The Defendant (D) is the publisher of the Daily Mail newspaper and also of its extremely widely read website/online edition.

1.3 At all material times C has been the owner of a mews property in South Kensington, 19 South End, London W8 5BU ("No.19"). The mews is largely residential, but although No 19 has the external appearance of a flat-fronted 3-storey house it was at the time she bought it an office building not a residence. It was her intention when buying it to reconstruct and extend it so as to create a very large and luxurious home for her personal use when in London. (She also has a home in Geneva.) This reconstruction would include a substantial underground rear extension containing a private indoor swimming pool.

1.4 Such extensions are becoming common in the wealthier parts of London and are often a matter of some local controversy, with neighbours objecting to the disturbance caused by the works themselves and the possibility of subsidence or other resulting damage.

1.5 In 2013, C applied to the local authority for planning permission for the proposed residential development. That planning permission was initially refused, but granted on appeal. In turn, that appeal was itself quashed on judicial review by an order of Supperstone J dated 17 February 2015, remitting the matter to the Planning Inspector for reconsideration.

1.6 Up to this point the planning dispute had been a matter of local interest only. But on 2 March 2015 C took an unusual course. Previously the façade of No 19 had been painted white and was in keeping with the neighbouring houses. But that day, C's contractors painted the entire façade with broad vertical red and white stripes, so that the house stood out dramatically from its fellows in the mews. Not surprisingly, this literally colourful action attracted much wider attention to C and her planning dispute, as she must have realised would happen. (In this judgment I shall use the phrase "the planning dispute" to refer compendiously both to the house-painting incident and to the planning matters which preceded and followed it.)

1.7 By April 2015, her action and the local response to it, which had included complaints to the local authority, came to the notice of D as a potential news story. There followed between April and July 2015 a sequence of contacts from D and published articles, which C now complains of as a "course of conduct" amounting to harassment. Most though not all of those articles remain on D's website in a modified form and are still accessible via Google on a search of C's rather unusual name. They will each be considered more fully below, but it is helpful to list them here in chronological order. (In each case the article was published online, and in some cases also in the print newspaper, in which case that publication is also noted.)

The letters and numbers in the list have been allocated by me for convenience of reference in this judgment.

| | | |
|---|---|---|
| 13 April 2015 | 1705 | Contact A – phone call to C's planning agent Savills |
| | 1746 | Contact B – phone call to C's planning solicitors Max & Co |
| 14 April | 0858 | Article 1 |
| | 1444 | Contact C – email direct to C |
| | Before 1540 | Contact D – phone call to Savills |
| | 1541 | Contact E – email to Max & Co |
| 15 April | 1030 | Contact F – "doorstep" visit by journalist and photographer to C in Geneva |
| | 1110 | Article 2 (also sued on separately as libel) |
| | | Article 3 (newspaper) with photograph of C's late father in RAF uniform |
| 16 April | | Article 4A (Jan Moir "opinion" column) |
| 17 April | | Article 4B (similar article in newspaper) |
| | 1300 | Contact G – phone call to Max & Co |
| | 2200 | Article 5A (also sued on separately as libel) |
| 18 April | | Article 5B (similar article in newspaper) |
| 28 April | | Article 6 |
| 12 May | | Article 7 |
| 7 July | | Article 8 |
| | | Contact H – email to Max & Co |
| 8 July | | Publication of photograph of C taken outside RCJ |
| 23 July | | Contact I – emails to Max & Co |
| 24 July | | Article 9 |
| | | Contact J – emails to DLA Piper |

1.8 During this period, C's legal advisers wrote several letters of complaint to D, pointing out matters to which she objected and indicating that she did not wish to be contacted by D. Again, these and D's response to them will be considered specifically below.

1.9 On 9 June 2015, C issued libel proceedings against D in respect of Articles 2, 5A and 5B (which differed materially from the others in that they included reference to unrelated financial allegations against C by members of her step-family, whom she has also sued for defamation). On 27 August 2015, D made a qualified offer of amends in respect of those articles and took them down from the website.

1.10 On 30 September 2015, C's solicitors told D's that they were considering amending the libel claim to complain of harassment and breach of privacy. On 4 November 2015, C accepted the offer of amends in the libel action. On 4 December 2015 the present proceedings for harassment and copyright infringement were commenced.

1.11 In the libel action, a Statement in Open Court was read on 14 March 2016. HHJ Parkes QC, sitting in the High Court, has since conducted the libel damages assessment hearing. He gave judgment on 17 March 2017 for the substantial sum of £54,000 (after discount for offer of amends). C has also been successful in the second libel action, against her stepson Robert Lisle and his wife.

1.12 The present strike-out application was issued on 1 July 2016, and heard on 12 December 2016. I reserved judgment to await the outcome of the libel damages assessment, which I considered might be relevant to some of the issues before me.

## 2. THE LAW OF HARASSMENT

2.1 The law against harassment is entirely the creature of statute, as interpreted by the courts. Section 1 of the Protection from Harassment Act 1997 prohibits harassment. The Act goes on to characterise breach of that prohibition both as a criminal offence punishable by imprisonment (s.2) and as giving rise to a civil claim (s.3). The elements of both the criminal and civil wrongs are the same.

2.2 The 1997 Act does not specifically define the word "harassment". Its relevant provisions are as follows:

*"s.1 (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 another.*

*(2) For the purposes of this section…the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.*

*(3) Subsection (1)… does not apply to a course of conduct if the person who pursued it shows:*

*… c. that in the particular circumstances the pursuit of the course of conduct was reasonable."*

*"3 (1) An actual or apprehended breach of s.1(1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.*

*(2) On such a claim damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment."*

*"7. Interpretation of this group of sections*

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

*(3) A "course of conduct" must involve –*

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

*(4) "Conduct" includes speech…"*

2.3 Because the Act is framed in wide general terms, the higher courts have given much attention to its interpretation and application. The Court of Appeal (Criminal Division) has, in the recent case of R. v. N (Z) [2016] EWCA Crim 92, approved Simon J's convenient summary of the effect of the authorities, as set out at para. 142 of his judgment in Dowson v. Chief Constable of Northumbria Police [2010] EWHC 2612 (QB):

*"1. There must be conduct which occurs on at least two occasions,*

*2. which is targeted at the claimant,*

*3. which is calculated in an objective sense to cause alarm or distress, and*

*4. which is objectively judged to be oppressive and unacceptable.*

*5. What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.*

*6. A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways, "torment" of the victim, "of an order which would sustain criminal liability.""*

2.4 It should be noted that the above formulation sets out the matters which as a matter of law the claimant must prove in order to establish a civil claim (or the Crown, to a higher standard, in order to establish the commission of a criminal offence). It is not directed to the apparently distinct question of what, assuming those elements to have been established, the defendant needs to prove in order to

make out the statutory defence under s.1(3) that "in the particular circumstances the pursuit of the course of conduct was reasonable". That specific question does not arise on the present application.

2.5 The focus of the Defendant's application now before me is on Simon J's elements 4, 5 and 6: is it already plain that the Defendant's conduct complained of did not cross the line so as to become "oppressive and unacceptable"? It is therefore worth going behind Simon J's summary to his principal source for those propositions, the decision of the House of Lords in Majrowski v. Guy's and St Thomas's NHS Trust [2006] UKHL 34. That was a civil claim in which their Lordships limited the apparent breadth of the Act's prohibition of harassment by emphasising that, since both civil and criminal harassment bear the same definition, no conduct could be civilly actionable unless it was also of sufficient gravity to warrant a criminal sanction.

*"All sorts of conduct may amount to harassment…A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour."* (per Baroness Hale at para. 66).

*"Courts will have to bear in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2."*

(per Lord Nicholls at para. 30).

2.6 Although the Act was aimed primarily at the mischief of "stalking", it is well established that it covers a wide range of other fact-situations, including harassment by media or online publications. But in cases of that kind, in which not only the claimant's right to private and family life under Article 8 of the European Convention on Human Rights is engaged but also the defendant's right of free expression under Article 10, special considerations arise. I should refer at this stage to some of the leading cases on harassment by publication:

a. Thomas v. News Group Newspapers [2001] EWCA Civ 1233

The Court of Appeal upheld a circuit judge's decision not to strike out a civil claim for harassment. In a series of articles and published readers' letters relating to police officers being disciplined for making racist jokes, the Defendant had referred more than once to the fact that the complainant was herself black. The Court of Appeal affirmed that in principle media publications might constitute harassment, but that in view of Article 10 of ECHR and s.12 of the Human Rights Act 1998 robust press criticism would not generally constitute unreasonable conduct or harassment, even if it was foreseeable that an individual might suffer distress as a result.

*"In general press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural definition of harassment. A pleading which does no more than allege that the defendant newspaper has published a series of articles that have foreseeably caused distress to an individual will be susceptible to a strike-out on the ground that it discloses no arguable case of harassment.…Before press publications are capable of constituting harassment they must be attended by some exceptional circumstance which justifies sanctions and the restriction on freedom of expression that they involve. It is also common ground that such circumstances will be rare."*

(per Lord Phillips MR at paras 34 and 35).

In Thomas, the court concluded that it was arguable that the articles constituted racist criticism which was likely to stimulate a "racial reaction" on the part of their readers and cause the claimant distress. It was conceded that, if so, that would be capable of constituting harassment (and, by implication, of being an "exceptional" case).

b. Trimingham v. Associated Newspapers [2012] EWHC 1296 (Tugendhat J)

This was a judgment at a final trial, upon claims for both harassment and breach of privacy. While she was in a civil partnership with another woman, the claimant had an affair with a prominent married male politician, which led to the breakup of both their existing relationships. She complained of a series of 65 articles which (among other things) included repeated derogatory references to her physical appearance and to her sexuality. Between paras 45 and 101 of his judgment Tugendhat J carried out his customary careful review of the law, giving particular attention to Thomas (above). At para. 55, he directed himself on the need, in cases where different Convention rights were in conflict, to follow the well-established test in Re S (a child) [2004] UKHL 47, under which neither Article as such has precedence over the other, and the court applies an "intense focus" to the comparative importance of the specific rights being claimed in the individual case, before applying the "ultimate balancing test" to the question of the necessity and proportionality of the proposed interference with Convention rights.

Applying those principles to the facts of the particular case, he took into account inter alia:

i. the characteristics of the individual claimant, as they were or should have been known to the journalists;

ii. to what extent the claimant was a public as opposed to a private figure;

iii. to what extent the coverage of her was repetitious and taunting, as opposed to being prompted by some fresh newsworthy event.

His overall conclusion was that it was not necessary or proportionate to make a finding of harassment on the facts before him. That decision gave considerable weight to the factor, not in issue here, that the coverage of the claimant was largely ancillary to coverage of her lover the prominent politician. But also, importantly, it was a decision reached after a full trial at which both the claimant and the journalists had given oral evidence.

c. Shakil-Ur-Rahman v. ARY and Ghafoor [2016] EWHC 3110 (QB) (Sir David Eady)

This was a claim for both libel (24 television programmes) and harassment (over 100 programmes). The claimant was a prominent Pakistani publisher whose newspapers and websites were widely read in both Pakistan and the UK. He was based in Dubai. The defendants published Urdu-language television programmes in the UK, and were rivals of the claimant. At trial, Sir David Eady found in favour of the claimant in respect of the libels and awarded very substantial damages of £185,000. He would have found that there was also a valid claim in harassment, but for the fact (not relevant to this case) that the claimant had not been present in this jurisdiction at the time of the campaign against him; the judge held that it was necessary as a matter of law for there to be an impact here upon the victim. What may be relevant to this case is para. 120 of his judgment, in which he referred to the fact that the evidence of the matters relied on as harassment "had been taken into account in the context of aggravation of damages for libel" and "would have added very little in any event".

## 3. THE DEFENDANT'S APPLICATION; GENERAL CONSIDERATIONS

### 3.1 Striking Out and Summary Judgement

a. A statement of case may be struck out in whole or part under CPR 3.4(2) if the statement of case discloses no reasonable grounds for bringing the claim.

b. Summary judgment may be given against a claimant under CPR 24.2 on the whole or part of his claim if the court considers that he has no real prospect of succeeding on the claim or issue and there is no other compelling reason why the case or issue should be disposed of at trial.

c. The parties to this application are substantially in agreement as to the familiar principles upon which the court should exercise these overlapping jurisdictions.

d. It is not for the court to conduct a mini-trial at this stage in order to determine the claimant's prospects of success. Whether on a strike-out or on a summary judgment application, any unresolved dispute of fact must be assumed in the claimant's favour, unless there is no room for dispute. Where however the material facts are already clear (the terms of a published article for example) or where the

claimant has put his case in a certain way, it is open to the court to carry out the appropriate assessment and grant the order sought.

e. These are draconian summary jurisdictions, and a court considering their exercise must always exercise caution, especially when as here there has not yet been any disclosure, or when the applicable legal principles have not yet been clearly established.

3.2 The Pleaded Case

I have listed above the 9 articles and 9 or 10 contacts, which together with the publication of the 2 photographs constitute the framework of the course of conduct complained of. I say "framework" because, as made clear by Lord Phillips in Thomas (above), it is not enough to make out an arguable case of press harassment merely to plead that articles were published (or here, inquiries made) and that distress followed. The essence of the tort is to establish the respects in which that conduct was oppressive and unacceptable, by the standards applicable to conduct of that general sort.

The allegedly oppressive and unacceptable aspects of D's conduct, so far as C has pleaded them, may be categorised as follows:

a. the content of the articles:

i. false statements as to fact;

ii. critical statements of opinion;

iii. intrusions on privacy and family life.

b. the manner of the contacts:

i. unsolicited, unwelcome and unwanted;

ii. in breach of an express request not to be contacted.

3.3 Unpleaded Allegations

The strike-out application is of course concerned with C's pleaded case as set out in her extensive Particulars of Claim and Reply. In answer to D's evidence in support, C has filed two witness statements which explain and amplify her case. Insofar as she goes into further details about matters already pleaded and explains their effect upon her, those are matters I should take into account, especially as indicating whether the need for a trial cannot be ruled out. But at certain points her evidence goes beyond that limit and seeks to raise new criticisms of D's articles and conduct. (For example, her pleaded complaint about Article 5A (PoC 3.15) is confined to two or perhaps three matters; but at paras. 38 to 42 of her first witness statement she complains of fourteen matters in that article, most of which are distinct from the three pleaded matters.) As stated at 3.2 above, the matters

relied on to show that the articles were oppressive and unacceptable are central to a claim for harassment based on publications. I should therefore disregard any new allegations of harassment made for the first time in evidence in answer to this application.

3.4 Individual Acts and Course of Conduct

a. D invites me to consider each of the matters alleged to form part of the course of conduct and to rule whether they are individually capable of amounting to acts of harassment. I accept that it is necessary for me to examine each act complained of and each of the pleaded respects in which C criticises it.

b. It is important to bear in mind, however, that the *actus reus* of the crime and tort of harassment is not the individual act but the "course of conduct" of which it forms part. I therefore view with great caution D's proposition that I should conclude that if no one act passes the requisite tests it must follow that there can be no actionable harassment here. The Defendant's case on this point may be summarised as that "ten zeroes are still just zero", the Claimant's as that "the whole can be greater than the sum of its parts". So far as the 1997 Act is concerned, it is clear as a matter of statutory construction that the former proposition is mistaken and the latter correct. It is inherent in the scheme of the Act that it may render a series of otherwise lawful acts unlawful, because of the manner in which they are carried out and the frequency of their repetition (among other things).

c. Individual acts complained of are likely to fall into one of three categories:

i. acts that are plainly of a harassing nature even considered alone (express threats for example), such that even one instance might warrant the grant of an injunction against repetition;

ii. acts that are plainly innocuous or even benign (the normal sounds of farm machinery at work in the day for example) such that no reasonable person would view them as harassment whatever the context or the frequency of repetition, and that they should not even be regarded as forming part of a course of conduct; and

iii. acts which are capable of forming part of a course of conduct of harassment by reason of their context and repetition, though individually they would not normally be so considered.

d. On an application such as the present, having considered the individual acts complained of, the judge should stand back and take them into account collectively before deciding whether or not the defendant has succeeded in showing that there is no case as to the existence of an actionable course of conduct.

3.5 The Television Programme

D also invites me to take into account the character of C, as revealed by her participation in a television programme "Posh Neighbours At War" first broadcast by Channel 4 on 2 May 2016. It is D's case that I can properly infer that C is a woman of strong character who relishes the dispute and is not likely to suffer distress from matters of the kind complained of here. For the following reasons I shall not take that programme into account on this application:

a. The programme was broadcast after the conclusion of the primary course of conduct complained of (though at a time when some of the material was still available on line). Under the Act, the principal relevance of C's characteristics is the effect that knowledge of them may have on the perception of a reasonable person as to whether the conduct is likely to constitute harassment of C (typically by causing her unwarranted alarm and distress). A subsequent event cannot affect such knowledge.

b. Further, C chose to participate in the TV programme after first publication of the matters complained of and as a result of them. It appears likely that she saw it as her opportunity to have her own say and show defiance. In short, she may have been putting on a performance, and little can be inferred from it about her state of mind in 2015 or the then effect of the press coverage upon her.

c. More fundamentally, if D's strike-out application depended materially on an assessment of C's character and the likely effect of the coverage upon her, it would be bound to fail, since I do not see how a court could justly form a view on those matters without hearing her give oral evidence at trial, as in Trimingham for example.

3.6 The Libel Proceedings

a. Another special feature of this case is the inter-relation between the harassment claim and the related libel action. For the details of the latter I refer to and adopt HHJ Parkes QC's judgment referred to above. The libel action was based only on three of the articles complained of as harassment, and only on certain parts of those articles, dealing not with the planning dispute but with two separate and distinct allegations of unrelated past misconduct by C.

b. The first article complained of was what I have called Article 2, a Mail Online article headlined: "Revealed: the war hero's daughter who infuriated neighbours with her £15 million "eyesore seaside hut" – and how she fell out with her own family after feud". As the headline indicated, it dealt partly with the planning dispute and partly with a separate and serious allegation concerning financial misconduct by C towards her stepson and his family which is the first allegation sued on as libel.

c. Article 2 was followed a few days later by Articles 5A and 5B, both headlined "Toxic neighbour with a past as colourful as her £15m house". As well as dealing with aspects of the planning dispute, these repeated the financial allegation. In addition they mentioned a second separate matter, referred

to as "the closed matter" in the libel proceedings and dealt with by Judge Parkes QC in a confidential annexe to his published judgment. I accept and shall follow his decision to treat the details of that matter as closed. For present purposes it suffices to repeat Judge Parkes QC's description at para. 5 of his open judgment:

*"a serious allegation of wrongdoing which the Defendant has not sought to justify and the publication of which I accept has caused the Claimant particular anger and distress".*

d. As above stated, neither of the matters complained of as libel was defended as true, and C recovered substantial damages from D, which but for the offer of amends would have totalled £90,000, as well as a separate settlement of £25,000 from her stepson and his wife. Her reputation in those respects is thus totally and publicly vindicated.

e. In the libel action, D attempted to rely on the circumstances of the planning dispute as what are known as Burstein particulars, background material serving to explain and mitigate the defamatory allegations complained of. Judge Parkes QC did not regard those matters as having any real connection with the allegations complained of, and did not treat them as warranting any discount to the damages due for those allegations.

f. Libel damages compensate for injury to reputation, which is not part of a harassment claim. But they also compensate for injury to feelings, which is very much part of a harassment claim. In this action C complains of the publication of Articles 2, 5A and 5B, including the passages sued on as libels. In his judgment Judge Parkes QC took into account in C's favour her evidence of the distress she had suffered as a result of readers' online comments on the articles complained of, even though the majority of them concerned the house-painting incident not the libels. He also took into account her evidence about the adverse effects of the articles on her health, though in the absence of expert evidence he gave it little weight.

g. In her Particulars of Claim in this action, C expressly complains of the publication of the financial allegation as harassment (3.8.4 and 3.15.2) and of the adverse effects on her health (3.20). She does not complain of the publication of the "closed matter" as harassment, though she does complain of a telephone call from Ms Knight of D to her solicitors about it on 17 April 2015 (Contact G).

h. The overlap between defamation and harassment claims based on the same publications is a matter on which there is little specific authority. C rightly points me to Tugendhat J's observations at para 91 of Trimingham (above). He regarded it as significant that the claimant was not pursuing any defamation or privacy claim in respect of *"the central defamatory theme of the articles as they refer to her, namely her involvement in the break-up of Mr Huhne's marriage"*. In this case C has sued for libel on some serious and self-contained parts of the articles, but not on the allegations about the planning dispute which form the great bulk of the articles. It appears likely that this is because there is

no doubt about the essential truth of the house-painting allegation or the scope that gives for the defence of any defamatory statements concerning it. Truth is not a defence to a harassment claim except insofar as it bears on the issue of reasonableness (the issue Tugendhat J was considering at paras 89 to 92 of Trimingham).

i. D suggests that in view of the libel proceedings it was an abuse of process for C to sue on the same publications by way of harassment. But the two torts are distinct as regards the liability elements, and it would be unfair to C for the most serious publications to be disregarded in considering whether D's conduct, considered as a whole, was a course of conduct so grave as to amount to harassment. (The damage elements do overlap, and in considering compensation for harassment the trial judge will of course be careful to avoid double counting.)

j. It appears to me that at this stage the proper approach is as follows:

i. to treat the publication of the libels as capable of constituting part of the course of conduct relied on as harassment (and thus as being relevant to whether other acts should be treated as acts of harassment and to the overall gravity of the harassment) notwithstanding that judgment has been entered for them as libels ;

ii. but to bear in mind the libel award in considering under the Jameel principle whether and to what extent C has any remaining worthwhile claim in harassment.

3.7 With those prefaces, I turn to deal with the various classes of pleaded criticism, as categorised at 3.2 above.

## B. THE ARTICLES

4. FALSE STATEMENTS AS TO FACT

4.1 According to the Particulars of Claim, the published articles contained the following false statements as to fact:

a. that C's mews property was worth far more than was in fact the case; (Articles 1, 2, 3, 5A, 5B, 6, 7, and 8);

b. that she had had the stripes painted at night, when in fact it was done in the daytime; (Articles 1, 2, 3, 5A, 5B and 8);

c. that in a lawsuit brought against her by a Mr Cobbe, he had been awarded far more against her than was in fact the case; (Articles 1 and 2);

d. that the mews or cul-de-sac was immaculate, when in fact it was not and other properties there were in poor condition; (Article 2, 3 and 6);

e. that she had fallen out with her family over an inheritance, when this was not true; (Articles 2, 5A, 5B and 7); (this is an aspect of the allegation complained of as the first libel);

f. that her reason for changing her given name to Zipporah was after the wife of Moses, when in fact it was after her grandmother; (Articles 7 and 8).

No specific complaints of inaccuracy are pleaded about the contents of Articles 4A, 4B and 9 (though complaint is made about a photograph in Article 9, considered at (6) below).

4.2 For present purposes I should approach the application on the basis that the articles are inaccurate in the respects C alleges.

4.3 A complicating factor in this case is that generally speaking Mail Online articles remain available on the internet for a long time after publication, and that they may be altered by deletion, addition or amendment during that time. Such continuing online publication is not only capable of increasing the severity of the injury caused, but also of constituting fresh acts of harassment.

(See Law Society v. Kordowski [2011] EWHC 3185 (QB) Tugendhat J., in which it was held that a single continuing online publication of a harassing nature could constitute a course of conduct, since it was likely to come to each of the claimants' attention on more than one occasion and cause further distress thereby.)

5. CRITICAL STATEMENTS OF OPINION

5.1 Articles 4A and 4B are two versions of the same piece, online and in the newspaper, by the columnist Jan Moir, headlined "Why it's all too easy for toxic neighbours to ruin lives". It deals with various neighbour problems, including C's case. It criticises her robustly, using terms such as "supreme arrogance", "a property developer masquerading as a human being", and "utter selfishness". But, perhaps because of such authorities as Taylor (above), no particulars are given of why or how these comments should be characterised as instances of harassment or as oppressive and unacceptable.

5.2 Article 9 is primarily a report of legal proceedings before Lang J, together with some responses to the decision by a local councillor and a neighbour. No express complaint is made as to its contents other than the photograph of C near the Royal Courts of Justice, considered at (6) below.

6. INTRUSIONS ON PRIVACY AND FAMILY LIFE

6.1 Under this heading one may group:

a. the articles about the family dispute, at 4.1.e. above, which overlap with the libel action;

b. the publication of a photograph (Photo 2) of her late father, a holder of the DFC who was killed in the war, in wartime RAF uniform; the photograph had been taken by C's mother; (Article 2);

c. the publication of Photo 1, a photograph of C at the unveiling in 2013 of a memorial to her father and his crew, and a portrait of her extracted from that photograph; (Articles 1 and 2). Strictly this is not pleaded as an instance of harassment, unlike Photo 2, but it would be artificial to treat them differently.

d. the publication of a photograph of C outside the Royal Courts of Justice; (Article 9).

6.2 In the copyright section of her PoC, not the subject of this application, C also complains of the publication by D of a photograph of herself taken by Andre Obeid and a watercolour drawing of her proposed development of the property. I do not understand these to be complained of as acts of harassment.

6.3 It is accepted on both sides that the photographs of C's father and of his memorial event were obtained by D from the internet. They had been publicly displayed on the website of the Wings Museum charity which commemorates wartime RAF casualties. C supports that charity and allowed her father's photograph to be displayed there. D may have re-used those images without obtaining any copyright clearance or other permission. That forms the subject of the copyright claim herein, in which C claims additional damages based upon flagrant infringement, including damages for distress. Copyright in the photograph of her father may have been inherited by C from her mother; but the copyright in the memorial photographs was only acquired by her via assignment after their initial publication by D.

6.4 C originally contended that the RCJ photograph had been specially commissioned by D; it now appears that it was not pre-arranged but was bought from paparazzi photographers. C contends that the photograph was clearly taken against her will, but that is not apparent from the published image.

## C. THE JOURNALISTIC CONTACTS

7. UNWELCOME, UNSOLICITED AND UNWANTED

7.1 This description is applied by the PoC to Contacts A and B, by which on 13 April 2015 D's reporter Ms Glanfield telephoned C's planning agent Savills and her planning solicitors Max & Co, seeking to speak to C about the house painting incident. Savills told her it was unlikely C would wish to speak to her.

7.2 It is also applied to Contact C, an email from Ms Glanfield to C herself on 14 April 2015, beginning "Hi Zipporah" and asking her to get in touch. C did not respond.

7.3 Though not expressly pleaded, it no doubt also applies to Contacts D and E, a phonecall by Ms Glanfield to Savills and an email to Max & Co on the afternoon of 14 April.

7.4 Contact F took place on 15 April at C's home in Geneva. At 10 am a reporter and a photographer knocked on her door. When she appeared in her dressing gown and declined to speak to them, they went away without attempting to take a photograph. No bad manners or undue persistence are complained of.

8. IN BREACH OF EXPRESS NON-CONTACT REQUEST

8.1 Also on the morning of 15 April 2015, Max & Co wrote to D, stating: "Our client does not want to be contacted directly or indirectly by the Daily Mail or the Daily Mail Online". From this point on, there is no complaint of any direct contact by or on behalf of D with C herself.

8.2 D did however continue to contact C indirectly via her solicitors. Contact G is a phonecall on 17 April 2015 from Ms Knights of D to Max & Co, seeking her response to various matters (including the allegations from her son-in-law and the "closed matter", which gave rise to the libel action).

8.3 On 23 April 2015, C's libel solicitors DLA Piper wrote to D complaining that Ms Knights had not given C's solicitors proper notice of the allegations published in Articles 5A and 5B or an adequate opportunity to respond prior to publication. D contends that that complaint is wholly inconsistent with the present contention that the journalists' pre-publication contacts are acts of harassment.

8.4 Contact H is a phonecall on 7 July 2015 from Ms Glanfield to Max & Co requesting a statement regarding a High Court case that day. (This was an application for judicial review of Kensington and Chelsea's planning policy, brought by her in conjunction with a construction company; the first hearing had taken place before Lang J that day.)

8.5 Contacts I and J are emails to Max & Co (on 23 July 2015) and DLA Piper, C's libel solicitors (on 24 July 2015). In each case they sought her response to the outcome of that High Court case, as reported in Article 9.

9. RESPONSIBLE JOURNALISM

9.1 In support of its case that this series of contacts is not capable of being regarded as part of a course of conduct amounting to harassment, D relies on the well-established principle that, in general, a responsible journalist considering the publication of a story about an identifiable individual should, where practicable, take reasonable steps to obtain that person's side of the story prior to publication, with a view to taking it into account in the published story.

9.2 This principle is recognised by the courts, for example at points vii. and viii. of Lord Nicholls' well-known "ten-point checklist" in Reynolds v. Times Newspapers [2001] 2 AC 127 at 205:

*" Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. But an approach to the claimant is not always necessary.*

*Whether the words complained of contained the gist of the claimant's side of the story."*

Although that checklist is not set out in s.4 of the Defamation Act 2013, which abolishes the Reynolds defence and replaces it with a statutory public interest defence based on consideration of all the circumstances, it is probable that the Reynolds decision will continue to be taken into account in the application of that section (see Duncan and Neill on Defamation (4th edn. 2015) para.14.20).

9.3 Equally, however, there is little doubt that oppressive methods of newsgathering such as door-stepping or besetting the home of a person sought to be interviewed are capable of amounting to harassment (see Trimingham above at para. 99). I see no reason why the same should not apply to oppressive and unacceptable telephone or email contacts from journalists. And similar contact with a third party, who is likely to pass the unwelcome message on to the claimant or to take action against her, is certainly capable of constituting harassment; see Hayes v. Willoughby [2013] UKSC 17.

## D. DISCUSSION AND CONCLUSIONS

10. THE LIVE ISSUE

10.1 The matters complained of as acts of harassment took place over the relatively short period of about three months (putting to one side the continuing online publication). They are closely linked in

subject-matter, beginning with C's conduct in respect of the house-painting incident and the planning dispute, and radiating out into other aspects of her life. From a journalistic standpoint they are all part of a single developing story. It is not seriously disputed that any or all of them, taken together, could constitute a "course of conduct" under the Act (subject to the other requirements, considered below, also being met) nor that they are, in a neutral and non-pejorative sense, "targeted" at C since she is their principal subject.

10.2 As stated above, the live issue on this application is whether C has a real prospect of success in establishing that the matters complained of amount to an actionable case of harassment by reason of their nature and severity. D puts its case that she does not on two bases:

a. that her case does not meet the requirement of the statute, that a reasonable person would regard the conduct as amounting to harassment; and/or

b. that it does not meet the Majrowski test as to the level of gravity required.

In practical terms, however, these give rise to similar considerations on the facts of this case and the outcome is likely to be the same.

10.3 D invites me to take a relatively narrow approach, asking myself whether the pleaded case can possibly satisfy the Majrowski requirement that the conduct complained of is so oppressive and unacceptable as to pass the threshold of criminality. C invites me to take a wider view, looking ahead to the final trial at which, as in Trimingham, liability will turn on the judge's application of Re S principles to the ultimate balance between the parties' respective Article 8 and Article 10 rights, and to say now that it is premature, indeed impossible, to conclude that the balance is bound to be struck in D's favour.

10.4 For the following reasons I consider that the approach proposed by D is the correct one.

a. My primary task at this stage is to consider whether C has failed to make out a sufficient case under the 1997 Act, interpreted in accordance with the relevant authorities. If she has not, further consideration of Article 8 will not rescue her case.

b. In any event, C is putting forward a false dichotomy. Thomas and Majrowski have already struck the balance between Articles 8 and 10 sufficiently for present purposes. Unless the conduct complained of is oppressive and unacceptable, unless it is exceptional in terms of journalistic misbehaviour, C will not be able to establish the necessity and proportionality in a democratic society of displacing Article 10 in her favour.

10.5 The starting point, in consideration of whether D's conduct is capable of constituting journalistic harassment, is the undoubted fact that C made the first move when she decided to paint her building in

this striking manner. As she must have realised when she did it, this was a public gesture which would probably attract wide attention to her planning dispute and herself. This is not a case in which a private person becomes caught up in a story not of their making (the innocent family of a murder victim for example). Whether or not this story concerned a matter of public interest, it was certainly a matter interesting to the public, and one which D was entitled to investigate and report in the exercise of its Article 10 rights within the limits of the law. Is it arguable that in doing so D went too far, so as to have become liable in harassment?

## 11. CONTACTS WITH CLAIMANT

11.1 In this case, as stated, C had deliberately performed a newsworthy act. So far as the journalists' subsequent conduct towards C (other than the content of their articles) is concerned, it can be summarised as follows (on the basis of the PoC and the original correspondence):

a. Over a three month period, involving the publication of 9 articles, their only direct contacts with her were the sending of one email, and one uninvited visit to her home. The former was in familiar but not offensive terms. The latter was conducted at the reasonable hour of 10 am, no attempt was made to photograph C in her dressing-gown, and when she asked them to leave they did so without demur.

b. As soon as they were sent a clear written request not to contact C directly or indirectly, they complied with it so far as direct contacts were concerned, and never did so again.

c. Prior to that request they had made 4 or 5 attempts to contact C via her professional advisers, Savills and Max & Co, who were acting for her in the very planning dispute which was at the centre of the story.

d. After that request, they did contact her solicitors on 4 occasions, in each case because there had been a material development (the step-family's defamatory allegations, and the High Court hearings) on which they sought her comments. This was in accordance with the general principles of good journalistic practice to which I have referred, and which DLA Piper had recognised in their letter to D. A request by the subject of a developing story not to be contacted again, even through her representatives, will seldom be conclusive; how can either side know, before a new allegation has arisen, what attitude the claimant would choose to take about responding to it? (Disregard of a request not to be contacted <u>personally</u> might be a different matter; but that is not this case.)

11.2 To a person like C, who has not previously been much in the public eye, the nature and extent of the press response to what she had done might well be surprising and distressing. But, unless her own dramatic public act was either to be ignored by the press or reported on her own terms without any attempt at investigation or comment, how was this level and nature of contact to be avoided? To any

person familiar with the conduct of responsible professional journalism, there is nothing surprising, oppressive, unacceptable or exceptional about the journalists' behaviour here. It was well within the limits of normal rough-and-tumble which people must expect in a free society, especially those who choose to attract attention to themselves by carrying out controversial acts. (I would go so far as to say that in some respects, particularly as to desisting from personal contact when asked, the journalists' conduct was a tribute to Reynolds and the higher professional standards it has encouraged.) I consider it highly likely on the basis of the solicitors' correspondence that, if C had had no complaints about what the journalists published, it would never have occurred to her to complain about the manner in which they investigated the story.

11.3 With my permission, the parties made written submissions following circulation of the first draft of this judgment, directed to matters arising from HHJ Parkes QC's libel judgment which was delivered after argument in this case. C made two points arising directly or indirectly from that judgment:

a. that following the "door-stepping" visit to Geneva on 15 April 2015 (Contact F), she was misquoted in the articles of 17/18 April 2015 (Articles 5A and 5B) as having referred to the matter being in the hands of her lawyers;

b. that the telephone call to her solicitors on 17 April 2017 (Contact G) which shortly preceded the publication of Articles 5A and 5B had been criticised by HHJ Parkes QC at para. 196 of the "closed" part of his judgment, essentially because the call had been made too soon before publication of the articles to give her time to respond, and had thus caused her "acute distress and anger" and a sense that "the publication could only have been malicious".

11.4 I remind myself that HHJ Parkes QC was dealing with the assessment of damages for the publication of the defamatory articles, whereas I am dealing at this point with whether the journalistic contacts which preceded the publication of those articles are capable of constituting acts of harassment. It is C's pleaded case on harassment that these contacts should never have taken place at all, not that they were made too late or resulted in misquotation. It is my firm conclusion, for the reasons above stated, that neither the doorstep visit nor the telephone call to solicitors in themselves constituted acts of harassment, essentially because it is already clear that each of them was well within the range of options open to a responsible journalist following up a story.

11.5 Properly analysed, C's above complaints are not about the nature of the contacts themselves but about the articles published as a result. As will appear at 13.3 below, I do not propose to strike out her case in respect of the publication and content of the articles. Nor will my order prevent her referring to the contacts as background and context from which to draw conclusions about whether the articles constitute harassment. But what it will preclude her from doing is suing on this plainly modest and

reasonable level of journalistic conduct as itself being actionable. I bear in mind in reaching this conclusion the general public importance of encouraging the practice of responsible journalism, and the undesirability of permitting the law of harassment to develop in a way which would leave such journalists, when considering whether to contact the subject of their story, in a professional dilemma, damned if they did and if they did not.

11.6 In short, I conclude that on the basis of C's pleaded case it is already clear that none of the instances of journalistic contact of which she complains is of such a nature as to be capable of constituting an act of harassment or part of a course of conduct amounting to harassment, and that regardless of the other matters complained of that part of her claim falls to be struck out at this stage.

12. CONTENT OF ARTICLES

12.1 There are several respects in which it is plainly well arguable that the contents of the published articles constitute actionable harassment, in that:

a. a reasonable person in the journalist's position ought to have known that publication would constitute harassment of C;

b. the publication was oppressive and unacceptable; and

c. the conduct was exceptional by the standards applicable to journalism.

12.2 I am referring in particular to:

a. the step-family's allegations about inheritance, which were plainly defamatory, grave and likely to cause distress to C, and may have been published without due care, as well as being wholly unconnected with the planning dispute or the house-painting; and

b. the publication, without authority, of the photographs of C's late father and of her standing next to what was symbolically his grave. These images had no connection at all with any aspect of the stories being published, but would obviously be likely to cause her unwarranted distress if published in that context. (The other photograph complained of as harassment, taken outside the Royal Courts of Justice, is of an entirely usual kind and does not merit that characterisation.)

12.3 It is C's case, which D cannot refute at this stage, that having decided that she was a person whom their readers "loved to hate", D chose to publish these obviously personal and distressing matters, not because they were relevant to the legitimately newsworthy planning dispute, but simply because they were about her and largely to her discredit and would therefore attract further readers and online "clicks". If so, their publication might well be held at trial to constitute a course of conduct both amounting to harassment and passing the Majrowski test of criminal gravity.

12.4 The final aspect of content which I should consider is the list of falsities and inaccuracies set out at 4.1 above (excluding (e), the inheritance dispute, already taken into account at 12.2 above). My observations on these, in the context of the overall inquiry as to whether the course of conduct passes the threshold of harassment, are as follows:

a. Three of them (the allegations as to the property's value, when the painting was done, and whether the mews is immaculate) are directly related to the planning dispute. None of these is of real gravity, being more an exaggeration than a complete error, and none is of itself of such a nature that a reasonable person would regard its publication as constituting harassment.

b. The fourth allegation (the Cobbe case) is indirectly related to the planning dispute, being a previous instance of C being involved in a property dispute. The error as to the amount Mr Cobbe recovered was of little significance in the context of these articles by comparison with the true report that the High Court and Court of Appeal judges considered her conduct unconscionable (indeed the article might have added that the House of Lords took the same view). This error is not of such a nature that a reasonable person would regard it as of itself constituting harassment.

c. The fifth allegation, as to C's change of name, is simply trivial.

12.5 If these matters were the only ones complained of, then even taken together they would plainly not be sufficient to pass the Majrowski test, or indeed the basic statutory test that a reasonable person in the journalist's position would consider them to constitute harassment. But, unlike the journalistic contacts considered at 11 above, they are not positively justified, so as to be incapable of constituting harassment even when viewed in a wider context. They need to be considered together with the publication of the financial allegations and the family photographs, in order to decide whether they are capable of forming part of a course of conduct amounting to harassment.

## 13. THE COURSE OF CONDUCT

13.1 For the reasons given at 11 above, I have concluded that the journalists' conduct towards C in respect of contact is not capable of constituting part of a harassment claim.

13.2 Equally, for the reasons given at 12.1 to 12.3 above, I have concluded that the defamatory financial allegations (also sued on as libels) and the copyright infringements are plainly so capable (subject to my observations on those claims at 13.4 below).

13.3 The matters I have classed as falsities and inaccuracies (see 12.4 above) are not of themselves of any great seriousness. But they form part of the same series of published material, indeed in some cases the same articles, as the financial allegations and the alleged copyright infringements. It would

be unrealistic and artificial to consider these matters in isolation from one another. C has put forward a case worthy of consideration at trial that these seemingly trivial errors are in fact an integral part of the campaign of harassment against her because, taken together with the other matters, they contribute to her overall portrayal as an exceptionally rich, greedy and uncaring person, and a stark contrast with her heroic self-sacrificing father. She wants to contend that, far from giving her the benefit of any doubt, D took many opportunities to paint the least favourable picture of her, and refused or delayed in correcting the errors even when pointed out. I remind myself that harassment is not concerned with injury to reputation; but a reasonable sense of unfairness and persecution is plainly capable of aggravating a claimant's subjective feelings of anxiety and distress caused by the publications. In this way, consideration of these matters at trial may assist C in persuading the trial judge that, considered overall, D's publications pass the Majrowski test of gravity; or at least, I cannot now be sure that they will not do so. For these reasons I do not propose to strike out C's case as to the content of the articles, though in respect of Articles 4A, 4B and 9 they should be treated merely as context and not as forming part of the actionable course of conduct.

13.4 I have borne in mind the parallel libel claim and the ongoing copyright claim, each of which obviously overlaps on both liability and damage issues with the harassment claim as I have limited it. For the following reasons I do not consider those other claims to be a factor of such weight that it should affect my decision on the present application, though they may well be very significant at trial.

a. Of course the libel award includes an element in respect of injury to feelings for the publication of the libels, which will overlap to a material extent with the similar damages recoverable in the harassment action. But it cannot be said with certainty that the whole of the potential harassment damages are already covered by the libel damages. For one thing, the libel damages (including the element attributable to hurt feelings) were reduced by 40% to take account of the offer of amends, which would appear to have no application to harassment, so full compensation for hurt feelings may not have been given. For another, the harassment damages, if awarded, will cover the effects of the course of conduct as a whole. In these circumstances it cannot be said to be an abuse of process to pursue the harassment claim separately even after the libel claim has been resolved.

b. In the case of the copyright claim, that has not yet been resolved. Again there is overlap between the flagrant infringement award sought in that claim and the harassment damages claim. But it is far from clear that C will recover such damages in copyright, given for example the issue about the subsequent assignment. She is entitled to have a second string to her bow.

14. ABUSE OF PROCESS

14.1 D has also applied to dismiss the claim as an abuse of process under the Jameel principle. In essence, that is a doctrine whereby otherwise technically valid claims can be struck out on the basis that the acts complained of and/or the harm done are plainly so trivial by contrast with the anticipated costs of the action that "the game is not worth the candle". (Jameel v. Dow Jones [2005] EWCA Civ 75.)

14.2 Given my above rulings, there is now no scope for invoking Jameel as a "fall-back" or "sweep-up" to deal with such parts of C's case as might survive the main applications. It suffices to say that C's subsisting harassment claim about the content of the articles relates to what is well arguably a substantial matter in terms of the number of articles, their terms, the extent of their publication, and the potential injury caused to her. (She is of course a person with very strong connections to England.) It is far from clear that the libel and copyright claims would alone be sufficient to compensate her sufficiently for the harassment of which she complains. This is not a Jameel-type case.

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