Neutral Citation Number: [2019] EWHC 2506 (QB)

Case No: HQ18M02313

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/09/2019

Before :

HIS HONOUR JUDGE PARKES QC
(Sitting as a Judge of the High Court)

- -

Between :

BVC	**Claimant**
- and -	
EWF	**Defendant**

- -
- -

Mr Gervase de Wilde (instructed by **Taylor Hampton Solicitors**) for the **Claimant**
The Defendant did not appear and was not represented.

Hearing dates: 19 June, 26 September 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PARKES QC

His Honour Judge Parkes QC :

Introductory

1. This is an application by the Claimant dated 17 April 2019 for summary judgment in a claim for misuse of private information and harassment. The privacy claim arises from internet publication, on a website created by the Defendant, of his account of his relationship with the Claimant. The harassment claim arises from a series of email communications from the Defendant to the Claimant over a period of some two years, and from publication of the website itself.

2. The parties were anonymised by order of Nicklin J on 27 June 2018.

3. The Defendant has served a Defence and Counterclaim. In the Counterclaim, the Defendant states that he relies on causes of action in negligence, battery and assault, intentional infliction of harm, trespass to goods, conversion, deceit, malicious prosecution and abuse of process.

4. The Claimant applies also to strike out, or for summary judgment on, the Defendant's counterclaim.

5. There is in addition an application by the Defendant. This is dated 5 June 2019. The application notice appears not to have been filed, because it does not bear a court stamp. I am told by Mr de Wilde, for the Claimant, and I accept, that it was served on his solicitors on Thursday 13 June. So insufficient notice was given. But Mr de Wilde did not take those points and was content to address the Defendant's application in his submissions.

6. The Defendant's application seeks an order striking out the claim pursuant to CPR 3.4 and discharging the interim injunction.

7. The Defendant did not attend the hearing of the application and was not represented. However, he has plainly been assisted in the conduct of his defence by someone with a sophisticated understanding of the law. I say that because there is no reason to suppose that the Defendant possesses that understanding himself.

8. He sent a nine page letter to the court and to the Claimant's solicitor dated 18 June 2019, which I saw on the morning of the hearing on 19 June. This is not the first time he has put in late unsworn documents: he did so before hearings on 4 July 2018 (Nicklin J) and 22 November 2018 (Dingemans J). The letter stated that he would not be able to attend the hearing, and that he did not live in England or Wales. He did not say why he was unable to attend. He did not state where he lived. The implication was that his inability to attend was linked to his place of residence. The letter was in effect (although not in form) a combination of a last-minute unsworn witness statement in response to the Claimant's third witness statement (itself sworn on 17 June 2019) and a written argument. I shall take the contents of the letter into account to the extent that they merit, without according them the weight of sworn evidence.

9. The sworn evidence before me consisted of a 45 page first witness statement of the Claimant dated 26 June 2018; a 70 page 'supplementary' witness statement of the Defendant dated 2 April 2019 (responding belatedly to the Claimant's first witness

statement); a 33 page second witness statement of the Claimant dated 17 April 2019 in support of his current applications; an 83 page witness statement of the Defendant dated 5 June 2019; and a 12 page reply from the Claimant dated 17 June 2019, to which the Defendant's letter to the court was a rejoinder. There are also substantial exhibits, numbered BVC 1-5 (exhibited to the Claimant's first witness statement) and BVC 6-8 (exhibited to his second), and in the Defendant's case exhibited to his 5 June 2019 witness statement and numbered EWF 10-17.

10. I have also considered Particulars of Claim of 22 pages plus a confidential annex containing the material published on the Defendant's website, and a Defence and Counterclaim which runs to 187 paragraphs (and many more sub-paragraphs) over 76 pages.

Proceedings

11. Nicklin J granted the Claimant an *ex parte* injunction on 27 June 2018. By that order, the Defendant was restrained from contacting or harassing the Claimant, from publishing the website or any of its contents to the world at large, and from publishing any of the information set out in a confidential schedule, or any information which was liable to or might identify the Claimant as a party to the proceedings or as the subject of the confidential information. The information set out in the confidential schedule was information concerning the Claimant's sexuality and his relationship with the Defendant; his sexual life, including intimate details of sexual activity; his health, including intimate details relating to his mental and sexual health; his family life, including relationships with his mother and brother; financial information; and allegations that he had been involved in criminal or regulatory wrongdoing.

12. That injunction was continued by the same judge on 4 July 2018, and by Dingemans J on 22 November 2018. On neither occasion did the Defendant attend.

13. A number of costs orders have been made against the Defendant (by Steyn QC on 17 October 2018, by Dingemans J on 22 November 2018 and by Master Cook on 11 April 2019). They have not been satisfied.

Challenge to the Jurisdiction

14. At the hearing on 27 June 2018, the Claimant's evidence was that to the best of his knowledge the Defendant, who is a British citizen, currently lived and worked in England. On that basis, Nicklin J was satisfied that it was plainly arguable that there was jurisdiction to grant an interim injunction.

15. However, the Defendant then put in evidence to the effect that he currently lived and worked in Switzerland, has done so since 2017, and was in Zürich on 27 June 2018 when the Claim Form and accompanying documents were served on him by email. Residence is not, of course, the same thing as domicile, and the permanence or otherwise of the Defendant's translation to Switzerland may be moot. As I understand it, his evidence on his application to challenge the jurisdiction was that he is domiciled in Switzerland, and for present purposes that contention is not, I think, in issue.

16. Switzerland and the UK are parties to the Convention on Jurisdiction and the Recognition and Enforcement of Civil and Commercial Matters (2007) (the Lugano Convention). Art 2(1) of the Lugano Convention provides:

> "Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State."

17. That general rule is the correlative of Art 4(1) of Regulation (EU) No 1215/2012, the Recast Judgments Regulation, which makes the equivalent provision for persons domiciled in a Member State of the European Union (which Switzerland is not).

18. So if, as the Defendant asserts, he is indeed domiciled in Switzerland, the starting point is that he should, all other matters being equal, be sued there.

19. Art 3(1) of the Lugano Convention provides that persons domiciled in a Convention State may be sued in the courts of another State (a State other than that in which they are domiciled) only as provided by the rules set out in Articles 5-24. (Art 5(1) of the Recast Judgments Regulation (RJR) echoes that provision for persons domiciled in an EU Member State.)

20. Art 5(3) of the Lugano Convention provides by way of special jurisdiction that

> "A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:
>
> …
>
> (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur …"

21. Again, this has its correlative in the substantially identical Art 7(2) of the RJR (previously Art 5(3) of Council Regulation (EC) No 44/2001, the Brussels Regulation).

22. The question therefore arose in these proceedings whether the courts of England and Wales have jurisdiction in accordance with Article 5(3) of the 2007 Lugano Convention.

23. In *eDate Advertising GmbH v X* [2012] QB 654, it was held by the CJEU to be settled case law that the rule of special jurisdiction was based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred (or might occur). This close connecting factor justified the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

24. The special jurisdiction focus on 'the place where the harmful event occurred' in Art 5(3) Lugano and Art 7(2) RJR was intended to cover both the place where the damage occurred and the place of the event giving rise to it: see *Shevill v Press Alliance SA* [1995] 2 AC 18. Those two places could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the

circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings (*eDate* at [42]).

25. So in *eDate* (a case involving a defamation claim arising from a newspaper article distributed in several states), it was held that a claimant might bring a claim against the publisher either before the courts of the contracting state where the publisher was established, or before the courts of each contracting state in which the article was published and where the claimant claimed to have suffered damage to his reputation, which had jurisdiction to rule solely in respect of the harm caused in the state concerned.

26. However, the court in *eDate* had to consider how the connecting criteria identified in *Shevill* for the special jurisdiction could be adapted to the internet age. The CJEU held as follows:

> "[48] The connecting criteria referred to … must therefore be adapted in such a way that the person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice, referred to in para 40 above.
>
> [49] The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a member state in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that state.
>
> [52] Consequently… article 5(3) of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the member state in which the publisher of that content is established or before the courts of the member state in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each member state in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the member state of the court seised."

27. The *eDate* 'centre of interests' doctrine was developed by the CJEU in *Bolagsupplysningen OÜ v Svensk Handel AB* [2018] QB 963 in the context of a

company's commercial reputation and economic activities. It was held that a person might have his centre of interests in a member state in which he did not habitually reside, if other factors, such as the pursuit of a professional activity, established the existence of a particularly close link with that state.

28. The Defendant filed an Acknowledgment of Service on 12 July 2018, indicating his intention to challenge the Court's jurisdiction. His application to the court sought an order setting aside purported service of the Claim Form, and discharging the interim injunction. He contended that the court had no jurisdiction to try the claim (or alternatively should not exercise any jurisdiction that it did have), because he lived and worked and was domiciled in Switzerland, and that service of the claim had been invalid (because he had been in Zürich on 27 June 2018 when he was served with the order of Nicklin J). He put in evidence and filed a skeleton argument but did not attend the hearing on 5 October 2018 and was not represented.

29. The competing evidence was, in short, as follows.

30. The Claimant, who became a naturalised British citizen in 2011, stated that:

    i) although not currently living in the jurisdiction, he had lived the majority of his adult life here, and was living here until 2012;

    ii) he had principally pursued the professional activity of practising both clinical and research based medicine in this jurisdiction, including working in a number of major hospitals around the UK;

    iii) he trained as a postgraduate doctor in England from 1999 onwards and retained his registration with the GMC;

    iv) he had established a career as a researcher based on publication in scientific journals either published or based in the UK;

    v) he presented his research at European conferences, where he continued to meet colleagues from this jurisdiction; and

    vi) there were numerous connections between the Claimant's friends and colleagues in this jurisdiction and those in State B.

31. The Defendant's evidence was that

    i) the Claimant had not lived or worked in this jurisdiction since 2012;

    ii) he no longer had a licence to practise medicine in the UK;

    iii) he had been habitually resident and working in State B since August 2014, was licensed to practice medicine there, and had obtained Permanent Residence;

    iv) his immediate family resided in State A, and his relationships with them were very important to the Claimant and much closer than any relationships which he had with anyone in this jurisdiction;

v) he had retained his citizenship of State A and was licensed to practise medicine there; and

vi) he had spent about 33 years of his life living in countries outside this jurisdiction, including States A and B.

32. The Defendant's application was heard on 5 October 2018 by Karen Steyn QC sitting as a deputy judge of the High Court.

33. The deputy judge dismissed the Defendant's application with costs. She held, in short, that the Claimant had a good arguable case that this jurisdiction was the state in which he had the centre of his interests, and that in any event a real and substantial tort (namely misuse of private information) had been committed within the jurisdiction. She also ordered that the steps already taken to bring the Claim Form and orders of 27 June and 4 July 2018 to the Defendant's attention (namely, service by email) constituted good service on him, notwithstanding that he claimed he was domiciled in Switzerland at the date of receipt of the documents, not (as had been believed) in this jurisdiction.

34. The Defendant sought permission to appeal from the judgment of Karen Steyn QC but was refused permission by Floyd LJ on 14 February 2019.

Whether it is still open to the Defendant to challenge the jurisdiction

35. All that notwithstanding, the Defendant appears to regard jurisdiction as a live issue which he is entitled to continue to argue.

36. The position on the pleadings is that the Claimant, having disposed of the Defendant's challenge to jurisdiction, nonetheless pleaded his case on the centre of his interests at paragraph 2 of his Particulars of Claim. In his Defence, the Defendant not unnaturally responded to that case, and at paragraphs 1-9 and 62-76 strongly disputes that this jurisdiction is the centre of the Claimant's interests, maintaining that in reality that centre is State B, where the Claimant currently lives and works, and that the Claimant is limited to claiming damages for any harm that has been caused to him within this jurisdiction.

37. In addition, a great deal of the Defendant's very lengthy witness statement of 5 June 2019, in response to the Claimant's application for summary judgment and in support of his own applications, revisited the issue of centre of interests in argumentative terms which are not appropriate in what is supposed to be an evidential context. It is clear that he is still asserting, notwithstanding the dismissal of his application for permission to appeal, that the decision on jurisdiction was wrong. He stated that he did not understand how Steyn QC was able to reach the decision that she did on the Claimant's centre of interests, and in effect described her conclusion as 'not reasonable or logical'. He also seemed to rely on the difference between the standard of proof applicable at the stage of challenge to the jurisdiction and that of balance of probabilities, as if he felt that the issue could be re-opened at trial.

38. Mr Wilde sought very properly to address the question of whether there might still be scope for the Defendant to advance a case on the issue of the Claimant's centre of interests at trial, but the focus of his argument was on the proposition that the Defendant had submitted to the jurisdiction. I realised on reflection after the hearing that I was

uncertain just what the Claimant's position was on the anterior question of whether (leaving submission to one side) it was in any event open to the Defendant to continue to challenge jurisdiction, and whether the Defendant's arguments on jurisdiction might still have some relevance to the question of the scope of a final injunction. I invited further short written submissions on those related points, which Mr de Wilde and the Defendant kindly provided.

39. Mr de Wilde's primary position, as I had expected, was that it was not open to the Defendant to pursue his jurisdictional challenge. He referred to a decision of Popplewell J in *IMS SA v Capital Oil and Gas Industries Ltd* [2016] 4 WLR 163, a case in which a defendant sought to make sequential challenges to jurisdiction, reflecting the distinction between CPR 11(1)(a) (challenge to the existence of jurisdiction) and (b) (challenge to the exercise of jurisdiction). The judge held that notwithstanding the difference between the two grounds, the applications should be brought together in a single application. He said at [36] '…it is in the interests of speed, efficiency and finality that such grounds should be brought forward at the first opportunity at which they may be presented, and that they should be disposed of on that occasion'. On the basis of that analysis, Mr de Wilde submitted that the Defendant's challenge had been conclusively and finally determined.

40. Mr de Wilde also speculated, as I had, that the Defendant might have been attempting to establish a meaningful distinction between 'good arguable case' and 'balance of probabilities', such that he could continue to advance a case on centre of interests at trial on the basis of his Defence. He suggested that to preclude that possibility it might be necessary for the court to find that the Defendant had no real prospect of successfully establishing that the Claimant did not have his centre of interests in the jurisdiction.

41. The Defendant put in brief but enlightening written submissions in answer to those of Mr de Wilde. He is not seeking to establish a distinction between good arguable case and balance of probabilities. His position is simply that the Claimant does not have his centre of interests in this jurisdiction, because his life is 'clearly centred' in State B. He has not abandoned his argument on jurisdiction. He maintains that the judgment of Steyn QC and the refusal of permission to appeal should not be the final word on the Claimant's centre of interests. 'It cannot be fair', he submits, 'to allow the claim to proceed on what is certainly a false premise'.

42. This amounts to no more than a refusal to accept the decisions of the courts.

43. The same is true of the Defendant's request for 'clarity on the definition of centre of interests pursuant to Article 267 of the Treaty of the Functioning of the European Union', posing the question whether Article 7(2) RJR is 'to be interpreted as meaning that a natural person who alleges that his personality rights have been infringed by the publication of information concerning him on the internet may have his centre of interests in a Member of State where he is not habitually resident, where he has no ongoing professional connections or employment, no home, no income and no immediate family'. In his letter to the court of 18 June 2019, the Defendant puts it this way: '… with no permission to appeal the judgment of Karen Steyn QC, if the court continues to accept the Claimant's centre of interests is in England and Wales despite very clear evidence to the contrary then it is necessary to refer the question of interpretation to the ECJ pursuant to Article 267 of the TFEU'.

44. I disagree. There has been minimal argument on this point, given that the Defendant did not attend to advance it, but in my firm view the process of reference under Art 267, even if this were a Recast Judgments Regulation case, which it is not, is not designed to provide a route of appeal against judicial evaluation of evidence of fact. A preliminary reference may be submitted if a question of EU law is raised before a national court, and a decision on that question is necessary for the national court to give judgment in the case. The law on centre of interests is not in doubt, and has been clearly stated by the ECJ in *E-Date* and *Bolagsupplysningen*. No decision on EU law is necessary for me to give judgment. I therefore dismiss that part of the Defendant's application.

45. The 'good arguable case' threshold was explained by Waller LJ in *Canada Trust Co v Stoltzenberg* [1998] 1 WLR 547 at 555C-G, a passage later approved by Lord Steyn in the House of Lords, and recently endorsed by the Court of Appeal (in the light of Supreme Court authority) in *Kaefer Aislamientos SA v AMS Drilling Mexico SA* [2019] EWCA Civ 10:

> "…what the court is endeavouring to do is to find a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction. That may involve in some cases considering matters which go both to jurisdiction and to the very matter to be argued at the trial, e.g. the existence of a contract, but in other cases a matter which goes purely to jurisdiction, e.g. the domicile of a defendant. The concept also reflects that the question before the court is one which should be decided on affidavits from both sides and without full discovery and/or cross-examination, and in relation to which therefore to apply the language of the civil burden of proof applicable to issues after full trial is inapposite. … It is also right to remember that the "good arguable case" test, although obviously applicable to the ex parte stage, becomes of most significance at the inter partes stage where two arguments are being weighed in the interlocutory context which, as I have stressed, must not become a "trial." "Good arguable case" reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."

46. Determination of jurisdiction is a process which has to be settled at an interim stage. Even in the unlikely case where the court cannot form a view one way or the other as to which party has the better argument, it is entitled to find a good arguable case if there is a plausible (albeit contested) evidential basis for it. That is because, as Green LJ stated in *Kaefer* at [80], "*it would not be right to adjourn the jurisdiction dispute to the full trial on the merits since this would defeat the purpose of jurisdiction being determined early and definitively to create legal certainty and to avoid the risk that the parties devote time and cost to preparing and fighting the merits only to be told that the court lacked jurisdiction*".

Conclusion

47. It is therefore clear to me that it is not open to the Defendant to attempt to keep his challenge to the jurisdiction alive until trial. In my judgment, the jurisdiction issue is settled, both as to challenge to jurisdiction and as to any contemplated challenge to the exercise of jurisdiction. Because the issue is settled, it is not necessary for the court to find that the Defendant has no real prospect of successfully establishing that the Claimant does not have his centre of interests in the jurisdiction.

Alternative argument on submission to the jurisdiction

48. In any event, Mr de Wilde submits that it is no longer open to the Defendant to challenge the jurisdiction, because he has submitted to it. Argument about submission to the jurisdiction arises where a defendant has not challenged jurisdiction, or has not done so in time, or has acted in a way incompatible with a challenge to the jurisdiction before the challenge is made, which is not the case here. It is unnecessary to advance an argument on submission to the jurisdiction when the jurisdiction has been challenged unsuccessfully. Once his challenge failed, the Defendant had no choice but to attempt to defend the proceedings. In those circumstances it is otiose to describe service of a defence, and the making of an application to strike out, in terms of submission to the jurisdiction. I do not think that I need say any more about that point.

The Facts: Background

49. The Claimant was born in what (to protect his identity) I shall call State A, and presently lives and works in State B. Both are countries in south-east Asia. He trained as a postgraduate doctor in England, and lived in the UK between 1999 and 2012. He met the Defendant in around 2006. He became a naturalised British citizen in 2011. He is also a citizen of State A.

50. The Claimant was brought up in a traditional household and his family are conservative. He is bisexual, but he says that both for cultural reasons and because homosexuality is illegal both in State A and in State B, he has kept his sexuality private and secret from his friends and family. This has led to him maintaining control over information about his sexuality, and he asserts that knowledge of his bisexuality is strictly limited. The defendant disputes that, although I do not think he asserts that knowledge of it is widespread.

51. The Defendant is a British citizen with whom the Claimant had a homosexual relationship for around 10 years, between about 2006 and 2015. The Claimant describes it as 'off and on'; the Defendant asserts that they were together most of the time, living together between December 2007 and June 2015 except for some months in 2009 and 2013 and for other short periods. However, the Defendant accepts that in 2009-2010 the Claimant was in a relationship with a woman, ST (a relationship which the Defendant brought to an end by sending an anonymous tip-off to the woman's father about the Claimant's homosexuality). During the period of his relationship with the Claimant, the Defendant did not work or study, (or at least he did not do so for the bulk of the time), he was dependent on the Claimant financially, and shared his lifestyle, including being taken abroad for holidays.

52. According to the Claimant, the Defendant in 2009 and between 2011 and 2015 carried out substantial credit card frauds by using the Claimant's identity, from which he derived up to £92,000, and which he freely admitted. The Defendant's position on these is not altogether clear. It might be thought to appear from the Defendant's emails of June and July 2015, referred to below, that he accepted responsibility for at least the second matter, although he preferred to refer to it as 'borrowing in (the Claimant's) name'. The cards used were registered in the Claimant's name to addresses in Edinburgh and the Philippines. In his Defence, the Defendant denies carrying out any credit card fraud, but then gives details which serve to obscure the position. He asserts that his use of the Claimant's cards was with the Claimant's consent (but that does not meet the case more fully set out in the Claimant's first witness statement, which is that he obtained cards in the Claimant's name that were not in fact the Claimant's cards); and he states that the Claimant's breach of promises to provide for him forced him to rely on unidentified credit cards for day to day spending (which does not meet the case that his use of the cards was fraudulent). In his witness statement of 2 April 2019, he denies having 'set up' any credit cards fraudulently or without consent, and maintains that the unpaid credit card debt related to spending that benefited both of them and was incurred with the Claimant's express or implied consent. It remains unclear why, if all that the Defendant did was to spend money with the Claimant's agreement on his credit cards, those credit cards should have been registered (as they clearly were) to addresses in Edinburgh and the Philippines.

53. For present purposes, it probably does not matter where the truth lies, and I do not need to decide the question. What does matter is that on the Claimant's case, it was the second credit card incident that caused him finally to break off the relationship in June 2015. The Defendant accepts that he arrived in State B in June 2015, and maintains that he was shut out of the home that he says he shared with the Claimant, who was furious with him and denied that they had ever been in a relationship. He went back to Scotland. He maintains that the Claimant launched a further angry attack on him in July 2015. It is common ground, however, that even after that time they were intermittently in touch.

54. It is the Claimant's case that as he made efforts to bring his relationship with the Defendant to an end, the Defendant sent him a substantial number of email communications about his grievances, which included the disparity between the parties' financial positions, his unhappiness at the idea of the Claimant having relationships with other men, and complaints about the way in which he felt he had been treated. Those emails are in evidence.

55. There are many differences between the Claimant's and the Defendant's accounts of their relationship. That is not surprising. In any relationship, especially a failing one, the parties have different perspectives and different grievances.

56. Clarifying the common ground has been made very much more difficult by the Defendant's behaviour in denying the truth even of small and immaterial assertions by the Claimant about details of their time together, and he makes few if any concessions. The vast majority of the paragraphs of the Claimant's first witness statement are met by the assertion in the Defendant's 2 April 2019 response that they are false, or substantially false: there is almost never an acceptance that anything deposed to by the Claimant is true. The same is largely true of the response of the Defence to the Particulars of Claim. The process adopted by the Defendant in his evidence (and in the Defence) has mostly been to state that a particular paragraph is false and then to set out

the particular areas of dispute. It is generally only possible to deduce the Defendant's acceptance of a particular piece of evidence, or his admission of an element of the Claimant's case, by working out which of the Claimant's assertions is not specifically countered. This makes the task of the court much harder than it need be; and the Defendant's inability to accept the correctness of any part of the Claimant's case, and his determination to stigmatise that case or evidence in terms of lies rather than accept that there might (for instance) have been errors of recollection, both runs counter to his duty to further the overriding objective and does no favours to the credibility of his own case. However, his evidence has not been tested, and it is not in general possible, nor necessary for present purposes, to resolve those differences.

57. It is the Claimant's case that the emails in particular, together with the publication of the website that followed, amounted to harassment of him. He might also have relied (but does not) on contacts and attempted contacts by telephone and other means. That case is strongly disputed.

The Emails

58. The emails complained of in the harassment claim were sent by the Defendant to the Claimant on 8 June 2015, 31 July 2015, 21 September 2016, 15, 19 and 26 October 2016, 14 February 2017, 15 May 2017, 3 November 2017, 14 December 2017 and 12, 17 and 19 June 2018. It is material to refer in detail to parts of a number of them.

59. The first email from the Defendant, dated 8 June 2015, refers to what the Claimant terms the second credit card fraud. The Defendant referred to what he called 'the money that was borrowed in your name', which he said was a debt unenforceable against the Claimant as long as the Claimant did not live in the UK, and he said that he had the money to offer a settlement to the debt collection agency. He said that he understood that the Claimant would want to talk to the Defendant's uncle about the debt. He went on:

> "I want you to consider what lies you have told. You have lied to your family about me; to immigration in America and [State B]; to the tax man. I am never going to blackmail you and don't want you to give me any money. But you should know that if you blow this up in my face it could hurt you as much as it hurts me. I am much more concerned about my family's welfare than any penalty I might face. Your family will come to know about my existence for ten years; your tax records would be examined; your immigration applications and so on. I am not the only one who has told lies… I know that you won't to be (sic) with me any more. You've not wanted to be for years. I will leave your life for good. If you want to build a family, live happily ever after, I won't stop you or interfere. But please don't destroy me or hurt my family in the process…. I want you to understand why it happened. I want you to give me a chance to make the settlements as I initially proposed using my own money. This can happen quickly. I want you not to inform my family or involve them in any of this. I don't care what happens to me but I can't hurt my mother. If you don't want to give me that chance, then let me go back, visit a police station and make a report about

> everything, absolving you of anything to do with it. It's your choice. I am able to contain this situation and so are you. I suppose in reality I need a different life as much as you do. None of this was sustainable. I beg you to give me the chance I've asked for."

60. It is not clear what exactly the Defendant was trying to say in his 8 June email. Given that he appeared to accept responsibility for the problems with the credit cards, and spoke of his wish to settle the claim, yet disavowed any wish for money from the Claimant, it is unclear what he meant by asking the Claimant for a chance. On the face of it, he did not need any help from the Claimant to resolve matters. Yet the email appears to suggest that the Claimant had a role to perform, and that if he failed to perform it, the Defendant might inform his family about their relationship. That was the Claimant's understanding of it. It is worth noting that the mention of blackmail, coupled with an immediate disavowal of it, became a theme of the sequence of emails.

61. There was a further email the following day, 9 June, from which it is evident that the Defendant had made an unheralded and unwelcome visit to the Claimant in State B. It is noteworthy that much of it concerns the question of whether the Defendant should make a settlement of the sums outstanding on the credit cards, or turn himself in to the police and accept his guilt. He concluded the email by thanking the Claimant for treating him 'with kindness and friendship all these years'. He went on: 'I'm sorry I had to spoil it with lies and deceit over money. You're my only friend. And now I'm alone again. I'm sorry'. Later the same day he emailed to say that he would make a police statement accepting full responsibility, and asked the Claimant to accept that his behaviour had not been motivated by greed. The following day, 10 June, there was a yet further email, saying that he would cancel the cards and offer a settlement, discuss matters with a solicitor and make a statement to the police, making clear that the Claimant knew nothing of what he had done. He ended by thanking the Claimant 'for being there for me and I am so terribly ashamed for ruining it'. On 28 June, the Defendant emailed again to say that he had set up repayment plans. He referred to having been made very happy ('happier than you can even imagine') by being with the Claimant.

62. In short, in the June messages the Defendant accepted his responsibility for the misuse of credit cards, acknowledged that the Claimant had done nothing wrong, and was regretful and apologetic for what he had done.

63. However, in his 2 April 2019 witness statement, he says that he told the Claimant he would happily go to the police and report what he calls the 'ridiculous accusation of fraud'. He says that the Claimant had locked him out of what he calls 'my home', and that he was 'going along with (the Claimant's) version of events' so that he could get back to the UK, where he felt safer. That version of events is not supported by his contemporaneous emails, which accept his own fault without reservation and make no reference to being locked out of his home.

64. The Defendant maintains that he had been in 'frequent, daily and reciprocal contact throughout all of June and July 2015', and that he retains Whatsapp and Skype logs for the period. He does not exhibit them. He also maintains that the Claimant and he reached an agreement on dealing with the outstanding debts, but that in late July the Claimant 'turned on' him, told him he expected him to pay the full amount due and

threatened to contact his family to get the money from them. For a brief period, he says, he blocked contact with the Claimant. There is no reference to that agreement, or to the Claimant's abandonment of it, in the Defendant's next email, which came on 31 July 2015.

65. The tone of the 31 July 2015 email was, however, very different from the June messages. It began:

> "I think there are some things you are going to have to understand before you make choices that destroy people's lives. I'm sorry you feel hurt and betrayed but please just read."

66. There were references to the disparity in the two men's incomes, complaints that the Claimant was miserly, reproaches that the Claimant had not allowed him to 'settle what could be settled, to repay what could be repaid', and, significantly, the admission that 'I even held out hope that you would be willing to make a contribution given the significant amount that you earn and the tax refunds that you are receiving'. In other words, he thought the Claimant should be contributing to repayment of the Defendant's credit card debts, which he had already accepted were his responsibility alone. He went on:

> "You earn hundreds of thousands of dollars a year; you are sitting on a fortune in cash; and right now are threatening to destroy my life over an unenforceable debt in another country.
>
> …
>
> In terms of the money. As I mentioned before, it's unenforceable. Despite that, to placate you, I have been making repayments – without any help from you. I did this to show I wanted to do the right thing.
>
> To give you a sense of perspective, you earn in excess of [sum in State B currency] a month. Your US tax refund (that I helped you with) is [sum in State B currency]. You are sitting on more than $600,000 in cash. The cost of a full and final settlement for the debt built up over several years is the equivalent of one or two months salary. It's a fraction of the tax settlement I helped you with.
>
> Your choices are:
>
> (a) To decide that the debt is impossible to enforce and ignore it. I understand why you wouldn't want to do that even if it is legally possible.
>
> (b) To help me make settlements for a relatively small sum ending the issue for good. As you know, I have already made progress with payment plans and would have eventually been able to settle for good. If you were able to help it would obviously be resolved much quicker.

> (c) To make reports against me. It's your choice. I will have to defend myself – not least to protect my family. I am frightened for them.
>
> I've been your partner for ten years – more or less my whole adult life. I know that we've not exactly been normal. I just didn't want it to end. Especially not like this. If you have any care about what happens to me you will try to resolve this situation amicably.
>
> Please don't use my family against me. It's an emotional pressure point. It serves no purpose except to hurt me. I can't handle hurting them – and my mother is very vulnerable. I have never threatened to contact your family and you should do me the same courtesy. Take time to think what you want to do. I'm not your enemy. I will speak to you when you are calm. Please have a sense of perspective about what the real costs actually are. Please find it in your heart to care about what happens to me. We're not on this planet for very long – please don't make it any harder than it already is….

67. The Defendant next emailed the Claimant on 10 August 2015. The email consisted of a collage of photographs of the two men together, entitled 'I love you [name]. I wish you were still my friend'. It continued with an affectionate reminiscence of their times together, but concluded on a slightly darker note: 'The biggest mistake of your life wasn't meeting me. It was treating me like I was nothing. Your decisions determine my life, but you never considered my needs. I dedicated a decade of my life to being with you. I cared for you, did my best to help you and would have anything [sic] for you. You would never have faced the future alone. That wasn't nothing'.

68. On 13 August 2015, the Defendant emailed the Claimant again. The email contained the following passage:

> "We have the capacity to resolve this issue; but you have no willingness to do so. I feel your anger and desire to punish me is causing you to make poor judgments…. You could have chosen to fix this problem. There was a lawful solution. The numbers don't really matter. Instead you're choosing to make it bigger – with the risk of unintended consequences. I don't think it's the right choice – for me or for you. It's a totally unnecessary step into the dark. I think you should reconsider. I've already lost you. I have nothing else to lose."

69. It appears from the Claimant's evidence that he simply ignored the Defendant's emails. He summarises the position by saying that the Defendant continued to email him throughout 2016 and 2017, seeking to re-establish contact, but he wanted no more to do with the Defendant so ignored his messages. It is not clear whether the Defendant continued to contact the Claimant between August 2015 and the autumn of 2016. The Defendant says that he resumed regular contact with the Claimant, presumably by electronic means, in December 2015 (he says 2005 but that must be an error), and that throughout 2016 they were in 'frequent, reciprocal contact'.

70. However, it is the Claimant's evidence that in April 2016, when he came to England to see his girlfriend, KK, he met the Defendant, who told him that his life was very difficult and that he needed money. The Defendant accepts that the Claimant offered him financial help, which suggests that he did indeed ask for it. The Claimant says that he made the Defendant payments between April and June 2016, and exhibits bank statements which appear to show transfers, including one to the educational course provider BPP. On the Defendant's account, those payments were 'deliberately miserly'.

71. It was during the period June-August 2016 that, on the Claimant's evidence, the Defendant began stalking him on gay dating websites, setting up a fake profile to try to speak to the Claimant and extract information from him. The Defendant denies having done so, but by some means (it is unclear how, if not by the means alleged) became aware that the Claimant was using the Grindr website to meet men for sex. His email to the Claimant dated 14 February 2017 (set out below) strongly suggests that his denial is untrue and that he did as the Claimant alleges. According to the Claimant, the Defendant started the spread of a rumour in gay chat rooms that the Claimant was HIV positive (the Defendant denies in his evidence that he started such a rumour). The Claimant also maintains that the Defendant threatened to inform his girlfriend KK about his sexuality and about his past relationship with the Defendant. That is admitted, in that the Defendant says he was 'very hurt' that the Claimant was still meeting men for sex, and that he 'objected' to the Claimant's treatment of KK, whom he said he would tell the truth about the Claimant if he did not stop seeing men.

72. What does appear clear is that in late 2016 the Defendant was still unable to accept the Claimant's rejection of him and tried to re-establish contact. I should say that the Defendant exhibits to his exhibit EWF 12 some screenshots of text messages, said to have been exchanged between the Claimant and the Defendant on 27 July 2016, which (if they are authentic) appear to show the Claimant's anger and bitterness at the Defendant's continued contact with him, and his wish that the Defendant should leave him alone.

73. The Claimant says that at this point (at some stage in summer 2016) he stopped communicating with the Defendant. The Defendant says that this is a lie: he was in 'frequent and reciprocal contact with the Claimant between September and December 2016'. He refers to a letter from the Claimant dated 24 October 2016 saying that he was glad that the Defendant had come to [State B], and that it had been good to see him. I do not think that is exhibited. However, the WhatsApp transcripts which he does exhibit (EWF10) do suggest frequent contact by that means from the end of September to the end of December. He also says that he travelled to State B and that throughout September and October 2016 he and the Claimant met frequently, going to restaurants, making trips and visiting a resort.

74. That version of events is not wholly borne out by the WhatsApp transcripts or by the contemporary emails. The WhatsApp transcripts suggest that the two men met in State B in late September and October 2016 on perhaps six occasions. It is clear from the transcript that the Claimant responded in a friendly but perhaps not overenthusiastic fashion to the Defendant's WhatsApp messages in late September, and that they continued to correspond via WhatsApp until late December 2016. However, the Claimant seems to have refused the Defendant's request to stay with him, and it is clear that the Defendant was pestering the Claimant during his visits to State B in October to meet more often than the Claimant was prepared to agree to. The Defendant flew back

to the UK on 31 October, when the Claimant reminded him that just because he had helped him did not mean he was responsible for him, and that the Defendant could not harass him all the time and had to become independent and get on with his life. It also appears from the transcripts that the Defendant had been offered a job in Zurich for some time in 2017.

75. The next email from the Defendant which the Claimant exhibits was dated 21 September 2016. It attached photographs of the Claimant and said only 'I miss this person so much it is killing me. I need you forgive me [sic] and stop this hatred. If I do crazy stuff it's because I'm really afraid of losing you forever. Please try'. The Defendant says in his evidence that this email was sent a day after he met the Claimant in State B, and that the Claimant's claim not to have responded to it is 'an easily proven lie'. It is not clear what he means. No explanatory material is exhibited.

76. According to the Claimant, the Defendant emailed the Claimant in October 2016 (I do not think this email is exhibited) to say that he was visiting State B to attend a friend's wedding. The Defendant says that he told the Claimant he had come to State B to see him, and that he would be going on to another Asian country for a wedding. At all events, the Claimant says that he refused to see him, which, as I have said, the Defendant denies, and which is not borne out by the WhatsApp messages, which suggest that several meetings took place. However, the Claimant's lack of enthusiasm for seeing the Defendant might on the face of it seem to be supported by the Defendant's email dated 15 October 2016, in which he wrote:

> "I came to [State B] because I wanted my friend back. I needed you to stop ignoring me, lying to me, to end the cruelty and to stop having sex with men. I wanted to forgive you, to be friends, to spend time together again – and truly hoped you would have the sense to do the same. That was all I wanted. I don't really feel I achieved my goal – and I didn't really expect to – but I know I tried as hard as I could. We used to be so close and I feel pain every single day that we're not anymore.
>
> I desperately needed your help last year when you left me homeless. I struggled because of your hatred and cruelty. You have no idea how close I came to losing my life. I am not going to make a specific demand of you and give you the opportunity to call it blackmail – but I will be clear it is not right to leave someone without a penny after a ten year relationship. It just isn't right. When I go back to England I have no home to go to and a lawsuit from my landlord to deal with.
>
> …..
>
> If the definition of insanity is to keep doing the same thing again and again expecting different results – then it's insane to visit [State B] to sit around for two weeks in case you decide to make time for me – so I'll have to stay somewhere instead. I don't have money to waste.

> You should have used this opportunity to put things right between us. I would have accepted you getting married and building a family – but I won't be buried."

77. It is the Claimant's evidence that this email was the first in which the Defendant suggested that the Claimant should give him money. I do not think that is right: that had been the gist of the email of 31 July 2015. Again, the Defendant refers to blackmail, albeit in the context of not wanting the Claimant to be able to accuse him of it.

78. The 15 October 2016 email was followed by another on 19 October 2016:

> "…As for the money – every single time I have asked for your help it's because I have needed it. We were in a relationship for ten years and you left me homeless, broke and suicidal. I accept that if I didn't depend on your [sic] so much when we were together I wouldn't have been in that situation – but that didn't change what happened. I still have no home to go back to and a lawsuit from my landlord to deal with that I can't afford to pay. Of course, in the long term I'll work something out – I'm really not stupid – but I wish you could have helped. It would have made a real difference and I would have been grateful.
>
> …
>
> I took a gamble coming here. It cost me everything I have. I think it was worthwhile going to the wedding and reaching out to you. I had to leave earlier than planned because I can't afford to stay here. I'll be gone in four days. I truly wish you would use that time to understand where I'm coming from and make peace with me. Please."

79. These emails provide an illustration of the Defendant's failure to engage constructively with the Claimant's evidence. It is but one example of many that could be given.

i) In summary, the Claimant's evidence at paragraph 40 of his witness statement of 26 June 2018 is as follows: at some point in the second half of 2016 he stopped communicating with the Defendant but the Defendant constantly tried to re-establish contact with him; in October 2016, the Defendant emailed and later called him to say that he was in financial difficulties with his landlord and that he needed money to pay the rent; the Claimant agreed to help on the understanding that he repaid the money by instalments of £100 a month, but stated that he was not prepared to support him financially any further; he transferred money to the Defendant, who did not contact him for a month, and when he did, sent initially cordial messages; however, when the Claimant made clear that he was no longer prepared to provide financial support, the tone of the correspondence changed, and became far more aggressive and focused on financial matters. The Claimant eventually simply 'ignored all contact' with the Defendant for the sake of his own sanity.

ii) At paragraph 38 of the Defendant's 2 April 2019 witness statement, that entire paragraph is said to be 'false', with 'some significant omissions, material non-

> disclosures and total fabrications'. Turning to the specifics, the Defendant says it is a lie that the Claimant stopped communicating with him and then received an email requesting money in October 2016: in fact he was 'in regular and reciprocal contact with the Claimant between September and December of 2016', they spent a lot of time together in September and October, they were in contact after he left State B in October 2016 virtually until 21 December 2016, and it was a lie to say that his correspondence was more aggressive and related to financial matters. In fact, he says, he broke off contact with the Claimant on 21 December 2016 'because he was meeting men for sex on Grindr and refused to stop'.

iii) But the Claimant did in fact undeniably receive an October email from the Defendant – two, arguably – in which money was requested. The Defendant does not, it appears, take issue with the Claimant's evidence of his offer to help him with a loan to pay the rent, or with the amount loaned, or with the Claimant's assertion that he said he was not prepared to support him further. Yet he stigmatises the entire paragraph as false, with omissions, non-disclosures and fabrication, while only specifically challenging the extent of their contact between September and December 2016 and the tone of his correspondence. He wholly fails to admit those matters which could and should have been admitted. This does not assist the court in its task of finding what is in issue and what is not, and it does not enhance the credibility of his evidence.

80. It plainly was in response to the Defendant's October 2016 emails that the Claimant agreed to help the Defendant discharge his debt to his landlord. It is his evidence that he felt threatened and under a perpetual state of siege from the Defendant, who would phone or text him as well as sending emails. He says that he wanted the Defendant to stop harassing him, so asked him to say how much he needed to clear the debt so that he would not be made homeless. The Defendant replied on 29 October 2016, telling the Claimant that he owed his landlord £1140. He went on:

> "I do not have any accommodation to return to. I don't have the ability to set up a home in the places where it's easiest for me to find employment. Realistically, I need at the very least £1200 or so to pay a first month's deposit and rent. If you were able to lend me £2400 so that I could pay for these things I could repay you £200 a month out of what I earn for 12 months…. I'm aware that if I didn't come here things could have been slightly easier but I don't regret it. The situation between us was really hurting me and I needed to come to try to fix things."

81. The Claimant duly paid the Defendant £2400 on 1 November 2016. He exhibits a redacted copy of the transfer, which shows a sum in State B currency, although not the identity of the transferee. However, the payment is not denied in the Defence. He says that he made clear to the Defendant that this was a loan (as indeed the Defendant had requested), and that he was not prepared to support the Defendant further.

82. According to the Claimant, the Defendant made no repayments of the loan. The Defendant appears not to deny that (witness statement 2 April 2019, ¶50: characteristically, the entire paragraph of the Claimant's evidence in which he asserts that the loan was not repaid is said to be false, but when he turns to specifics, it is not

denied). The Claimant did not pursue him for the debt. His evidence is that there was no contact with the Defendant for some months, but that then the Defendant resumed his attempts to be in contact, and he refused to take his calls. The Defendant does not deny that he made no repayments.

83. The next email contact appears to have been a message of 14 February 2017. The Claimant correctly refers to a change in tone, and to the revelation that the Defendant had apparently set up a false profile on a homosexual dating website in order to chat to the Claimant while posing as someone else. He says that he felt threatened by the Defendant's emails. He did not respond to them. The following are extracts from the Defendant's 14 February email:

> "I asked you for an apology and for you to stop seeing other men. I was hardly being unreasonable. I need you to acknowledge the things you've done to me. Sadly, it's a long list: your persistent lack of care for me when you knew I was vulnerable; cheating on me with [KK] and the men online; denying my existence to everyone for over ten years; your part in the financial mess I was forced into in Lexington; turning me away from the home we shared in [State B]; leaving me homeless; refusing to help me when I was in danger; meeting men for sex when my life was falling apart; pushing me towards suicide; the completely insane hatred and cruelty you subjected me [sic] this past eighteen months. Words don't even fully capture how much hurt you've caused me. I didn't deserve to be treated that way. Not at all …. You kept me a secret – that gave you enormous power over my life and left me totally without security. That is the root cause of my problems. Would you have treated me that way if other people knew? I don't think you would. No-one would have let you …. I gave up my education and opportunities – partly to be with you when you were always on the move building your career and partly because I couldn't cope on my own. I am struggling to put the pieces together because my whole adult life was about being with you.
>
> …
>
> I can't tolerate you having sex with other men. It fills me with rage. For you to cast aside after ten years, destroy my life, and then imagine you can replace me with another boy is deeply, deeply hurtful. You spoke – when you didn't realise you were chatting to me – about meeting someone special and trying to build a future with another man. That will be over my dead body… It's just the way it is. I do want all the names and contact details of these sluts you've met – especially the 'special' one. I *probably* won't do anything so it certainly isn't going to be worth it for you to protect them.
>
> I was seriously doing you a big favour – honestly and with the best of intentions and good will – by promising not to interfere in your relationship with [KK] (if there even is one). You see, I

> truly do not want you back because you've done too much to hurt me deliberately. I wouldn't have denied you having a family because I think it would bring you some happiness. But you have to be realistic that it's not something you can achieve successfully if you don't make peace with me and stop seeing other men.
>
> [X and Y] have invited me to Bali for ten days in March. She's pregnant and they have asked me to be the godfather. I'll be in [State B] at the start of April for about two weeks. I should be able to give you most of the money I owe you by then. I hope you use the opportunity to spend time with me and stop treating with me contempt [sic]. If I haven't received a true apology by then I there's [sic] no point seeing you when I come. I can't threaten you into an apology. It's worthless if you don't mean it – but you've had long enough to think about it. If you insist on seeing other men or refuse to promise that you've stopped – then you will be deliberately hurting me, provoking me and this time you really won't get away with it."

84. The Defendant's explanation for this email and those that followed, sent after he 'broke contact' with the Claimant on 21 December 2016, is that he wanted 'the hatred between (them) to end', he wanted an apology, and he wanted the Claimant to stop meeting men for sex.

85. The Claimant did not reply to the 14 February 2017 email. On 15 May 2017, the Defendant emailed him again. He repeated his demand for an apology. He went on:

> "… I want you to stop having sex with men and to end all contact with those you've been meeting. I'm not changing my position on it. The only thing that will end my pain is if you stop. I think you are making a serious mistake if you carry on. You are destroying your friendship with me and risking your own future happiness. I'm not going to drop it. I won't be buried. Do not test me."

86. In August 2017, the Claimant received a letter from the authorities in [State A], enquiring about his dual citizenship of both state A and the United Kingdom, and asking him to decide which citizenship he wished to retain and which to renounce. He suspected the Defendant (rightly, as it later emerged) of having informed the State A authorities of his UK nationality.

87. In September 2017, the Defendant contacted the Claimant by Whatsapp to say that he was visiting [State B] and wanted to meet. The Claimant agreed to do so, in order, he says, to confront him with passing the information about his UK citizenship to State A. On the Claimant's account, which is not challenged (except in the usual sense that the Defendant stigmatises the entire paragraph containing the account as false), the Defendant admitted what he had done and described it as a 'warning shot'. He also admitted what he had done (and described it in the same terms) in an email of 14 December 2017 (referred to below). The Claimant says that he then ended all further contact with the Defendant, taking the view that the Defendant was capable of carrying

out his threats and was a danger to him. The Defendant maintains that they spoke several times on the telephone after September, during which the Claimant 'almost' apologised to him. The Defendant does not say who called whom.

88. On 3 November 2017, the Defendant wrote again. In his email, he made a number of allegations for what the Claimant says was the first time. To judge from the emails, that seems in broad terms to be correct. He began:

> "I'm still waiting for an apology. You are testing my patience and severely underestimating you strongly held my grievances are [sic]."

89. The Defendant then accused the Claimant of having contracted sexually transmitted diseases and having endangered his health; of punching and threatening him; of subjecting him to 'absolute mental torture with (his) prolonged anger and hatred'; of threatening to cause distress to his family when his mother was vulnerable; of threatening physical violence against the Defendant if he disclosed that the Claimant 'cheated' on KK with men; and of instructing him to kill himself when the Defendant had been in hospital as a result of the Claimant's 'abuse'.

90. The Claimant, I note, absolutely denies that there is any truth in these accusations, which do not sit at all comfortably with the Defendant's earlier emails, such as his expressions of gratitude for the Claimant's 'kindness and friendship' (9 June 2015), nor even with the email of 14 February 2017, which set out a 'long list' of 'things you've done to me' yet inexplicably omitted any reference to threatened or actual physical violence.

91. The Defendant went on:

> "What did all this abuse, anger, hatred get you in the end? You almost destroyed your best friend so now you think you have the freedom to invite diseased sluts around to [address]? It's utterly shameful that you left me homeless and without a penny after a ten-year relationship – yet have spent millions on an apartment.
>
> I haven't demanded money from you – I don't need it or want it. I am all too aware that you'd love to accuse me of blackmail. I don't trust you. I know you'd throw me under a bus if you had the chance. You will never be in a position to threaten me. You are dishonest, hateful and cruel. You only get away with the things you've done because you manage to keep it a secret. I'm not entire sure [sic] why I allow that.
>
> ….
>
> You made a terrible choice when you set yourself against me. There was a time when I had given you a kidney if you needed one [sic] – now, I don't care what happens to you. I am not afraid of letting others judge what you have done.

> I have learned too much about your true nature to want to be your friend. I could never trust you. But I would like you to acknowledge what you did to me. I would like you to sincerely apologise. I would like you to stop whoring yourself out to men. I want the names and contact details of the many men you've been meeting. I want you to drop the hate and start acting like a decent human being. That's what it would take for me to find peace and to forgive you. I would rather forgive you but it isn't going to happen until you accept your behaviour was completely out order [sic]. I will not let you bury what you have done to me…"

92. The Defendant wrote again on 12 November 2017:

> "You have made no acknowledgement and given no apology for the hell you have out me through. You have given no indication that you will ever change. You are immune to reason. You clearly have so much hate inside you. I offered you forgiveness and peace. Honestly, I don't want hatred in my life. I never sought to be your enemy. I did everything possible to make peace with you and you offered me nothing but cruelty in return. I won't let you get away with what you've done. It was absolutely monstrous and has done so much damage to me. …..You encouraged me to kill myself. You bullied me, threatened me, subjected me to an onslaught of cruelty and abuse. You set out to destroy me. You did this knowing I was a vulnerable person and absolutely distraught. I have no doubt whatever that you were trying to force me to take my own life because you would have been able to keep your lies a secret. It was out of order and I am determined not to let it drop. Don't underestimate my resolve and that even from the other side of the world – I can hold you to account…. I cannot forgive you until you change how you're dealing with me …. This hatred and deliberate cruelty was a terrible choice to have made and I don't think that either of us know what the consequences are going to be."

93. On 14 December 2017 there was yet another email. It began with yet another demand that the Claimant acknowledge the wrongs that the Defendant alleged he had committed, and that he should apologise, and warning 'I won't let it drop'. He continued:

> "I have done everything I could to make peace with you. A year ago I was so hopeful that things would be okay. I know I had tried my best. How could I have done more? I wanted peace and forgiveness between us. Discovering you were whoring yourself to men again in December broke my heart all over again. It was nowhere near the worst thing you had done to me – but it just broke me. You knew this wasn't acceptable to me and deeply hurtful. I pleaded with you for an apology for months. Reporting your immigration fraud was a warning shot. I just wanted you to stop hurting me. You asked me in [State B] if we are "even now".

> No, (Claimant's name), not even close. You'll know it when we are even…
>
> I suffer every day because of your cruelty. I don't have a problem holding you responsible for what you've done…. Don't dare accuse me of blackmail again when I haven't asked you for a penny. I want you to end this hateful behaviour – acknowledge your mistakes and apologise. I want to forgive you and move on – but I won't let you bury what you've done. It's not an option for me. Once I open Pandora's Box, there will be no way of undoing it or controlling what happens next. You have pushed me too far…"

94. The 'warning shot' to which the Defendant referred appears to have been an admission of his responsibility for the complaint received by the immigration authorities of State A from a UK source to the effect that the Claimant had dual citizenship of State A and the UK, as a result of which the authorities of State A (which does not allow dual citizenship) requested the Claimant to choose the citizenship of one state and renounce the other. In his website account of their relationship, the Defendant admitted having reported the Claimant to the immigration authorities of State A. He described it as 'a relatively benign report as a warning shot'.

95. In April 2018, according to the Claimant, the Defendant texted the Claimant to say that he was returning to State B, and wanted to meet. He admits texting to say that he would be visiting State B, but says that he did not ask to meet. However, he does not say what the gist or purpose of the text was. The Claimant blocked his number and did not respond.

96. There were no further contacts until 12 June 2018, when the Defendant emailed the Claimant as follows:

> "I'm in [State B] now. We won't be meeting and I won't be contacting you again. I just don't feel safe with you. You have done serious long-term damage to my mental health because of your hatred, cruelty and abuse. I asked you repeatedly to accept responsibility for what you did to me and to apologise. I think it would have made a real difference. I wish you had reflected on your behaviour and reached out. I tried very hard to make peace with you and find forgiveness between us – but you have made it impossible. That's your choice.
>
> I have no financial demand of you nor will I accept payment from you. I'm doing just fine – no thanks to you.
>
> I've created a website to hold you to account for what you did to me during our time together. It's been checked by a lawyer and there's really nothing you can do. I'd caution against doing anything unlawful or stupid to retaliate – but I realise I'm not dealing with a rational person. You only ever got away with what you did to me because it was hidden.

> [The Defendant then stated the URL of the website]
>
> I know it means nothing to you but I loved you very dearly and I would have been there for you. That was real and true. I would never have treated you the way you treated me. You put me through hell and I truly never deserved it."

97. Four days later, on 16 June 2018, the Claimant responded to the Defendant's email, asking if the Defendant wanted to meet to discuss it. The Defendant's response was immediate:

> "Sorry, I made clear that I won't be meeting with you. In the past you have used our secret meetings to intimidate me, to threaten me, to deny and to distort facts. I do not feel safe with you and do not trust you.
>
> You should have accepted responsibility for your cruelty and abuse. I truly never deserved it. You should have been fair and compassionate. I suffer with severe psychological trauma because of what you did to me.
>
> If you won't take responsibility or even apologise then it's right that you are held to account. It's Karma – you reap what you sow. My conscience is clear.
>
> Make no mistake: I would truly prefer for there to be peace, understanding and forgiveness between us. I want to let bygones be bygones. I want to move on with my life and don't want you to be a part of it.
>
> If you have something to say to me then please put it in writing. Before you say anything you may regret, I'd suggest you think about how to deal with this legally, fairly and morally."

98. The Claimant, who regarded that last sentence as a veiled demand for money, emailed to ask whether the Defendant wished to speak by telephone. The Defendant replied by saying that he did not trust the Claimant, and that he was not sure what there was to discuss. He asked if the Claimant was 'going to apologise'. The Claimant answered by noting that the Defendant had contacted him two months before by WhatsApp, saying he 'wanted to end this hatred and find common ground'. The Claimant said he wondered if they could still do that. The Defendant's reply on 17 June was as follows:

> "I pleaded with you for peace, forgiveness, compassion and fairness. I did so in good faith and with sincerity. You ignored it. I've been through hell and I suffer every day because of your hate and abuse. It never leaves me. You went too far and have done real damage. What do you suggest would put this right?"

99. The Claimant replied the same day:

> "Well, let's talk, cause I don't know what your present situation is and why you are going out of your way to destroy my reputation. I have always been kind to you and supported you for many years, but now you are saying all these things about me which are untrue. It would be silly to ask you if this is fair cause you don't seem to care about fairness, but only to damage my name. But I don't really know what your present life situation is like."

100. The Defendant's final email, also sent on 17 June 2018, was in these terms:

> "There's nothing to talk about that can't be written down. That protects me and it protects you. I don't trust you and I know that you will use discussions to bully, deny or even entrap.
>
> My present situation is that I suffer with PTSD as a result of your abusive conduct during our secret relationship. I am using the website to hold you to account for your conduct. You only got away with what you did to me because it was a secret. I am very offended that you think you were "always kind". That's totally unacceptable and demonstrably another deception. You are "playing the fool". You goaded me to kill myself when you knew I was at risk – and that's just the tip of the iceberg. You broke every promise you ever made to me and left me homeless after a ten year relationship. That's not support. I stand by every word I have written on the website and I think it's more than fair after what you did to me. At present, I don't intend to take any further action.
>
> I would welcome an apology and I'm open to hearing positive suggestions about resolving these matters fairly and lawfully – but I have no demands of you."

101. It is unclear what 'positive suggestions' the Defendant had in mind, given that he claimed to be making no demands of the Claimant. On the face of it, he wanted something more than a mere apology. What could he have meant, apart from a renewed relationship (which he appears not to have wanted any more than the Claimant did), or money? The Claimant felt that the Defendant was attempting to induce some form of financial offer, perhaps believing that if he disavowed any explicit demands, they would not be seen as blackmail. In his view, the only reasonable interpretation of the Defendant's actions and communications was that the threat of publication of the website was a demand for money.

The Website

102. The URL of the website which the Defendant set up was simply the Claimant's name, which is an unusual one, with the .com suffix. It was published on the WordPress platform, and was accessible to the public at large. It carried the Claimant's photograph, gave his nationality and his professional details and stated where he was working. I accept, for it is obvious, the Claimant's evidence that a Google search against the Claimant's name would have produced it as a result, at least once it had been indexed.

103. The website account in its original form may have been put online as early as 10 June 2018 (it contained a date stamp to that effect), and ran to over twenty pages.

104. It began with a photograph of the Claimant, and was headed 'My Secret Life – An exposé of [the Claimant's] decade of deceit and abuse of his former partner'. It gave his full name, his nationality, his profession, his medical specialty and his current place of work. In brief summary, it included information concerning the Claimant's sexuality and his relationship with the Defendant; his sexual life, including intimate details of sexual activity; his health, including intimate details relating to his mental and sexual health; his family life, including relationships with his mother and brother; financial information; and allegations that he has been involved in criminal or regulatory wrongdoing.

105. The Claimant's decision to seek an injunction from the courts was founded on his wish, for a number of personal and professional reasons, to keep his relationship with the Defendant in particular, and his sexual orientation in general, a secret. It is his evidence that he has largely succeeded in doing so. He says that he did not speak of his sexuality to any of his friends or colleagues in the UK, with the exception of an ex-girlfriend to whom it was disclosed by the Defendant. He is concerned that his family, who come from a traditional religious background intolerant of homosexuality, should not know of his sexual orientation, which they would not be able to accept, and that he should not be at risk of persecution or prosecution in state A or state B, where homosexuality is illegal. To the best of his knowledge, only three people (including the Defendant) know about it. Other friends and colleagues might have guessed, but he was not at all open about it.

106. The Defendant disputes that, maintaining that the Claimant's brother was well aware of their relationship, having actually seen them together in bed, that the Claimant introduced him to many of his friends during their relationship, and that he knew members of his family fairly well: all such people would have understood that they were in a relationship.

107. It is difficult to square that account of the Claimant's openness with one of the Defendant's abiding complaints, which is that the Claimant throughout their relationship sought to keep it secret and to ensure that friends and relatives did not know what their true relations were: see for instance his email of 14 February 2017, where he complains that the Claimant denied his existence for over ten years, and kept him a secret, and similar complaints in his website account. I see no reason to doubt the Claimant's wish to keep his sexual orientation secret, so far as he could.

108. In his website account, the Defendant admits the Claimant's insistence on secrecy but describes his claimed reason for that – a fear of rejection by his family - as a 'very insidious lie' that left the Defendant vulnerable to abuse, homelessness and without legal recourse. He created the website, he maintains, because he had no other means of redress for the 'terrible psychological abuse, physical abuse, financial abuse and criminal conduct' to which he says he was subjected. His reason for his decision to publish is said to have been that keeping the Claimant's 'abuse' a secret was 'stopping (him) from moving forward'. Yet in his witness statement of 2 April 2019 he insists that he had not threatened to expose the Claimant's sexuality: 'It is already widely known to many people so this would be completely pointless'. What he wanted, he said, was what he had made clear over the preceding 18 months – an apology for the

Claimant's mistreatment of him, and an end to the Claimant's hatred, and peace and forgiveness between them.

109. It is noteworthy that the Defendant expresses the concern in his account, and in his evidence, that the Claimant would accuse him of blackmail. He refers to a meeting in summer 2017 in state B, where he says that he made clear he was not demanding money from the Claimant. He believes that 'nothing in (his) correspondence amounts to a demand for money – neither direct nor implied' (witness statement 2 April 2019 ¶58). He claims that he has 'made recordings and kept records' of every recent contact with the Claimant, 'to disprove any false allegations'. Unfortunately, he does not exhibit them. (Similarly, he claims that the Claimant made threats to harm or kill him if he disclosed their relationship, and states that he can prove it because he recorded the telephone calls. But he has not put them in evidence either.)

110. On the Claimant's case, the statements made by the Defendant on the website are a mixture of truth and falsehood, but have in common an essentially private nature.

Contents of the Defendant's website account

111. The Defendant's website account states that the Claimant is homosexual, and that he and the Defendant were in a relationship for many years, a relationship in which the Defendant had been the passive partner and in which the Claimant was psychologically or physically abusive: he could be 'threatening, unfaithful, callous and cruel'.

112. The Defendant states that the Claimant kept the truth of his sexuality secret from his family but that he had an incestuous relationship with his brother, who knew of his sexuality and used it against him, and that he had been sexually abused as a child. He refers to Skype calls between the Claimant and his mother in which his mother said homosexuality was against her religion and that he must sacrifice his happiness in this life so that she might be happy. According to the Defendant, she would threaten suicide and say she had nothing to live for if she did not have grandchildren.

113. The Defendant refers to the Claimant's attempts to meet other men via online sites and details of information that he posted on those sites, and to details of holidays and sexual activities which the Claimant had with other men at different times. He refers to the Claimant having moved in with a work colleague, BT, and having implied he was having a sexual relationship with him, and to the Claimant's reprehensible behaviour when in the colleague's flat (reading a psychological report, trying on his underwear). He explains these revelations in terms of wanting people to understand what sort of person the Claimant is. He gives details of what he says that the Claimant did sexually to him and made him do to the Claimant. He states that the Claimant had a sexually transmitted disease in 2013; that he had sex with a (named) work colleague who later died of Aids; and that he consulted a psychiatrist and threatened suicide in 2015.

114. The Defendant identifies two heterosexual relationships which the Claimant had, one with ST, gives her profession and the city where she lived, and refers to the alleged nature of the relationship and what the Claimant is said to have told him about it. Similarly, he identifies another girlfriend, KK and refers to unpleasant remarks said to have been made by the Claimant about her. He alleges that the Claimant cheated on KK with men during his relationship with her.

115. There are many details of the Claimant's financial affairs and the arrangements which he had with the Defendant while they were in a relationship. He goes into the extent to which the Claimant supported his brother when he was in the UK, including in what were said to be his brother's fraudulent activities. He refers to the Claimant's income and assets and to his levels of spending, particularly on credit cards, and makes a number of allegations of promises made by the Claimant of financial support or gifts, which were broken.

116. There are a number of allegations of what on the face of it would appear to be criminal behaviour by the Claimant, including what is said to have been tax evasion in various jurisdictions and immigration fraud on the US authorities, the purchase of cocaine in Italy, assault on the Defendant on a number of occasions in different countries, including the USA in 2013 and 2014, state B in 2014, and Italy in 2015, and threats of violence in state B in autumn 2016; and he alleges that in 2016 the Claimant goaded him to kill himself. It is said that in 2006 the Claimant asked for a sample of the Defendant's blood to check its cholesterol levels, but in fact ran a full screen of the blood, presumably to check for sexually transmitted infections, without the Defendant's consent. The Claimant is said to have lied to his superior about the test and to have billed the university fraudulently for it.

117. There are innumerable complaints about the Claimant being unkind to the Defendant in the course of their relationship, for example being rude about his weight, about him cutting the Defendant off from social interaction, about his failure to treat him as his partner, about taking him to squalid hotels for sex, about not giving him a key to flats which the Claimant rented, so that the Defendant had to be let in and out, and was told to leave whenever the Claimant's family or others who could not be told about the relationship were due to visit. The Defendant complains that the Claimant exploited his (undefined) mental problems to obtain sex and keep their relationship secret.

118. The Claimant denies that there is any truth in many of the allegations made by the Defendant, and in particular those involving criminality and cruel and threatening behaviour. There is no point in reciting the detail of his denial.

Abbreviated version of the website account

119. A later version of the website, apparently updated on 17 June 2018, was much shorter than the first, and stopped in 2011. However, even in its abbreviated form it still contained the Claimant's photograph, his nationality, professional details and place of work, and information about the Claimant that fell into the same categories as the original version, although it was less extensive.

Website public access ended

120. The Claimant contacted the Defendant about the website, on legal advice, and the Defendant responded by email dated 19 June 2018 to say that he would take the website down 'for now' because he did not want to cause the Claimant 'additional stress'. He said 'I'm not a bad person. I've just been pushed too far'. After about 19 June 2018 the Defendant appears to have placed the website behind a password-protected wall, with the result that (so far as is known) it was not thereafter generally available to the public at large. It is not known if the password was made available to any third party.

Application for Summary Judgment & to Strike out Defence

121. The Claim Form was issued on 27 June 2018. The Claimant seeks, so far as material:

> "(1) Damages, including aggravated damages, for misuse of private information in respect of the use and publication of private information concerning the Claimant, included on a website identified in the Claimant's first witness statement;
>
> (2) Damages, including aggravated damages, for harassment under the Protection from Harassment Act 1997 (PHA);
>
> (3) An injunction to restrain the Defendant from
>
> (a) contacting the Claimant by email, telephone, social media or otherwise howsoever or otherwise pursuing a course of conduct which amounts to harassment of the Claimant contrary to the PHA;
>
> (b) publishing or causing the publication in any form of
>
> (i) the website, or any of its contents, to the world at large;
>
> (ii) private information or purported private information pertaining to or concerning the Claimant.

122. The Particulars of Claim were served on 19 December 2018, and the Defence and Counterclaim on 3 March 2019.

123. The Claimant's application for summary judgment and to strike out the Defence and Counterclaim was issued on 17 April 2019. It is supported by a witness statement of the Claimant, his second, dated 17 April 2019.

124. When the Defendant issued his application to strike out the claim pursuant to CPR 3.4, he supported his application with a witness statement dated 5 June 2019.

125. The Claimant replied to that evidence with a witness statement of 17 June 2019, and the Defendant's letter to the court dated 18 June was intended as an unsworn response to the Claimant's witness statement of the day before.

126. CPR 24.2 provides that the court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if (a) it considers that (i) the claimant has no real prospect of succeeding on the claim or issue; or (ii) the defendant has no real prospect of successfully defending the claim or issue, and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

127. To resist an application for summary judgment the respondent must show a real prospect of success, meaning one that is better than merely arguable. That does not oblige the respondent to show that his case will probably succeed at trial.

Misuse of Private Information

128. The website which is the focus of this claim contains the Defendant's account of his homosexual relationship with the Claimant over some ten years, starting in 2006. I have summarised its contents above. A similar summary is pleaded at paragraphs 18 and 19 of the Particulars of Claim and is not disputed by the Defendant in his Defence.

129. It is now trite law that liability for misuse of information is determined applying a two-stage test: (i) does the claimant have a reasonable expectation of privacy in the relevant information; and (ii) if yes, is that outweighed by countervailing interests, typically freedom of expression under Article 10?

Reasonable expectation of privacy

130. The Claimant's pleaded case on reasonable expectation of privacy is, as one would expect, that such information is relates to aspects of his life which are plainly private and confidential, and (so far as concerns sexuality, sexual life, health and personal finances) at the core of the interests protected by art 8 of the European Convention on Human Rights, that it was disclosed to the Defendant in confidential circumstances, and that the information about his sexuality was information over which the Claimant sought to maintain control, so as to guard it from disclosure even to close friends, family and colleagues.

131. The Defendant's response is a blanket denial (Defence, paragraph 29) that the Claimant has any reasonable expectation of privacy in respect of the information and that (as a citizen of State A and a resident of State B) the Claimant has any rights under Art.8. That appears to be either a re-statement of the Defendant's challenge to the jurisdiction, with which I have already dealt, or a misunderstanding of the scope of the European Convention on Human Rights and the court's duty to give effect to it under s6 Human Rights Act 1998, or possibly both.

132. So far as material, the Defendant also pleads (at paragraph 32) that he never agreed to keep any of the information on the website private, and that the Claimant does not have ownership of the information; that knowledge of the Claimant's sexuality is known to all the Defendant's friends and family, and to several of the Claimant's friends and family members; and that the Claimant uses 'gay sex hook-up websites' and posts photographs of himself, thereby showing that his sexuality is not a secret. These matters are relevant to the question of reasonable expectation of privacy, but they are not determinative.

133. As far as concerns the information about alleged criminal or regulatory wrongdoing, the Claimant contends that the wrongdoing is alleged to have taken place years ago, that the Defendant never made any disclosure to the appropriate authorities (with the exception of a disclosure to the authorities of State A concerning the Claimant's UK citizenship), there had never been any investigation or prospect of an investigation by any authority (with the possible exception of State A, which had told the Claimant that he had to elect between UK and State A citizenship), and that (as regards most, if not

all, of the allegations) the alleged wrongdoing was private in the sense that the Defendant was the only witness, making the prospect of any meaningful investigation, let alone a finding adverse to the Claimant, very remote.

134. The Defendant responds (Defence paragraph 30) that even if many of the events took place many years ago, he still suffers mental health problems as a result; he says that he repeatedly raised the allegations with the Claimant; he suggests that all that prevents investigation is his own wish not to make matters worse for the Claimant by taking his allegations to the authorities; and he contends that the fact that the Claimant chose to bring a claim in misuse of private information is tantamount to an admission that the allegations are true. That last contention is plainly misconceived, and I say no more about it. At paragraph 32, he pleads that 'by definition' allegations of criminal or regulatory wrongdoing cannot be private information. That, as I shall explain, is also misconceived.

135. Whether or not the Claimant has a reasonable expectation of privacy in any given information is an objective question. It is a question of what a reasonable person of ordinary sensibilities would feel if placed in the same position as the Claimant and faced with the same publicity (*Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481). That is a broad question of fact which takes account of all the circumstances of the case including the attributes of the claimant, the nature of the activity in which he was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the Claimant and the circumstances in which and the purposes for which the information had come into the hands of the Defendant.

136. The information disclosed on the Defendant's website was information which became known to the Defendant because he was in an intimate relationship with the Claimant over a period of years. The Claimant is a man who is deeply concerned to keep information about his sexuality, his health and his financial affairs to himself. It is clear enough from the Defendant's own evidence – indeed, it is a repeated complaint – that the Claimant wanted to keep the relationship secret. Even had he not done so, claims based on privacy do not depend on confidentiality or secrecy alone, since the Art.8 right to respect for private life extends to the right to prevent unwanted intrusion into one's personal space (*CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB) at [23], *PJS v News Group Newspapers Ltd* [2016] AC 1081). The central information disclosed by the Defendant, on which everything else depends, is the information about the Claimant's sexuality and sexual behaviour. Information of that sort, together with information about his mental and physical health, finances and private and family life, is at the core of the values which Art.8 protects. I have no doubt that the objective test is satisfied, and that the Claimant does indeed have a reasonable expectation of privacy in the website information.

137. In my judgment it makes no difference whatever if (as the Defendant maintains, but the Claimant denies) a number of his and the Claimant's friends and family did in fact know of their relationship, or if (as I think is accepted) the Claimant's identity as a person seeking a certain sort of sexual partner on the internet will have been known to users of such websites. Even if the information were much more widely available than even the Defendant contends, the question would be not whether the information was generally accessible but whether the remedy of injunction would serve a useful purpose (*PJS*, above, and see eg *CTB v News Group Newspapers Ltd* [2011] EWHC 1334 (QB)).

Much of the information disclosed in the Defendant's website concerns private matters other than the Claimant's sexual life; but even if it concerned his sexuality alone, the Claimant would be entitled to ask that such information should not be disclosed more widely than to the fairly narrow coterie which (even on the Defendant's case) is aware of it. On the facts of this case, an injunction would plainly serve a useful purpose.

138. The Defendant asserts, in effect, that the Claimant has no reasonable expectation of privacy in the Defendant's allegations of wrongdoing. In my judgment, that contention is misconceived.

139. Several years ago, in *PNM v Times Newspapers Ltd* [2014] EWCA Civ 1132; [2014] EMLR 30, Sharp LJ referred to the 'growing recognition that as a matter of public policy the identity of those arrested or suspected of crime should not be released to the public save in exceptional and clearly defined circumstances'. In *ERY v Associated Newspapers Ltd* [2016] EWHC 2760 (QB); [2017] EMLR 9, the defendant conceded that the fact that the claimant had been interviewed by police under caution was information in which he had a reasonable expectation of privacy, and in the light of that concession, Nicol J could not see why he did not also have a reasonable expectation of privacy in the information that he was being investigated by the police. It now appears to be established that (in general) a person has a reasonable expectation of privacy in the fact of a police investigation, at least up to the point of charge: *Richard v BBC* [2018] EWHC 1837 (Ch); [2019] Ch 169; *ZXC v Bloomberg LP* [2019] EMLR 20 at [119].

140. The Defendant's allegations are currently no more than his word against the Claimant's. With the exception of the matter of the Claimant's citizenship of State A, they have not been disclosed to the competent authorities, let alone made the subject of investigation by them. It would be remarkable if a claimant accused of wrongdoing by a former lover, with (the Claimant would say) a palpable axe to grind, should be in a worse position than a person under proper investigation by an efficient and independent police force or public authority. I therefore conclude that the Claimant's reasonable expectation of privacy extends to those allegations.

Is the Claimant's reasonable expectation of privacy outweighed by countervailing interests?

141. At this stage, the court must consider whether the reasonable expectation of privacy is outweighed by other interests which conflict with it. Neither Art.8 nor Art.10 has precedence, and where their values conflict, the court must consider carefully (or, as is often said, apply an 'intense focus' to) the comparative importance of the rights claimed. The justification for interfering with or restricting each right must be taken into account, and the test of proportionality applied.

142. It has been said often that the decisive factor at this stage is an assessment of the contribution which publication of the information would make to a debate of general interest (see eg *Von Hannover v Germany* (2004) 40 EHRR 1; [2004] EMLR 21; *K v News Group Newspapers Ltd* [2011] EWCA Civ 439; [2011] 1 WLR 1827).

143. Relevant considerations in that assessment have been said to be how well-known the claimant is, the subject matter of the publication, the prior conduct of the claimant, the method of obtaining the information and its veracity, and the proportionality of the

interference with the exercise of the freedom of expression (*Springer v Germany* (2012) 55 EHRR 6; [2012] EMLR 15).

144. The Defendant relies on the proposition that the disclosure of his allegations of wrongdoing is in the public interest. He also argues, in effect, for a right to tell his own story, which is a right protected by art.10.

145. That, as I understand his Defence, is the extent of his argument that the Claimant's reasonable expectation of privacy is outweighed by his own interest or by the public interest.

146. In my judgment there is no prospect of the Defendant establishing, on the basis of his pleaded case, that publication of the information contained in his website account contributes to a debate of general interest. The Claimant is a private person, not a public figure, and the subject matter of the account is concerned with essentially private matters arising during a private relationship between two lovers. It has no possible wider public interest. I see no distinction in this respect between his broader account and the allegations of wrongdoing, which are either simply the word of the Defendant against that of the Claimant or unsupported by any evidence which the Defendant has adduced. He asserts in his Defence (¶30(d)) that 'There will certainly be *some* evidence that supports my allegations – if not the smoking gun'. That will not do. Even if there was such evidence, it would be difficult to see how there could be any public interest in publicising the allegations to any recipient other than the proper public authority.

147. There is of course a right to tell one's own story in one's own words: see eg *OPA v A* [2016] AC 219. But that story can and should be told without the intrusion into the Claimant's private life which his website account entails. As Eady J said in *McKennitt v Ash* [2005] EWHC 3003 (QB); [2006] EMLR 10 at [77]:

> "The question is to what extent it is legitimate to protect one person's privacy when another connected person has a right of privacy and also, correspondingly, a right to waive it in the exercise of freedom of expression …. This is why it is so important for me to have in mind the recent pronouncements in *Von Hannover v Germany* to the effect that protection of privacy will extend to relations with other persons and embrace a social dimension. It must follow, in broad terms, that if a person wishes to reveal publicly information about aspects of his or her relations with other people, which would attract the prima facie protection of privacy rights, any such revelation should be crafted, so far as possible, to protect the other person's privacy. This is important particularly, of course, in the context of "kiss and tell" stories. It does not follow, because one can reveal one's own private life, that one can also expose confidential matters in respect of which others are entitled to protection if their consent is not forthcoming."

148. I am uncertain how far, in weighing the importance of the Defendant's right to tell his own story, it is material to take into account the increasingly threatening tone of the emails that preceded the publication of the website account, and the demands by the Defendant for some unspecified satisfaction from the Claimant. The Defendant himself

explained his creation of the website as a means of redress for the abuse which he claims to have suffered. It is difficult to avoid the conclusion that a substantial factor in the Defendant's motivation was a desire for revenge on the Claimant for perceived wrongdoing on the Claimant's part. On the other hand, it is no part of the court's function to decide the truth or falsity of the Defendant's allegations, and if the Defendant suffered as he claimed, it would be understandable that he should want to speak out about it. But even if that is right, the entitlement to speak out on his own behalf does not encompass a right to intrude so uncompromisingly into the Claimant's private space.

149. In my judgment, the Claimant's reasonable expectation of privacy and his Art.8 interests in maintaining that privacy far outweigh the very slender justification which the Defendant advances for worldwide publication of his account. Thus far, the Defendant does not have a real prospect of success in resisting the claim at trial. I do not regard his defence to the privacy claim as even arguable.

Jurisdiction

150. However, the Defendant makes other points. He repeats in his Defence his insistence that the Claimant's centre of interests is State B, not this jurisdiction. That point has been decided against him.

151. I observe that part of his case is that no harmful event (in the sense of Art 5(3) Lugano) occurred in England and Wales 'as neither party was in England and Wales, no third party accessed the website content (in England or Wales or elsewhere) and the Claimant was in [State B] at the time'. Moreover, he goes on at paragraph 27 of his Defence, 'There was no threat to republish the website content'. He asserts (contrary to the decision of Steyn QC) that the Claimant's centre of interests was State B, and, moreover, that the Claimant cannot rely on Art 5(3) Lugano to obtain an injunction in respect of an internet publication harming personality rights, or to obtain 'global damages'.

152. The Defendant states in evidence (5 June 2019, ¶65) that before the website content was removed, it was accessed 'several times' from various IP addresses round the world. He expresses the opinion, which he may or may not be qualified to do, that those visits appear to be by automated 'bots' rather than individuals, and by the Claimant and his solicitor. He asserts that there was no third party access of the website content from England and Wales or elsewhere, and that the website content was never indexed by Google or another search engine, although the URL was later indexed by Google. It is unclear (because the Defendant does not say) what the source is of this information, which appears on the face of it to be the stuff of IT expertise, or how far it is well-founded. This is a question which goes primarily to damages.

153. The claim for an injunction is founded on the probability that the website information would have been easily available to anyone who entered the Claimant's name into a search engine, and that but for the injunction, a real and substantial tort would have been committed within the jurisdiction (and beyond).

154. The Defendant's position is that he was entitled to publish the website information, and did so because he thought it reasonable that the Claimant's behaviour 'abuses' should be publicly disclosed, because he found it cathartic (witness statement 5 June 2019 ¶15),

but that he took it down (or at least restricted access to it without a password) before the claim was issued, without any direct threat to republish it. In his witness statement of 5 June 2019 (¶64) he says that he 'removed' the content on 19 June 2018 within minutes of the Claimant telling him that he had an emergency at home. It is unclear why he did so. At one point (¶16) it is perhaps implied that it was because he wished the Claimant's family well; at another (¶64) he says 'I did not so as an act of compassion'. It is unclear whether the word 'do' is missing. He maintains that no 'direct threat' was made to republish the content.

155. That may be true, but the Defendant has not offered an undertaking not to make it available on the internet again, as he could easily have done, and given his claim to be entitled to publish the information, and his repeated threats to disclose the Claimant's private information in the sequence of emails referred to above, in my judgment there is more than sufficient ground for the Claimant to apprehend further publication.

156. Mr de Wilde submits that the Claimant is in any event entitled to an injunction founded on Art 5(3), but that the finding that this jurisdiction is his centre of interests entitles him to seek an injunction from this court preventing the Defendant from making the website available again in any jurisdiction.

157. It is relevant to refer again to *Bolagsupplysningen OÜ v Svensk Handel AB* [2018] QB 963. That was an Estonian libel case concerning jurisdiction under the Recast Judgments Regulation (No.1215/2012) (RJR) for internet publication of damaging information. The Grand Chamber developed the 'centre of interests' doctrine stated in *eDate Advertising GmbH v X* [2012] QB 654. The court had to answer three questions about Art 7(2) RJR, which it glossed as follows:

> "(1) Whether article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that a person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him can bring an action for rectification of that information and removal of those comments before the courts of each member state in which the information published on the internet is or was accessible.
>
> (2/3) Whether article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the member state in which its centre of interests is located and, if that is the case, what are the criteria and the circumstances to be taken into account to determine that centre of interests."

158. As far as the second and third questions were concerned, the court held as follows:

> "[44] …article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the member state in which its centre of interests is located."

159. Recognising that material published on the internet is universally available, the court answered the first question in these terms:

> "[48] …in the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal (the *eDate* case, para 46), an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage pursuant to the case law resulting from *Shevill's Case* [1995] 2 AC 18, paras 25, 26 and 32 and the *eDate* case, paras 42 and 48, and not before a court that does not have jurisdiction to do so.
>
> [49] In the light of the above, the answer to the first question is that article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that a person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him cannot bring an action for rectification of that information and removal of those comments before the courts of each member state in which the information published on the internet is or was accessible."

160. So where a claimant seeks an injunction to rectify or remove damaging material from the internet, he can only do so only in the state where the defendant is domiciled (the general rule, as stated by Art 2(1) Lugano and Art 4(1) RJR), or (by virtue of the special jurisdiction: Art 5(3) Lugano and Art 7(2) RJR) in the state where he has his centre of interests, and not before the courts of each member state in which the information is accessible.

161. As Nicol J observed in *Saïd v L'Express* [2018] EWHC 3593 (QB); [2019] EMLR 9 at [32(iv)], the Grand Chamber was concerned exclusively with remedies for the rectification or removal of information from the internet, and seems to have made no change to the existing rules for damages, even damages for internet publication.

162. In the present case, it has been determined that the Claimant's centre of interests is this jurisdiction. This, therefore, is the only jurisdiction (apart from Switzerland, where the Defendant claims to be domiciled) in which the Claimant can bring his claim for an injunction in respect of the internet publication of his private information.

163. Mr de Wilde sought, perhaps out of a concern that the Defendant's challenge to the jurisdiction might still be alive, with consequent peril for the finding that this jurisdiction was the Claimant's centre of interests, to argue that the principle stated in *Bolagsupplysningen* is limited to cases where the claimant seeks rectification or removal of internet material: by contrast, he said, the present Claimant seeks an order restraining any further publication. In my view, that is not a valid distinction. The Grand Chamber referred only to rectification and removal because in that case the offending website was still available. It was not a case where the claimant sought an injunction to restrain further publication of material which had been taken down. There could be no valid distinction between removal of existing material and restraint of threatened publication. However, a distinction was made between claims for an injunction in respect of internet material and claims for damages, which (as Nicol J noted) appear still to be governed by the pre-existing rules.

164. In sum, my conclusion as far as concerns this part of his claim is that the Claimant is entitled to summary judgment for a final injunction to restrain further misuse of his private information. I will have to hear the parties on the precise form of the order.

165. The Claimant's position on damages for misuse of private information is not clear. If the Defendant is right about the extent of publication, then assessment of damages might be a futile exercise. It would certainly involve further expenditure, and there are already costs orders against the Defendant which he has not satisfied. There may be questions of double actionability and proof of foreign law in respect of damages for publication of the private information outside this jurisdiction. The Claimant does not want the court to assess damages immediately following judgment. I can put his mind at rest: on the evidence presently available there is no possibility of assessing damages. I think that the Claimant must in principle be entitled to summary judgment for damages for misuse of private information, to be assessed, but the scope of the assessment must for the present be left open.

Harassment

166. The Claimant also alleges harassment, by the emails which I have referred to or set out above, and by publication of the website account.

167. The Protection from Harassment Act 1997 (PHA) provides as follows, so far as material:

> "**1 Prohibition of harassment**
>
> (1) person must not pursue a course of conduct—
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other...
>
> …
>
> (3) Subsection (1) … does not apply to a course of conduct if the person who pursued it shows —

(a) that it was pursued for the purpose of preventing or detecting crime,

(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

2 Offence of harassment

(1) A person who pursues the course of conduct in breach of section 1 is guilty of an offence…

3 Civil remedy

(1) An actual or apprehended breach of section 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, conduct on at least two occasions in relation to that person ….

(4) 'Conduct' includes speech."

168. In *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233 Lord Phillips, with whom the other members of the Court of Appeal agreed, observed at [29]-[30] that s7 of the PHA did not purport to provide a comprehensive definition of harassment: for there were many actions that foreseeably alarm or cause a person distress that could not possibly be described as harassment. He believed that s7 was dealing with that element of the offence which was constituted by the effect of the conduct rather than with the types of conduct that produced that effect. In his view, 'harassment' was a word with a meaning which was generally understood. 'It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct'.

169. The elements of the tort were summarised by Simon J in *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB) [142]. There must be conduct which occurs on at least two occasions, which is targeted at the claimant, is calculated in an objective sense to cause alarm or distress, and is objectively judged to be oppressive and unacceptable. What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs. 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'.

170. Harassment may be by way of a campaign of emails (*ZAM v CFW* [2011] EWHC 476 (QB)), by banners towed by aircraft and by leaflets (*Howlett v Holding* [2006] EWHC 41, where what was found to be objectionable in the defendant's exercise of his freedom of expression was the impact that it had on the claimant's privacy and psychological well-being) and by internet publication (*Law Society v Kordowski* [2011] EWHC 3185 (QB); [2014] EMLR 2). In *Kordowski* at [60], [64], the judge accepted submissions by the claimants that:

> "(1) publication of individuals' names on websites in the knowledge that such publications will inevitably come to their attention on more than one occasion and on each occasion cause them alarm and distress constitutes harassment; and;
>
> (2) that where publication is an ongoing one on a prominent website, the distress and alarm caused by the publication will also be continuous. It is reasonable to infer in every case that those posted would suffer such distress and alarm on at least two occasions."

171. The Claimant's case is that the Defendant sent him unwanted, threatening, oppressive and unreasonable communications by email, which were harassing of him and which amounted to blackmail. He does not say that any unwarranted demand with menaces was ever made in terms, but that, in all the circumstances, the Defendant's communications amounted to blackmail by seeking a financial settlement from him while holding over him the threat of disclosure of his private information. He relies on the Defendant's frequent disavowals of blackmail as serving to emphasise that this was precisely his object, arguing that the well-established defamation principles for establishing the meaning of words in the mind of the ordinary reasonable reader illustrate the ability of the reader to read between the lines, and to read in an implication more readily than a lawyer, and the need to take into account the financial context in which the emails were sent, namely an ongoing financial dependency which had come to an end.

172. It is perfectly plain, and requires no finding of fact as to the correctness of the Defendant's allegations about the nature or events of his relationship with the Claimant, that the Defendant was quite unable to cope with, or to accept, the Claimant's decision in June 2015 to bring the relationship to an end, after what the Claimant regards as a second credit card fraud by the Defendant.

173. From the very start of the sequence of emails (8 June 2015) the Defendant was making threats to disclose the details of their relationship if the Claimant failed to make some

unspecified choice. At the same time, he was both disavowing any intention of blackmail and at the same time making clear that he had financial difficulties (he admits having been financially dependent on the Claimant) with which the Claimant could help. That had become very clear as early as 31 July 2015, when the Defendant's email emphasised the disparity in the two men's resources, and suggested that the Claimant should contribute to a settlement of the credit card debt which the Defendant had earlier accepted was his responsibility alone. By 13 August 2015 he was repeating that the Claimant had made a wrong choice and that he should reconsider, because the Defendant had nothing to lose. After the Claimant had helped the Defendant with his money problems between April and June 2016, making payments which the Defendant regarded as 'deliberately miserly', the Defendant by his email of 15 October 2016 raised a new and much revisited topic, an insistence that the Claimant should stop having sex with men, and again referred to his financial grievances, while at the same time insisting that he was not making a specific demand which the Claimant could call blackmail. On 19 and 29 October, the grievance over money was again the theme. That led to the Claimant lending him £2400 to pay his landlord, money which was not repaid. Despite that, by email of 14 February 2017, the Defendant was making a number of new allegations about the abusive nature of the relationship, seeking an apology and threatening that if the Claimant insisted on seeing other men he would not get away with it. The email of 15 May 2017 repeated the threat over the Claimant's sexual activities, saying that the Claimant should not test him. It was in August 2017 that it became apparent that the Defendant had informed the authorities of State A of the Claimant's dual nationality. On 3 November 2017 he was 'still waiting for an apology', and making allegations of physical violence and other aggression; and he stated that he had not demanded money from the Claimant ('I don't need it or want it. I am all too aware that you'd love to accuse me of blackmail'), and again demanded that the Claimant should cease his sexual activities and apologise to him: 'I will not let you bury me'. The blackmail theme was repeated on 14 December 2017: 'Don't dare accuse me of blackmail again when I haven't asked you for a penny'. He demanded an apology, and threatened to 'open Pandora's box'. There was then no contact until 12 June 2018, when the Defendant emailed the Claimant to tell him about the website. On 16 June, in response to the Claimant's suggestion that they meet to discuss his message, the Defendant wrote that the Claimant should 'think about how to deal with this, legally, fairly and morally'. On 17 June, he asked the Claimant what he thought would 'put this right'. Later the same day, he told the Claimant that he would welcome an apology and was 'open to hearing positive suggestions about resolving these matters fairly and lawfully': 'but', he said, 'I have no demands of you'.

174. As I have observed above, it is unclear what 'positive suggestions' the Defendant had in mind, given his claimed disavowal of financial demands. He was seeking something more than an apology. It seems quite clear to me that this entire sequence of emails was highly threatening in its tone, and made a series of repeated demands of the Claimant, both financial and in relation to the Claimant's sexual activity, failing compliance with which the secrets of the Claimant's private life would be exposed. The Defendant's clumsy repeated disavowal of blackmail appears to me to be disingenuous. I do not wish to make a finding on the basis of written evidence that the Defendant has committed blackmail in the sense of a criminal offence, but he certainly made a number of repeated demands with menaces.

175. The Claimant's case is that the sequence of emails, and the publication of the website, caused him enormous anxiety and distress. I regard that case, which can hardly be challenged, as wholly credible.

176. In my judgment, the Claimant has established a very strong prima facie case of harassment. The Defendant's behaviour occurred on multiple occasions, it was targeted at the Claimant, it was calculated in an objective sense to cause alarm and distress, and in my judgment its cumulative effect was thoroughly oppressive and unacceptable. As far as the website is concerned, it was available to the world at large for a number of days, and even if it stood alone, its continued availability was liable to cause the Claimant continuous distress (see *Kordowski*).

Defences

177. It is necessary to consider the Defendant's answer to the Claimant's case, and the extent to which he pleads any of the PHA s1(3) defences.

178. In part, he insists that during parts of the period in question (September to December 2016) he was in daily contact with the Claimant, and in September and October actually spending time with him. That, of course, is not an issue that I can decide, but it makes no difference to the threatening effect of the emails which he unarguably sent in October 2016. He repeatedly denies having made demands for money after October 2016, and relies on his disavowal of blackmail. He continues to rely on his challenge to the jurisdiction, but also asserts that the PHA does not apply because 'the applicable law is [State B] law'. I will return to that point.

Reasonableness

179. At paragraphs 43 to 60 of his Defence, the Defendant asserts that his actions were reasonable. That is a reference to s1(3)(c) PHA, which provides that that s1(1) PHA does not apply to a course of conduct if the person who pursued it shows that in the particular circumstances the pursuit of the course of conduct was reasonable. His pleaded case on reasonableness is a repetition of the allegations made in the later emails and in his website account, and a description of the suffering that he claims to have endured.

180. To summarise that case, the Defendant claims to have had a continuous ten year relationship with the Claimant from March 2006 and June 2015 (in fact, just over nine years), which was often close and loving but in which the Claimant made use of coercive control, abuse and threats to control him; that as well as being kind and caring, he could also be cruel, threatening and deceitful; that the Claimant assaulted, beat him, sexually assaulted him, including once by anal rape, made threats to kill him and subjected him to emotional abuse, causing the Defendant serious psychiatric problems and PTSD; that the Claimant compartmentalised his life, mostly keeping the relationship a secret from others, and isolating him from his friends and family, as a mechanism of control; that the Defendant had to ask permission to come and go from their home and was denied keys; and that the Claimant had financial control over the Defendant, and broke promises to provide for him financially, so that the Defendant had to use credit cards (presumably the Claimant's), leading to false accusations of fraud. He wanted to forgive the Claimant for his conduct, but the Claimant refused to

apologise, so he created the website, partly as a cathartic exercise but partly to hold the Claimant publicly accountable for his conduct.

181. I was not addressed by Mr de Wilde on any authority on the effect of s1(c) of the PHA, or on the approach I should take to the reasonableness of the Defendant's conduct. His position was simply that a rambling account of the Claimant's conduct, as he described paragraphs 43-60 of the Defence, provided no objective justification of the Defendant's behaviour, by which I take him to have meant no objective case that in the particular circumstances the Defendant's pursuit of the course of conduct was reasonable.

182. Plainly, I cannot determine the truth of those allegations on the basis of conflicting pleadings and witness statements. Truth is not a defence to harassment, but it has been said (eg *Kordowski* at [164]) that the falsity or inaccuracy of the words constituting the course of conduct may be relevant, and in *Hourani v Thomson* [2017] EWHC 432 (QB) at [209], the court accepted that the truth or otherwise of an allegation was a particular circumstance to be taken into account in determining whether a course of conduct was reasonable. That seems to me, with respect, plainly correct. It seems to me that for present purposes of dealing with the harassment claim I must assume the truth of the Defendant's allegations, and consider whether on that assumption he has shown, or could show, that it was reasonable for him to behave as he did.

183. In *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB) at [53], Tugendhat J summarised the words of Lord Philips MR in the leading case on harassment by publication or speech, *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, in these terms:

> "…for the court to comply with HRA s.3, it must hold that a course of conduct in the form of journalistic speech is reasonable under PHA s.1(3)(c) unless, in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in Art 10(2), including, in particular, for the protection of the rights of others under Art 8. "

184. That is not, of course, to alter the burden of proof, which remains on the Defendant under s1(3)(c). *Thomas* and *Trimingham* were both press cases. *Hourani* was a case of a public campaign which involved publication of allegations to many third parties. In such cases, the Art.10 right has a particular importance. The Claimant's case in harassment rests at least as much on the sequence of emails from 2015 to 2018 as on the publication of the Defendant's website account, which forms a sort of coda to the preceding course of conduct. It is not easy to analyse the emails, which were only published to the Claimant, in terms of an intense focus on competing Art.8 and Art.10 rights, but of course the publication of the website account does raise rather different issues.

185. The course of conduct made up by the sequence of emails continued for a full three years after (as the Defendant himself accepts) the relationship ended. To start with, it evidenced an inability to accept that this thoroughly abusive relationship (as for present purposes I must assume it was) was over. Then the tone changed to make repeated allegations of wrongdoing, to demand again and again an apology for that wrongdoing

which it was plain was not going to be forthcoming, and to make threats to reveal the Claimant's private affairs, and in particular his sexuality, if he did not comply with (among other demands) the thoroughly unreasonable demand that he should cease sexual activity with other men. The termination of an abusive relationship may give the unfortunate victim a number of choices, many of which (such as making a report of criminality to the proper authorities, or instructing solicitors to pursue a civil claim) might be entirely reasonable. But I am not persuaded that the course of conduct which the Defendant decided to adopt by his sequence of emails, viewed as a whole, can be described as reasonable. It was futile; it was aggressive; and it was threatening.

186. The website account plainly does involve the exercise of the Defendant's Art.10 right to express himself and to tell his story to others. But it must be seen in its context, as the culmination of a sequence of threats to expose the Claimant's private life if he failed to comply with what in my judgment were (at least in part) plainly unreasonable demands, and indeed as the carrying into effect of those very threats. To take matters very shortly, I cannot find that the revelation to the world at large (which is what publication of the website account at least potentially involved) of essentially private details of a relationship between two people, some three years after the relationship had come to an end, and as the culmination of a series of unreasonable threats, could possibly outweigh the importance of the Claimant's Art.8 right to keep the details of the relationship private. In other words, the Defendant's course of conduct as a whole, including the publication of the website account, was so unreasonable that in principle it would be necessary (in the sense of a pressing social need) and proportionate to limit his Art.10 rights in the protection of the rights of the Claimant under Art 8 .

Applicable law

187. In addition to the challenge to the jurisdiction, in which he persists but which in my view cannot assist him, the Defendant raises a more substantial point, namely that the applicable law in respect of the harassment claim is State B law. He makes the same point in respect of the claim in misuse of private information, but it does not have the same force in that context, because on any view the Claimant is entitled to obtain in the jurisdiction which is the centre of his interests an injunction restraining internet publication. However, it has considerable force in the context of the tort of harassment. There is of course an internet element in the harassment claim (publication of the website account as the culmination of a campaign of email harassment), but the bulk of the harassment claim rests on the emails, which were simply sent by the Defendant to the Claimant. It may be a moot point where the Defendant was at all points during that campaign: he claims (witness statement 5 June 2019 para 49) to have been in State B throughout, but given that on his own case he was excluded from the Claimant's home there in June 2015, that seems improbable. It would be remarkable if he only emailed the Claimant when he was visiting a country where he did not have a home. It seems likely that he was either within this jurisdiction or, occasionally, in State B. However, that may not matter very much, for the fact is that the Claimant appears to have been in State B throughout.

188. The Defendant submits that the applicable law for the harassment claim is State B law. He maintains that the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) does not cover claims brought in misuse of private information or harassment, and that the applicable law is determined by Part III of the Private International Law (Miscellaneous Provisions) Act 1995.

189. He is right that Rome II (which is directly applicable in this jurisdiction) does not apply to claims arising from violations of privacy and rights relating to personality, including defamation: see Art 1.2(g) and s15A of the 1995 Act. However, I can see no basis for his submission that it does not include harassment, which is not a right relating to personality, and is not excluded by any other provision of the Regulation. The general rule under Rome II, Art 4, is as follows:

> "1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

190. In short, under Rome II, the applicable law is generally the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred. In the case of the Claimant's claim in harassment, that would be the law of State B. The Defendant is not, I believe, an expert in the law of State B, but his assertion that State B has no statutory provisions equivalent to the Protection from Harassment Act 1997 may well be right. I do not know: apart from his assertion, there is no evidence.

191. The result would not be different if the 1995 Act did apply. Sections 11, 12 and 15A provide as follows, so far as at all material:

> "11. Choice of applicable law: the general rule.
>
> (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
>
> (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the

country where the individual was when he sustained the injury;

(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the most significant element or elements of those events occurred….

12. Choice of applicable law: displacement of general rule.

(1) If it appears, in all the circumstances, from a comparison of—

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

15A. Disapplication of Part III where the rules in the Rome II Regulation apply.

(1) Nothing in this Part applies to affect the determination of issues relating to tort which fall to be determined under the Rome II Regulation….”

192. In short, if the 1995 Act applied, the applicable law would be that of the country in which the events constituting the tort occurred, which would be taken to be the law of the country where the most significant element of elements of those events occurred. On the face of it, that would appear to be the law of State B.

Conclusion

193. Either way, it seems to me that if the Defendant is right, he has a real prospect of successfully defending the harassment claim. I therefore refuse to order summary judgment on this part of the claim.

Counterclaim

194. The Defendant has brought a counterclaim. He states that he relies on causes of action in 'negligence, battery and assault, intention infliction of harm (sic), trespass to goods, conversion, deceit, malicious prosecution and abuse of process'. The Claimant applies to strike out, or for summary judgment on, the counterclaim. For the purposes of the Claimant's application I assume the truth of the allegations which the Defendant makes. As far as I am aware, none of the matters raised was the subject of a complaint by letter before action in accordance with a pre-action protocol.

Negligence [Counterclaim paragraphs 100-117]

195. The claim in negligence seems to be based on the Claimant's alleged act in taking a sample of the Defendant's blood in August 2006 under the pretext of performing a test for cholesterol. The Defendant claims to have discovered when he read the Claimant's first witness statement of 20 June 2018 that in fact the Claimant must have tested the sample for 'other conditions like HIV and hepatitis'. The Claimant had stated in his witness statement at ¶106 that he did not subject the Defendant to a blood test against his will: he was testing the blood of high risk individuals for HCV (hepatitis C virus) infections as part of his PhD, and the Defendant asked him for a test for HCV and HIV. However, I must assume for present purposes that the Defendant did not give that consent, but consented only to a cholesterol test.

196. Given that it is not alleged that the Defendant suffered any injury as a result, any cause of action could only be in assault (by vitiated consent), not in negligence. A negligence claim would fail at that first hurdle.

197. However, even if it be assumed that the Defendant could overcome the six year limitation period for claims in tort (s2, Limitation Act 1980), which would entail pleading and proving deliberate concealment by the Claimant of the true nature of the testing of the blood sample (s32(1)(b), Limitation Act 1980), the damages recoverable for a technical assault that caused no actual injury would be notional, and on any view disproportionately small by comparison with the cost of the claim and use of court time and resources in pursuing it to judgment. In my judgment, for the claim to continue would be an abuse of process: *Jameel v Dow Jones Inc* [2005] EWCA Civ 75; [2005] QB 946.

198. The Defendant also complains that throughout their relationship the Claimant prescribed antibiotics for him, including azithromycin, and contends that in 2008 he had a bad skin reaction caused by an antibiotic prescribed by the Claimant. That is the only injury relied on. The Claimant denies that he did more than (at the most) prescribe azithromycin on one occasion when treatment was needed. The Defendant maintains that 'any paper trail' will support his account. As I have said, for present purposes I assume the truth of his allegation that the Claimant prescribed these antibiotics, and that the Defendant suffered a bad skin reaction. But it would be utterly unrealistic to imagine

that it could be proved, 11 years later, either that the Claimant had been in breach of duty by giving the prescription (which would depend on his assessment at the time of the Defendant's condition) or that the skin reaction was caused by the Claimant's negligent prescription of the antibiotic. It is not enough for the Defendant to assert that the 'paper trail' will support his account. That is pure speculation.

199. The Defendant also alleges that the Claimant prescribed antibiotics for him on many other occasions, apparently mainly in the US state where they then lived, and that he had a duty of care not to do so without a diagnosis or legitimate reason. He alleges (without seeking to add it as a party) that the Medical Centre where the Claimant worked was vicariously liable for his actions. But he alleges no injury, which is fatal to a claim for personal injury negligence.

200. Moreover, the claim is many years out of time (see Limitation Act 1980 s11(4)), so there is a good limitation defence, and the injury suffered (even if proved) was apparently trivial, and a claim founded upon it would inevitably be wholly disproportionate to any damages which might conceivably be obtained.

201. For the reasons that I have given, the claim pleaded at paragraphs 100-117 of the Counterclaim must be struck out.

Battery and Assault [Counterclaim paragraphs 118-136]

202. The Defendant pleads that the incidents throughout his relationship with the Claimant that give rise to a claim in assault 'are simply too many to mention'. However, the instances that he does mention are an assault by two punches to his face in in March 2009, an assault by pushing in July 2009, assault by pushing, kicking and spitting in February 2010, and assault by grabbing the Defendant by the throat in January 2012. All those assaults are said to have taken place in England. He also alleges assault by pushing to the floor in August 2012 (apparently in Kentucky, USA), assault in the USA (presumably in Kentucky) by punching in July 2013 and in 2014, assault by kicking and pushing and later by punching in State B in 2014, and assault in Italy in 2015 by (inter alia) grabbing by the throat and slapping. The Defendant also alleges (Counterclaim §133) that the Claimant had anal sex with him after the Italian assaults. He does not say that he did not consent to this, and it is not clear whether he means to say (a) that he consented to the sexual relations but objected to the Claimant compressing his throat during sex, or (b) that he did not consent to the sex.

203. All the UK assaults are out of time: s2, Limitation Act 1980. I assume that the Claimant will take the limitation point, for his counsel raised it in argument. Those claims will therefore fail.

204. The sustainability of the claim in respect of the foreign assaults seems to me profoundly doubtful. There are questions of applicable law as well as of jurisdiction. It is difficult to see on what possible basis a claim could properly be brought in this jurisdiction against a person resident in State B for assaults alleged to have been committed in the USA (in whichever state) or in Italy. Mr de Wilde submitted, in my judgment correctly, that this jurisdiction could not be the proper forum for such a claim. There may also be *Jameel* questions as regards the US assaults, although the Italian allegation is potentially more serious.

205. Paragraphs 118-136 of the Counterclaim must therefore be struck out.

Intentional infliction of harm [Counterclaim paragraphs 137-153]

206. The Defendant also relies on 'countless' incidents of what he calls non-violent abuse. He pleads that 'In many respects the intentional infliction of harm is the tort that has done the most damage to me – the harm to my day-to-day life and my mental health has been long term and often totally debilitating'.

207. The acts that he relies on are verbal abuse and threats, including threats to kill, and coercive control in a relationship. He alleges that in consequence he has suffered PTSD and has required cognitive behaviour therapy and psychiatric medication, which he says is attributable to the 'decade long emotional abuse and coercive control' that he suffered at the hands of the Claimant. Some of the acts relied upon go back to December 2007, and some of them appear to have taken place in the USA and in State B.

208. This appears to be an invocation of the jurisdiction identified in *Wilkinson v Downton* [1897] 2 QB 57, which was considered by the Supreme Court in 2015 in the context of threatened publication of a book by the defendant which was said to have been likely to cause mental damage to his son: *OPO v Rhodes* [2015] UKSC 32; [2016] AC 219. It is clear that the tort of intentionally causing physical or psychological harm requires words or conduct directed towards the complainant for which there was no justification or reasonable excuse, an intention to cause physical harm or severe mental or emotional distress (mere recklessness will not suffice), and a consequence in terms of physical harm or recognised psychiatric illness.

209. Mr de Wilde suggested that *OPO* shows that the conduct element of the tort cannot arise in a case involving communications between two people, but I do not think that is right, although of course, as Lord Neuberger said in *OPO* at [111], the tort must not interfere with the give and take of ordinary human discourse (including unpleasant, heated arguments in domestic contexts, sometimes involving the trading of insults or threats).

210. The claim is thoroughly inadequately pleaded as it stands, for in the main it fails to make clear except in the most general terms what the conduct is that is relied on, where it took place and when, and it appears to include conduct which on any view would be out of time and/or committed in a foreign country.

211. Moreover, the Defendant does not allege that the conduct relied upon was intentional, in the sense that the Claimant intended to cause severe mental distress which in fact resulted in recognisable illness (*OPO v Rhodes* at [83-87]), except perhaps to the limited extent that it is pleaded that he knew the Defendant was vulnerable and goaded him to take his own life. It seems most improbable that, even if the allegations relied on are true (which of course is denied), the Claimant would have had such an intention in the case of most of the conduct relied on (for instance, isolating the Defendant from his family and friends, or not allowing him a key to an apartment, or taunting him about his appearance, or keeping financial control in the relationship, or reneging on promises). Those are the kinds of matters which Lord Neuberger may have had in mind in *OPO*. I cannot see how such behaviour, which (if it took place) would have been controlling and no doubt upsetting, could be said to have occurred with the intention on

the Claimant's part of causing him severe mental or emotional distress. I repeat that the Defendant does not (as he would have had to do) allege that it was.

212. Moreover, while the Defendant's case is that his psychiatric problems are 'attributable to the decade-long emotional abuse and coercive control' that he says he suffered, there is no pleaded suggestion that there is any psychiatric support for the causative link that he alleges. His own belief in the causal connection is plainly insufficient. I note that in his 5 June 2019 witness statement, at ¶151, he refers to (but does not exhibit) 'dozens of pages of reports in which psychiatrists and psychologists write about the abuse (he) suffered and the impact on (his) mental health'.

213. I think that it is in principle necessary to distinguish between those allegations which are not alleged to have occurred with the requisite intention on the Claimant's part, and those which are. I do not think that the court can permit a long trawl through every aspect of the Claimant's allegedly controlling behaviour during several years of a relationship, simply because cumulatively it may have had a debilitating effect on the Defendant. The focus must be on that conduct which is alleged to have taken place with the intention of causing the Defendant severe mental or emotional distress. That conduct, in my judgment, is pleaded at paragraphs 146-153, which show the germ of an arguable claim.

214. However, there is a further difficulty in the way of the claim, even if it is cut down to those paragraphs. There is no allegation, and it appears on the face of it to be improbable, that the actions relied upon (certainly those within the scope of paragraphs 146-153) took place in this jurisdiction, or that English law is in fact the applicable law of the tort. Where a place is identified, it is State B or (in one instance) Scotland. On the face of it, the Claimant's alleged behaviour cannot properly be the subject of a claim in this jurisdiction, given that (certainly in recent years) the Claimant was resident in State B, and the Defendant's whereabouts when the tortious acts allegedly took place are wholly unclear.

215. Paragraphs 137-153 must therefore be struck out.

<u>Trespass to goods and conversion [Counterclaim paragraphs 154-160]</u>

216. The Defendant alleges that the Claimant locked him out of their apartment in State B in June 2015, as a result of which he was left homeless and lost access to his belongings: 'virtually all of my possessions were now inaccessible to me'. It is alleged that the Claimant did not return any of this property to him, and he has either withheld, destroyed or otherwise disposed of all the Defendant's property, with the exception of a bag. The property is not described except in the most general terms ('items of furniture, artwork, hundreds of books, computer equipment, flight training equipment, hundreds of items of clothing, shoes, sports equipment, linens and kitchen equipment').

217. Mr de Wilde contends that this claim fails at the first hurdle, in that the Defendant's complaint amounts to no more than saying his goods were inaccessible to him, which is not enough. I am not sure that I agree. What the Defendant is saying is that the property has been withheld from him (or destroyed). If the Claimant has denied the Defendant access to his property, that may in principle be enough: see *Clerk & Lindsell, Torts, 22nd ed.*, ¶17.32. I should make clear that it is the Claimant's seemingly uncontradicted case (2nd witness statement, paragraphs 52-53) that he has kept all the

property for the Defendant, a case convincingly buttressed by the photographs of the property which the Claimant exhibits at "BVC 8".

218. However, if the Defendant is right, the tortious behaviour relied on was committed in State B. I have no way of knowing, and the Defendant does not state, whether the behaviour relied upon would be actionable by the laws of State B, nor on what basis the Defendant contends that this court is the appropriate forum for the claim. It is difficult to see how a claim could properly be brought in this jurisdiction against a person resident in State B for a conversion or interference with goods alleged to have been committed in State B, even if (which is not pleaded) the conversion is actionable by the laws of that state.

219. Paragraphs 154-160 will therefore be struck out.

Deceit [Counterclaim paragraphs 161-171]

220. The Defendant alleges that he and the Claimant had a number of financial agreements that he relied upon but on which the Claimant reneged.

221. In his Counterclaim, he pleads (a) that in 2008-9 the Claimant allowed him to use his credit cards for personal spending, but then accused him of using them fraudulently, and forced him to accept responsibility for them and obtained the sum which he said he had lost from the Defendant's family; (b) that the Claimant made certain promises of financial support to him in 2011-2012 when they were moving to the USA, but failed to adhere to them, forcing the Defendant to use credit cards and to incur debts; and (c) that in summer 2013, in the USA, he asked the Defendant to go back to England to renovate and sell his house for him, promising him half the equity to pay down his debts, but reneged on the agreement.

222. In his 5 June 2019 witness statement, the Defendant elaborates on his pleaded case, accepting that their agreements may not have been contracts 'in a formal sense', but maintains that they were promises that he believed, relied on, and acted on to his detriment.

223. Mr de Wilde correctly submits, relying on *Derry v Peek* (1889) 14 App Cas 337, that the elements of deceit require that the claimant should plead and prove a false representation, which the representor knows to be untrue, or does not believe to be true, or is reckless as to its truth or falsity, intending that the representee should act in reliance on it, and that the representee does so and suffers loss in consequence.

224. There is no pleaded case, and no evidence to show, that the Claimant (even if he made the representations pleaded) did so with the state of mind necessary to make good a claim in deceit. That alone must be fatal to this part of the Counterclaim.

225. Mr de Wilde might also have observed that element (a) of the claim in deceit does not involve a representation at all, nor any allegation of loss to the Defendant; that elements (a) and (b) are both on the face of it out of time; and that element (c) appears to involve a representation made in some unstated part of the USA, which (without any plea or proof of foreign law) does not give rise to a tort actionable in this jurisdiction.

226. This part of the Counterclaim is unsustainable, and I do not think it can be saved. It must be struck out.

Malicious prosecution [Counterclaim paragraphs 172-176]

227. The Defendant alleges that the Claimant, by asserting in these proceedings that the Defendant made demands of the Claimant for money, had made a malicious fabrication and had misrepresented the nature of their relationship and certain financial transactions in 2016, as a result of which he has been greatly distressed.

228. The tort of malicious prosecution entails maliciously setting the law against another without reasonable and probable cause, in circumstances in which the prosecution is determined in the victim's favour. There is no possible basis for supposing that the tort is made out here. This part of the Counterclaim is quite unsustainable, and must be struck out.

Abuse of process [Counterclaim paragraphs 177-182]

229. The Defendant alleges that the Claimant is guilty of abuse of process by relying on misuse of private information instead of defamation, in order to avoid the restrictions in the law of defamation on prior restraint. Moreover, he relies in support of a contention of *Jameel* abuse on the fact that the Claimant has not showed that any third party accessed his website, and contends that for the Claimant to have brought a claim in harassment when neither party is domiciled in this jurisdiction and no act or course of conduct has taken place in this jurisdiction is also an abuse.

230. This is misconceived. Abuse of process is not a cause of action, although it may ground an application to strike out a claim or part of a claim.

Conduct since issuing proceedings [Counterclaim paragraphs 183-186]

231. The Defendant alleges (a) that the Claimant obtained an interim injunction by relying on a false witness statement; (b) that he has falsely asserted that his centre of interests is in England and Wales despite 'clear evidence' to the contrary; (c) that he has made searches of the Defendant's private data (his address) that 'may be contrary to the Data Protection Act'; and that he has contacted a member of the Defendant's family by telephone and email, and sought to obtain his personal information from a relative, which amounted to intimidation and a 'transparent threat designed to pervert the course of justice'.

232. These matters disclose no viable cause of action, and must be struck out.

Conclusion on Counterclaim

233. The whole of the Counterclaim will be struck out.

Defendant's Cross-Application

234. On his cross-application, the Defendant seeks an order striking out the claim pursuant to CPR 3.4 and discharging the interim injunction, on the following grounds which (apart from the reference to State B) I set out verbatim:

> "(1) The Claimant does not have his centre of interests in England and Wales and therefore is not able to obtain an injunction on an internet publication as per the ECJ in *Bollagsupplysningen* [sic]. He is not entitled to claim damages for alleged harm outside the jurisdiction as per the ECJ in *E-Date/Martinez*.
>
> (2) No alleged act or alleged harm has occurred in England and Wales. Neither party was in England and Wales on the relevant dates. The applicable law under s11 Private International Law Act 1995 is [State B] law. The tort of misuse of private information and the Protection from Harassment Act 1997 do not exist in [State B] law.
>
> (3) The injunction interferes with my rights under Article 10 and Article 8 of the ECHR relying on a cause of action that does not exist in the applicable law. The injunction is an unlawful breach of my Convention rights as the restriction is not prescribed by any applicable law.
>
> (4) Further and (sic) alternatively, the disputed Website content was not accessed or read by any third party in England and Wales (or elsewhere). The claim is an abuse of process as per *Jameel v Dow Jones*.
>
> (5) Further and alternatively, the claim is an abuse of process as the "nub" of the Claimant's claim is about reputation and the truth of falsity (sic) of what is alleged. The claim is a disguised defamation claim brought in the tort of misuse of private information to avoid the *Bonnard v Perryman* rule against prior restraint.
>
> (6) Further and alternatively, the Claimant should not be entitled to any equitable relief as his comprehensively dishonest witness statements and targeted acts of intimidation since starting these proceedings engages (sic) the clean hands doctrine.
>
> If the Court is unable to strike out the claim, I seek an order that refers the proper interpretation of centre of interests to the European Court of Justice under the Article 267 TFEU procedure."

235. The first ground is that the Claimant does not have his centre of interests in England and Wales. That question has been determined against him.

236. As for the second ground, I have already determined that the Defendant appears to have a real prospect of defending the harassment claim (but not the claim in misuse of private information), such that the Claimant should not be given summary judgment on that claim. It does not follow that it should be struck out, and I decline to do so. It is in all other respects properly pleaded and prima facie well founded. The question raised by the Defendant cannot be assumed at this stage to be correct or fatal to the claim.

237. As for the third ground, I have already made clear that I do not accept that argument so far as concerns the claim in privacy. As regards the claim in harassment, I am not granting a permanent injunction in respect of that cause of action. I have found that there is a real prospect of defending the claim in harassment, but that does not mean that the claim should be struck out. In any event, the injunction stands on the basis of the claim in privacy.

238. The fourth ground relies on the principle stated in *Jameel v Dow Jones Inc* [2005] EWCA Civ 75; [2005] QB 946. It is not yet clear how many hits there were on the website while it was publicly available, and it may well be that an assessment of damages for breach of misuse of private information will turn out to be an expensive and pointless exercise. But it is too early to say, and (as I understood Mr de Wilde) it is unlikely that the Claimant would want to proceed with an assessment if the game is plainly not worth the candle. However, even if that turns out to be the case, it does not mean that there is not substantial value to the Claimant in the primary relief that he seeks as far as misuse of private information is concerned, namely a permanent injunction. I have determined that he is entitled to that relief, because the Defendant has no reasonable prospect of defending that part of the claim. That is enough to dispose of this ground of the Defendant's application.

239. On the fifth ground, the Defendant maintains that the contents of the website account are true, so that if the claim had been brought in defamation he would have a defence of truth under s2, Defamation Act 2013, in which case no interim injunction would have been granted (see eg *Bonnard v Perryman* [1891] 2 Ch 269 and *Greene v associated Newspapers Ltd* [2005] QB 972). There is often an overlap between privacy and defamation. If the nub of the claim is the protection of reputation, then the Claimant cannot avoid the restrictions that apply in defamation claims by formulating his claim in some other cause of action (see eg *Hannon v News Group Newspapers Ltd* [2015] EMLR 1 and *ERY v ANL* [2017] EMLR 9). In this case, aspects of the website account jeopardised both the Claimant's reputation and his privacy. But the fact that the Claimant could have pleaded a cause of action in defamation in respect of some of the allegations is no answer to a claim for an injunction to restrain breach of privacy. In fact, the matter which most concerns the Claimant (the revelation of his sexuality) is both admittedly true and not defamatory of him, so to that most important extent he would have no remedy in defamation. I accept that there are reputational aspects to the claim, as is very often the case in privacy actions, but I do not agree that the nub of the claim is protection of the Claimant's reputation.

240. The sixth ground is misconceived. I am tempted to say that it is mischievous, because the Defendant's adviser must be well aware that it is wholly unsustainable. It is obvious that the court cannot make a finding about the truthfulness of witness statements at a summary stage.

241. The Defendant also asks that if the Court is unable to strike out the claim, the proper interpretation of 'centre of interests' should be referred to the European Court of Justice under the Article 267 TFEU procedure. I have already explained at [43-44] above why I am not prepared to do that.

242. For those short reasons, the Defendant's application is dismissed.

Claimant's Application for a Hadkinson order

243. Mr de Wilde submitted that the Claimant was entitled to an order that the Defendant should take no further steps in the litigation until he satisfies the substantial costs orders that have been made against him on three separate occasions. He also complains (inter alia) that the Defendant's conduct in failing to co-operate with the Claimant's solicitors in progressing the litigation, in failing to concede the correctness of any part of the Claimant's claim (a point I have referred to above), and in litigating (as Mr de Wilde puts it) 'by ambush', putting in evidence or letters to the court very shortly before hearings rather than in good time, demonstrated the characteristics of a vexatious litigant. There is some force in that complaint. From what I have seen, the Defendant, although to an extent well advised, has little appreciation of his duties to the court or to the furtherance of the overriding objective.

244. The basis on which Mr de Wilde seeks this order is, he submits, to be found in the principle in *Hadkinson v Hadkinson* [1952] P 285, recently reviewed by the Court of Appeal in *Orenga de Gafforj v Orenga de Gafforj* [2018] EWCA Civ 2070; [2019] 1 FLR 73. In *Orenga* at [11], Peter Jackson LJ summarised the relevant principles as follows:

> "For present purposes, it is enough to note the exceptional nature of the order and to record the conditions that are necessary before it can be made. I would summarise these as follows:
>
> 1. The respondent is in contempt.
>
> 2. The contempt is deliberate and continuing.
>
> 3. As a result, there is an impediment to the course of justice.
>
> 4. There is no other realistic and effective remedy.
>
> 5. The order is proportionate to the problem and goes no further than necessary to remedy it."

245. As will be obvious, the difficulty with Mr de Wilde's application is that the Defendant is not in contempt of court by his failure to satisfy the orders against him. I asked Mr de Wilde for his authority for the proposition that failure to pay costs orders, or failure to co-operate in furthering the overriding objective, is to be stigmatised as contempt of court. He was unable to adduce any. There are ways of compelling the Defendant to comply with court orders, but in my judgment the *Hadkinson* route is not (or not yet) one of them.

Overall Conclusion

246. In the outcome, I grant the Claimant summary judgment for a permanent injunction to restrain the further misuse of his private information, and for an assessment of damages. I refuse him summary judgment on his claim in harassment. He will need time to consider that claim to take into account the Defendant's point on the applicable law of the tort.

247. The Defendant's Counterclaim will be struck out, and his cross-application dismissed.

248. The Claimant's application for a *Hadkinson* order is dismissed.

249. This judgment has already been delayed too long, so it will be handed down without the attendance of the parties being required or expected. However, I will hear the parties thereafter on the precise form of the order which I should make, and on such consequential orders and directions as may be necessary. The complexity of the matter may require an oral hearing, which should be arranged as soon as possible to suit the convenience of the parties and the court.