IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
ON APPEAL FROM DEPUTY MASTER SABIC KC
(Order dated 13 May 2024 in Case No QB-2020-003558)
Case No: KA-2024-000084
Neutral Citation Number: [2024] EWHC 3115 (KB)

Royal Courts of Justice
Strand, London, WC20 2LL

Date: 5th December 2024

Before :

MR JUSTICE LINDEN

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Between :

SAMUEL COLLINGWOOD SMITH	**Appellant/ Third Party**
- and -	
(1) SONIA POULTON	**Respondent/ Defendant**
(2) JOHN HEMMING	**Respondent/ Claimant**
(3) DARREN LAVERTY	**Respondent/ Fourth Party**

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Samuel Collingwood Smith (in Person)
Sonia Poulton (in Person)
John Hemming (in Person)
The 3rd Respondent did not attend and was not represented.

Hearing date: 23rd October 2024

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JUDGMENT

Mr Justice Linden:

Introduction

1. This is an appeal against part of an Order made by Deputy Master Irena Sabic KC on 13 May 2024 in Claim No QB-2020-003558 ("the Claim"). So far as relevant to the appeal, the Deputy Master refused the Third Party appellant's ("Mr Smith's") application to strike out certain particulars of a course of conduct which was alleged by the Defendant (Ms Poulton) to amount to harassment. His application contended that the challenged particulars did not disclose reasonable grounds for bringing the claim and/or they were an abuse of the process of the court: see CPR Rule 3.4 (2)(a) and (b).

2. Permission to appeal was granted on the papers by Mrs Justice Steyn on 22 August 2024.

The hearing

3. Mr Smith and Ms Poulton were not legally represented. However, Mr Smith holds a Master's degree in law and he said that he had been advised by two barristers in relation to his strike out application: Mr David Hirst and Mr Matthew Hodson. He has also conducted a number of hearings on his own behalf and has assisted others as a McKenzie friend over several years, and therefore has experience of the practice and procedure of the courts. Ms Poulton appeared to have significantly less experience – she emphasised that she is a journalist and not a lawyer - but has taken part in procedural hearings in the context of, at least, the Claim.

4. Mr Smith and Ms Poulton made submissions based on their skeleton arguments and separate bundles which they had prepared. It was apparent that there has been acrimonious litigation between the parties to the Claim and in other related claims involving associated parties over a number of years. Mr Smith and Ms Poulton each maintained, including by reference to other claims, applications and orders, that the other was in the habit of misusing the legal process for their own ends. I made clear, as Mr Smith appeared to be aware and both appeared to accept, that my focus had to be on whether the decision of the Deputy Master was wrong, or unjust because of a serious procedural irregularity. Their arguments should concentrate on whether Rule 3.4 (2)(a) or (b) applied to the particulars which Mr Smith had challenged and whether the Deputy Master was wrong to consider that it was not proportionate to strike them out. Mr Smith largely complied with this; Ms Poulton less so.

5. Ms Poulton argued, pursuant to her Respondent's Notice, that Mr Smith's application was part of a pattern of deliberate delaying tactics. But, as I told her, I was not in a position, in the context of the appeal, to conduct a survey of the various claims and applications over the years in order to reach a reliable view. I would, however, take into account, as part of her argument that Mr Smith's strike out application was an abuse of process or a delaying tactic, the fact that the particulars which Mr Smith was now saying were unarguable and/or an abuse of process had been pleaded from the outset of the litigation more than three years before his application or had been added by amendment in the course of the litigation with his consent. In the course of his submissions I also gave Mr Smith an opportunity to explain his approach by putting the relevant points to him.

6. The Claimant, Mr Hemming, also attended the hearing. After Ms Poulton had made her submissions in reply to Mr Smith's appeal he asked to make a small number of points. This was unexpected including, it appeared, by Mr Smith who had argued the appeal fully. The appeal concerned an application which Mr Smith had made, and Mr Hemming had not put in a Respondent's Notice or a skeleton argument, or indicated that he wished to make submissions in support of the appeal. I was therefore reluctant to allow him to make submissions at this stage of the hearing. However, he said that one of his points was that he had not been indemnifying Mr Smith until Ms Poulton had brought Mr Smith into the proceedings by way of her Part 20 Claim against him. Mr Smith added, in an email after the hearing dated 23 October, that this meant no more than that Mr Hemming has agreed to meet any costs orders which might be made against Mr Smith. Mr Hemming's second point was that, as Mr Smith had already said, his application to strike out was resisted by Ms Poulton: she had not made any concessions until after the hearing before the Deputy Master.

7. Mr Smith then replied to Ms Poulton.

8. After the hearing, I received email submissions from the Fourth Party in the Claim ("Mr Laverty") dated 25 October 2024. There was also an email from Mr Smith seeking to ensure that I had seen Mr Laverty's email. I have taken all of the email submissions after the hearing into account in coming to my decision.

The background

9. The underlying dispute between the parties has resulted in more than one claim and various applications in the Claim itself. A fuller account of the litigation is provided in the judgment of Mrs Justice Hill dated 23 November 2023: [2023] EWHC 3001 (KB). In this judgment, however, I will focus on the aspects of the background which are most relevant to the appeal.

10. By way of very brief introduction to the parties:

    i) Mr Hemming was the Member of Parliament for the constituency of Birmingham Yardley from 2005-2015.

    ii) Ms Poulton describes herself as a full-time freelance journalist, social commentator and broadcaster who has had various journalistic jobs. So far as relevant to the appeal, at material times she produced content for a platform known as "Brand New Tube", of which a Mr Muhammad Butt is the founder.

    iii) Mr Smith is a director of an IT firm. He also writes a blog under the pen name "Matthew Hopkins" which he posts under the heading "Matthew Hopkins News@MHNWitchfinder". He says that he has known Mr Hemming for over a decade and they are friends who support each other personally and politically.

    iv) Mr Laverty is described as an associate of Mr Hemming and Mr Smith who, it appears, was involved in a dispute with Ms Poulton in relation to tweets which he published about her in 2015/2016.

11. Mr Hemming's claim against Ms Poulton, which was issued on 9 October 2020, is in libel and for breaches of the data protection legislation. Initially it was based on an

interview of Ms Poulton which was published on YouTube and in audio form on Spotify and Stitcher on 19 November 2019. I have not been shown his Particulars of Claim but I gather from the materials that Mr Hemming's case for the purposes of his defamation claim is that words used in the course of this interview meant that he is a paedophile who raped an Esther Baker when she was a child, and that he has used baseless legal threats to attempt to hide his sexual misdeeds with children. Mr Hemming denies these allegations.

12. By Order dated 24 November 2023, Hill J granted Mr Hemming's application to, amongst other things, amend the Particulars of Claim to add data protection claims based on three subsequent publications, a claim in defamation based on a fourth, and a claim in harassment on the basis of what is now a total of five pleaded publications. The words complained of, and their alleged meanings, are attached to Hill J's judgment but, in very broad summary, the additional publications are tweets/online posts which are alleged to mean that the allegations for which Ms Poulton is being sued in the Claim are true, and that Mr Hemming and his associates were trying to stop the truth coming out by stalking and making false allegations against her as a journalist who writes about matters of public interest including child abuse. Again, these allegations are denied by Mr Hemming.

13. Ms Poulton denies liability and she has made a counterclaim against Mr Hemming, and additional Part 20 claims against Mr Smith and Mr Laverty, alleging harassment by them contrary to the Protection from Harassment Act 1997. For convenience and "due to their inextricably linked facts" the Part 20 claims and the counterclaim are pleaded together in her Defence and Counterclaim, the first version of which was dated 21 January 2021. I will deal with Ms Poulton's pleaded case in greater detail below but the thrust of it is that Mr Hemming, Mr Smith and Mr Laverty have pursued a course of conduct amounting to harassment. It is alleged that they have, by emails and online posts, sought to incite violence against her, to intimidate her, to smear her, to undermine her working relationship with Mr Butt and to deter lawyers from representing her in the litigation. Again, this is disputed by Mr Hemming, Mr Smith and Mr Laverty.

14. The Claim was before Deputy Master Bard on 30 April 2021. Mr Hemming was represented by Mr Hodson and Ms Poulton by Mr Richard Munden, both of counsel. Mr Smith and Mr Laverty were not legally represented. The Deputy Master permitted certain amendments to the harassment claim on the usual terms as to costs. These amendments added further particulars of alleged harassment by Mr Hemming, Mr Smith and Mr Laverty, and they were made with the consent of all three of them. Mr Hemming's consent was subject to an application which Mr Hodson for summary judgment and/or a striking out of all or some of the Defence and Counterclaim, including the harassment claim. Mr Smith left the hearing after he had dealt with the amendments and the consequent order for costs in his favour, and Mr Laverty remained as a non-participating observer.

15. Summary judgment was refused by Deputy Master and Mr Hemming's application to strike out was largely unsuccessful in respect of Ms Poulton's defence to the defamation claim and wholly unsuccessful in relation to her defence to the data protection claim and her counterclaim in harassment. The Deputy Master's reasons are set out in his judgment dated 11 June 2021 (revised on 15 June 2021). These included the following in relation to part of the pleaded counterclaim in harassment at [113] of his judgment:

> *"Thus, the complaint is of six incidents (although that in (d) above is sub-divided into a number of items), the first four of them within one three-week period. Mr Hodson submits that it is misconceived and audacious to suggest that dealings with legal advisors can amount to harassment. I do not see why this should be so as a matter of principle: if unpleasantness and pressure are filtered through an agent before reaching the principal, that does not inherently diminish their impact; and when that unpleasantness and pressure is directed personally at the agent, with a personal threat that he should cease to represent that principal for own benefit or advantage, that seems to me to be perfectly capable of constituting harassment of the principal (regardless of whether it might also be harassment of the agent)."*

16. At [115] the Deputy Master said:

> *"I regard it as at least properly arguable that the matters alleged against [Mr Hemming], taken together, are capable of amounting to a course of conduct of harassment by him, intended (at least in part) to pressure [Ms Poulton] into silencing herself, which involved a mixture of threats (in relation to legal proceedings and otherwise), criticisms, and pressure on her legal representatives – and, for the avoidance of doubt, this latter is capable of constituting harassment regardless of whether or not the legal representatives do withdraw. I add that I would not find it hard to attach the label 'oppressive and unreasonable' or 'oppressive and unacceptable' to the email of 5 November 2020 sent by [Mr Hemming] to [Ms Poulton's] solicitor, warning about his personal parliamentary aspirations... Mr Hodson makes the point that the witness statement of Mr O'Donnell ([Ms Poulton's] former solicitor) does not confirm that he withdrew because of this threat, or even that he observed that it caused distress to the [Ms Poulton]; but I do not see these points as material for the purposes of summary judgement or strike-out."*

17. Mr Hemming did not appeal against the decision of Deputy Master Bard.

18. On 23 November 2021 a Tomlin Order was made by the Court staying Ms Poulton's claim against Mr Laverty, settlement having been agreed between them. That settlement is now the subject of separate litigation related to alleged breaches of its terms by both parties, but there was no suggestion before me that the Part 20 claim between Ms Poulton or Mr Laverty is "live".

19. On 17-18 October 2023, Hill J then heard six applications by the parties and gave directions to progress the matter to trial. The neutral citation for her judgment on these applications is given at [9], above. Mr Hemming was again represented by Mr Hodson at the hearing. The other parties, including Ms Poulton, were unrepresented. The applications included an application by Ms Poulton, dated 13 February 2023, to re-amend her Amended Defence and Counterclaim to add further particulars of harassment by Mr Smith and Mr Hemming which were alleged to have occurred between 26 August and 9 September 2022, as part of the overall course of conduct which she alleged. Again, the addition of the particulars (but not certain other amendments sought to be made by Ms Poulton) was consented to by Mr Hemming and Mr Smith, albeit Mr Smith said in writing that he considered them to be an abuse of process because they were an attempt to get round difficulties with a claim in libel and because they were complaining about journalistic material, whereas there was no plea of conscious or negligent abuse of power by the media. He said that he was consenting only because he believed that it

was in the public interest for him to prove the truth and reasonableness of the allegations which he had made in the articles about Ms Poulton on which she relied: see [163] of the judgment of Hill J.

20. The particulars of the course of conduct amounting to harassment alleged by Ms Poulton were pleaded as sub-paragraphs of paragraph 131 of the Re Amended Defence and Counterclaim as it had become by the time of Mr Smith's application to strike out, which was dated 15 March 2024. Mr Smith had pleaded to each of the particulars in detail in a Re-Amended Defence to Part 20 claim dated 22 January 2024. Ms Poulton did not file a Reply.

21. There was then a Case Management Conference before Deputy Master Sabic on 1 May 2024. However, in the event she heard an application by Mr Hodson, on behalf of Mr Hemming, for a trial of a preliminary issue on meaning in relation to two of the publications complained of by Mr Hemming and for parts of the Re-Amended Defence to be struck out. She also heard Mr Smith's application to strike out.

22. Mr Smith's application notice, and his submissions in support of his application, identified the following categories of particulars which were sought to be struck out pursuant to Rule 3.4(2)(a) and (b) and explained why they should be struck out:

    i) Paragraphs 131(a)-(f), 131(vi-a), 131(ix-a), 131(k), 131(l) and 131(xiii-a) were said to be otiose and irrelevant as they made allegations against Mr Laverty only, and the claim against him had been settled. It was said that there were resource implications if these particulars remained as part of the statement of case.

    ii) Paragraph 131(n)(iv) was said to be barred by absolute privilege because it complained about Mr Smith reporting Ms Poulton's solicitor to the Solicitors' Regulation Authority ("SRA") on 5 November 2020. In any event the complaint had been about the conduct of the Ms Poulton's solicitor when he was acting for clients other than her, and there was no plea that the complaint was targeted at her.

    iii) Paragraphs 131(n)(v), 131(n)(vi) and 131(r) were allegations against Mr Hemming albeit it was pleaded that he acted in concert with Mr Smith and Mr Laverty. These particulars were said by Mr Smith to be barred by absolute privilege in that they were communications with Ms Poulton's legal representatives with litigation in prospect or on foot, and it was contended that there was no plea of targeting Ms Poulton.

    iv) Paragraphs 131(n)(i)-(iii), 131(p), 131(q) and 131(w) were said to be complaints about journalistic material which was protected by Article 10 of the European Convention on Human Rights ("ECHR"). They were said to be published to the world at large and there was no plea of targeting Ms Poulton nor, in the case of 131(n)(i)-(iii), any pleaded explanation of why they were oppressive or unreasonable.

The decision of Deputy Master Sabic

23. Deputy Master Sabic gave judgment on Mr Hemming's application on 1 May 2024 and granted it. I understand that a preliminary hearing on meaning took place before a

Deputy High Court Judge on 12 July 2024 and Mr Hemming has applied for permission to appeal against her decision.

24. At a reconvened hearing on 13 May 2024, Deputy Master Sabic gave a short (11 paragraph) oral judgment on Mr Smith's application. She correctly noted that there were essentially three categories of particulars which were sought to be struck out – those which were said to be otiose ("Category 1"), those which were said to be barred by absolute privilege ("Category 2") and those which were said to be protected journalistic material ("Category 3"). She said that she reminded herself of the guiding principles and the powers under which she was asked to determine the application and particularly the terms of CPR Rule 3.4(2)(a) and (b), which she summarised. She then said this at [5]-[6] of her judgment:

> *"5. When applying the above test, it is important, in my judgement, to have in mind the complex history of these proceedings, which have most recently resulted in the judgement of Hill J, of 24 November 2023, whereby she sets out the protracted procedural history, which I do not repeat here.*
>
> *6. In my judgement, it is important for any future court hearing this case to have full visibility of the procedural path which has led to the current state of these proceedings, including the proceedings against [Mr Laverty] and how those relate to the outstanding issues. For that principal and overarching reason, which applies to all grounds on which the application is made, I do not consider that it would be appropriate for me to strike out any part of the defence or the counterclaim. There is, in my judgement, a greater risk of causing an obstruction to the just disposal of this case if any such parts are struck out and cannot sensibly be considered by the trial judge."*

25. The Deputy Master then turned to each of the three categories of particulars which she had identified and said:

i) At [8] of her judgment, that the argument that the specified particulars were otiose *"carr[ies] some merit"* but that, for the reasons she had given, it would not be right for her to strike them out at this stage.

ii) At [9], that the arguments based on absolute privilege *"are well made and they do carry some merit"*. However, "*in addition to the overarching reason*" (emphasis added):

> *"I do not consider that it would be appropriate for me to tie the hands of the trial judge on this issue and prevent Ms Poulton from seeking to make out this part of her counterclaim at trial. It will, of course, be open to Mr Collingwood Smith to argue the merits of the claim in any way he considers appropriate at trial."*

iii) At [10] she said that she did not think it was appropriate for her to determine the freedom of expression/journalistic material issue on the merits at this stage *"particularly given that this is not an application for summary judgment"*.

26. She therefore dismissed Mr Smith's application.

The appeal

27. Mr Smith's overall complaints under Grounds 1-4 of his appeal are that the Deputy Master's judgment was deficient. She did not decide whether the threshold requirements under Rule 3.4(2)(a) or (b) were satisfied, which was a failure to take into account relevant considerations (Ground 1) and a serious procedural irregularity (Ground 2). At [6] of her judgment she took into account irrelevant matters in referring to the judgment of Hill J (Ground 3). All that Hill J had said, at [273] of her judgment was:

> *"Further, this is a case where it is not only desirable but necessary for the original text, amendments and re-amendments to be clearly indicated on the face of the statements of case. I direct that all the statements of case comply with PD 17, paras. 2.3-2.4, using red to reflect the first set of amendments agreed to or ordered, with further amendments in green, then violet and tallow. Amended text which the parties had sought to include but which were not agreed to or ordered should not feature."*

28. This did not mean that there could be no strike out of irrelevant pleadings given that the text of the particulars which were struck out could remain but with a red line through them. Moreover, the Deputy Master failed to consider the impact of leaving the impugned parts of the harassment case in the Re Amended Defence and Counterclaim on the conduct of the proceedings including on disclosure, the evidence which would require to be prepared, the number of pre-trial disputes and the length of the trial (Ground 4).

29. Grounds 5-7 allege errors of law in failing to accept Mr Smith's arguments that it was permissible and proportionate to strike out each of the categories of particulars which he had challenged. I set out these arguments below.

The Category 1 particulars (Ground 5)

30. Mr Smith submitted that these particulars are otiose, for the reasons which he had set out in his application to Deputy Master Sabic. However, he and Mr Hemming would need to prepare to meet the case against Mr Laverty as Ms Poulton's statement of case was unclear and, in any event, her position could change. This would likely entail disputes about disclosure and was in any event a waste of the resources of the parties and the court.

31. Mr Smith also submitted that, in any event, the particulars pleaded at paragraph 131(a)-(f) of the Re Amended Defence and Counterclaim related to tweets posted by Mr Laverty in 2015 which therefore could not form part of a course of conduct which included events from 9 October 2020 onwards which were the subject of the other particulars under paragraph 131. In this connection, he relied on *Lau v Director of Public Prosecutions* [2000] EWHC 182 (QB).

The Category 2 particulars (Ground 6)

32. Mr Smith submitted that the acts complained of in these particulars were barred by absolute privilege. He relied on *White v Southampton University Hospitals NHS Trust* [2011] EWHC 825 (QB) to argue that this prevented any complaint about the matters alleged in paragraph 131(n)(iv) of the Re Amended Defence and Counterclaim because this was a complaint about him reporting Ms Poulton's solicitor, Mr Blake O'Donnell, to a regulatory authority. He also contended that *Singh v Moorlands Primary School* [2013] 1 WLR 3052 CA, which sets out the principles applicable to judicial proceedings immunity in relation to the giving of evidence, is authority for the proposition that Ms Poulton's complaints about alleged threats which Mr Hemming had made to her legal representatives were also barred.

33. In the course of Mr Smith's submissions on this topic I asked him whether he was aware of any authority which dealt with the question whether the type of absolute privilege on which he was relying applied to claims in harassment, as I thought that there was. His initial reaction was that I was taking a point against him which had not been taken by Ms Poulton but I pointed out that it was he who was submitting that the Deputy Master's decision was wrong because, as a matter of law, the relevant particulars of harassment were not actionable and/or were abusive. Neither *White* nor *Singh* were harassment cases or considered the application of the privilege contended for in the context of such a claim. Mr Smith said that he would look into this and informed me, when we adjourned at 1pm, that he had found a case which was on point. This was *Iqbal v Dean Manson Solicitors (No 2)* [2013] EWCA Civ 149 to which he referred in his reply.

34. In *Iqbal* three letters written to a solicitor, Mr Iqbal, which deliberately attacked his professional and personal integrity in an attempt to embarrass him into declining to act for his client or advising his client to meet the demands of Dean Manson Solicitors. Mr Smith relied on [32] and following of the judgment of Rix LJ which emphasise that for this type of letter to fall outside the privilege the defamatory language must have no reference at all to the relevant legal proceedings. However, I drew his attention to [58] where Rix LJ said:

> *"The context there was a claim in harassment, which is a crime as well as a tort. It is arguable, but I am certainly not prepared to enter upon that argument here, that absolute privilege does not apply, or does not apply in quite the same way, in such a context: just as it does not apply in the case of perjury or contempt of court. Moreover, the allegations involved in the harassment proceedings both arise out of letters which are not, or arguably are not, matters of a witness's evidence in the course of proceedings, and arguably have a degree of wantonness and egregiousness which may stand outside any reference whatsoever to the subject-matter of any proceedings. Moreover it is perhaps arguable that where there is a form of persecution….in effect an attempt to drive a professional man out of his livelihood, public policy demands a judicial inquiry unless it is plain that even so absolute privilege prevails.."*

35. Mr Smith said that he was relying on the ratio of *Iqbal*. However, I pointed out that the passages on which he relied proceeded, with respect correctly, on the basis that the privilege applied to defamation claims and they delineated the limits of the privilege in that context. The prior question was whether the privilege applied at all, or in the same way, to claims in harassment based on letters written in the context of actual or threatened legal proceedings. The view of the Court of Appeal, expressed in [58] of *Iqbal*, was that it was arguable that it did not. Mr Smith responded that if I was minded

to apply what the Court of Appeal had said, he would wish to apply for a certificate for a leapfrog appeal to the Supreme Court.

36. In addition to his arguments on absolute privilege, Mr Smith submitted, as he had done in his application to the Deputy Master, that there was no plea of targeting. This was a further reason why the relevant particulars did not disclose reasonable grounds for bringing the harassment claim and/or were abusive.

The Category 3 particulars (Ground 7)

37. Again, Mr Smith advanced the arguments which he put forward in his application to the Deputy Master. He took me to *Sube v News Group Newspapers Ltd and Express Newspapers* [2020] EWHC 1125 (QB) at [65]-[69], *McNally v Saunders* [2021] EWHC 2012 at [66]-[79], and *Davis v Carter* [2021] EWHC 3021 (QB) at [68]-[76] and he emphasised the following points, all of which I accept:

    i) That the tort of harassment requires a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person: per Lord Sumption JSC in *Hayes v Willoughby* [2013] UKSC 17 at [1].

    ii) In the context of the right to freedom of expression under Article 10 ECHR, the particular importance of protecting the right to publish journalistic material as reflected in, for example, section 12(4) of the Human Rights Act 1998.

    iii) The fact that this principle is not limited to trained journalists, the mainstream press or media. Whether material is journalistic is to be determined by its subject matter, rather than its author. Bloggers and social media users may therefore enjoy the same protection and it may also apply to publications which are puerile or abrasive in tone and style: see e.g. *McNally* at [70]-[75].

    iv) That, in the case of journalistic material, nothing short of a conscious or negligent abuse of media freedom will justify a finding of harassment. Such cases will be rare and exceptional: e.g. *Sube* at [68(5)-(6)].

    v) That publication to the world at large can constitute harassment but most publications of this sort are not targeted at another person as is required for the purposes of a claim in harassment and it may be difficult, particularly in the world of social media, to distinguish between targeted speech and speech which is merely "about" the person: see e.g. *McNally* at [66]-[69].

38. Mr Smith submitted that the Category 3 particulars were journalistic material to which these principles apply. They were posted on his blog to the public at large. Moreover, there was no plea of targeting, nor that the relevant particulars amounted to a conscious or negligent abuse of media freedom. Nor, in the case of two of the posts published by Mr Smith, complained of at paragraphs 131(n)(i) and (ii) of the Re Amended Defence and Counterclaim, was there any indication of what content, if any, was said to be offensive or capable of amounting to harassment.

Grounds 8 and 9

39. Grounds 8 and 9 argued that the Deputy Master's exercise of her discretion was perverse and that the criteria for interfering with a case management decision were met.

Abuse of process

40. It was apparent from the papers that Mr Smith was aware of the potential issue as to why he had not made his application to strike out earlier in the proceedings and whether it was permissible for him, in effect, to seek to vary the orders of Deputy Master Bard and Hill J which allowed the particulars which he was now challenging to be introduced into Ms Poulton's pleaded case by consent and made costs orders accordingly. In his skeleton argument at first instance Mr Smith explained that he was relying partly on a change of circumstances – the settlement of the claim against Mr Laverty – and partly on new grounds which had not previously been before the court. And he cited *Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies)* [2012] 1 WLR 2591 which he included in his bundle for the appeal.

41. In response to Ms Poulton's contention that his application and/or this appeal were an a delaying tactic and part of a pattern of grinding her down because he and Mr Hemming did not want the matter to reach trial, Mr Smith pointed out he could not have challenged the particulars relating to Mr Laverty until the claim involving Mr Laverty was settled in November 2021.

42. As far as the other categories are concerned, Mr Smith said, as he had in his application notice dated 15 March 2024, that he had decided to wait until the pleadings closed before raising his challenge – to keep his powder dry until Ms Poulton had had the opportunity to file a Reply to his Defence in case there were any facts which might make the issues triable. He had not envisaged that this would take 3 years. He believed that this approach was appropriate given that it was possible that Ms Poulton would have corrected the alleged deficiencies in her statement of case when filing a Reply, and he relied on his experience in *Samuel Collingwood Smith v Esther Baker* [2022] EWHC 2176 (QB). He accepted that he had not given any indication of his approach at the relevant times or reserved his position before Deputy Master Bard. However, he said that he had in effect reserved his position when consenting to further amendments to the particulars before Hill J or, at least, was attempting to do so when he said that the particulars were an abuse of process. He also told me that when Ms Poulton did not file a Reply he took stock with the benefit of legal advice, the deficiencies were identified and he made his application.

Mr Laverty's email of 25 October 2024

43. As stated above, two days after the hearing Mr Laverty sent an email to the court marked for my attention. He explained that although he had not attended the hearing of the appeal he had decided to make late submissions because his interests were engaged. He said the following based on accounts of the hearing which had been given to him by Mr Smith and Mr Hemming:

> *"Mr Smith had applied to strike out pleadings related to Ms Poulton's claim against me, which he said were irrelevant. I had at the time nothing to add. I understand now that in the hearing Mr Justice Linden is considering the option of either striking out the pleadings, OR simply recording in a judgment that they are defunct and binding Ms Poulton that way. I submit that he should do the former.*

> *Ms Poulton has spent much of these court cases making wild allegations about everyone else whilst claiming to be a victim. She has entered into an agreement never to disparage me again. Forever. That agreement is in the court bundle. She therefore makes the most of the privilege of court proceedings as it is her only opportunity to do so. Her pleadings are literally scandalous, were left in due to spite and **I** may appeal if they are left in. I consider the court's raising of a new proposal gives me a basis to do so. The pleadings should be struck out. Ms Poulton played the, "I'm not saying why" game until Sam got permission to appeal."*

44. He went on to argue that Ms Poulton should not be given permission to amend.

Ms Poulton's position

45. Ms Poulton complained bitterly about what she said were the tactics of the other side and alleged that the history of the various proceedings in which she and they had been involved, and the timing of the applications of Mr Hemming and Mr Smith which were considered by Deputy Master Sabic, showed that they were desperate for this matter not to come to trial. In her written submissions she drew attention to the judgment of Hill J where, at [231] and [232] in particular, Hill J expressed concerns about the manner in which Mr Hemming, with the strong support of Mr Smith and Mr Laverty, was approaching a separate but related claim against Ms Poulton (KB-2023-002707). These concerns were that *"the manner of the proceedings is designed to cause [Ms Poulton] problems of expense and harassment of the sort which calls into question whether it is being pursued for an improper collateral purpose*". Hill J said that, taken with other aspects of Mr Hemming's and Mr Smith's approach to the litigation *"the [Ms Poulton's] submissions about harassment and oppression appear persuasive"*, albeit she also noted that there were similar allegations against Ms Poulton and declined to strike the 2023 claim out. Before me, Ms Poulton pointed out that Mr Hemming had now appealed against the decision of the Deputy High Court Judge on meaning and she said that she guaranteed that "they" would appeal against my decision if it went against them.

46. Ms Poulton emphasised that she is not a lawyer and my attempts to persuade her to focus on the issues which I needed to decide were not entirely successful. She said that she had paid lawyers to plead the Re Amended Defence and Counterclaim and, as far as she was concerned, this disclosed a perfectly arguable case. I asked her specifically about each plea in respect of Mr Laverty and she confirmed that she was not alleging that either Mr Hemming or Mr Smith were liable for the actions of Mr Laverty complained about in the Category 1 particulars. She said that this had been made clear to them in advance of the hearing before Deputy Master Sabic but the materials which she showed me did not make this entirely clear and I accept, as Mr Hemming and Mr Smith pointed out, that she resisted the application to strike these particulars out. Indeed, as I understood it, she resisted the appeal against the Deputy Master's refusal to strike them out.

Overall legal framework

Harassment

47. The relevant terms of the Protection from Harassment Act 1997 are very familiar, as are the general principles to be applied in determining a claim under the 1997 Act. As

far as harassment based on speech or publication is concerned, I have reminded myself of the judgment of Nicklin J in *Hayden v Dickenson* [2020] EWHC 3291 (QB) at [44] in which he analysed the relevant authorities and summarised the applicable law. This summary was approved by the Divisional Court in *Scottow v Crown Prosecution Service* [2020] EWHC 3421, [2021] 1 WLR 1828 at [24]. Save to the extent set out below, however, it is not necessary to rehearse these principles in greater detail than I have at [37], above, in order to determine the appeal.

48. In my view, however, it is important to note that in *Worthington v Metropolitan Housing Trust Ltd* [2018] EWCA Civ 1125, Kitchin LJ (as he then was) reiterated the need for a court, when considering a harassment claim, to look at the course of conduct complained of a whole. Citing *Iqbal v Dean Manson (No. 1)* [2011] EWCA Civ 123 at [45] he said this:

> *"60. … It is, in my view, also important to have in mind that, as the Court of Appeal explained in the Iqbal case, it is the course of conduct that has to have the quality of harassment rather than each of the particular events which constitute that course."*

49. As I will come on to explain, Mr Smith's approach of seeking to "pick off", as it were, some particulars of harassment pleaded by Ms Poulton, but not others, was at odds with this principle and the Deputy Master's decision was fundamentally consistent with it.

Applications to strike out

50. CPR Rule 3.4(2)(a) and (b) provide as follows:

> *"3.4 (2) The court may strike out a statement of case if it appears to the court-*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; or*
>
> *(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; …"*

51. The Rule therefore identified two issues for the court (see *Asturion Fondation v Alibrahim* [2020] 1 WLR 1627 at [64] and *Cable v Liverpool Victoria Insurance Co Ltd* [2020] 4 WLR 110):

i) first, is one of the specified bases for strike out established?; and

ii) if it is, second, should the court in the exercise of its discretion strike the statement of case out?

52. Although Mr Smith also referred to Rule 3.4(2)(b) in his application notice of 15 March 2024, ultimately his arguments were put principally on the basis that there were no reasonable grounds for pursuing the particulars which he was challenging as they were otiose, not actionable by reason of absolute privilege and/or bound to fail as pleaded. They were also said to be abusive for this reason. In any event there was no basis other than this on which the Deputy Master could have found that these particulars were abusive or struck them out.

53. As to the test under Rule 3.4(2)(a), it is well established that, in contrast to an application for summary judgment under Rule 24.2, the court should focus on the pleaded case (see: *The Royal Brompton Hospital NHS Trust v Hammond* [2001] 1 Lloyds Rep PN 526 at [106]) and should ask whether that case is hopeless or bound to fail. Applications to strike out on the no reasonable grounds basis do not require evidence and the court should normally assume the pleaded facts to be true unless they are contradictory or obviously wrong: see e.g. *MF Tel Sarl v Visa Europe Limited* [2023] EWHC 1336 (Ch) at [34(1)].

54. Nor, generally, should the court seek to determine points of law which are not settled, particularly where the facts are in dispute or evidence would potentially shed light on the issue of law or the issue of law may not arise when the facts are found. Thus, for example, in *Barrett v Enfield LBC* [2002] AC 550 Lord Browne Wilkinson said this at 557:

> *"In my speech in the Bedfordshire case [1995] 2 AC 633 , 740-741… I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing ….it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."*

55. Examples of the type of case which may be struck out under Rule 3.4(2)(a) are given in [1.2] of Practice Direction 3A on Striking Out a Statement of Case. These are:

> *"(1) those which set out no facts indicating what the claim is about, for example "Money owed £5,000",*
>
> *(2) those which are incoherent and make no sense,*
>
> *(3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."*

56. Even if a statement of case or parts of a statement of case do satisfy the Rule 3(2)(a) test, it does not follow that the defective pleading will necessarily be struck out. As noted above, in these circumstances the court should determine whether it is proportionate and in accordance with the overriding objective to take this potentially draconian step (see e.g. *Fairclough Homes v Summers* [2012] 1 WLR 2404 at [48]). In determining this question it will be relevant to consider whether the defects are capable of being corrected by appropriate amendments (see e.g. *In Soo Kim Park & Others* [2011] EWHC 1781 (QB) at [40]) or whether other measures such as the provision of further particulars are appropriate (see e.g. *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926 at 1932B).

The role of the court in an appeal from a determination of an application to strike out

57. Rule 52.21(3) provides that:

> *"(3) The appeal court will allow an appeal where the decision of the lower court was—*
>
> *(a) wrong; or*
>
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."*

58. Although the appeal court's role is generally one of review (see Rule 52.21(1)) in practice it may, in an appropriate case, be in a good position to judge the correctness of, and/or more willing intervene in, a decision about whether a statement of case is bound to fail or is abusive. It will, however, generally be reluctant to interfere in the exercise of discretion or case management decisions by the first instance judge: the second question under Rule 3.4(2). In *Cable v Liverpool Victoria Insurance Co Ltd* (supra) at [74] Coulson LJ said this in relation to an appeal against the determination of an application to strike out:

> *"When considering this aspect of the appeal, I remind myself that this court will only interfere if it considers that the first instance judge has erred in principle, or if she has left out of account a feature which should have been considered or taken into account a feature which should not have been considered, or failed to balance various factors fairly in the scale"*

59. In view of Mr Smith's criticisms of the Deputy Master's judgment, in effect I reheard his application to strike out. I will address his arguments in support of that application below.

Discussion of the appeal

What were the Deputy Master's reasons for her decision?

60. The starting point is to consider the basis on which the Deputy Master rejected Mr Smith's application. With respect to her, I agree with him that her judgment is short and that the reasoning is not as detailed or as clear as it could have been, although he put the point more forcibly than this. I also agree with him that insofar as [6] of her judgment meant that striking out the relevant particulars was inappropriate because it would mean that the trial judge was not aware of the procedural history or that the allegations had been made, this objection could have been dealt with by putting a line through the relevant particulars rather than deleting them.

61. However, I am not convinced that this is what she meant and, in any event, her judgment should be read as a whole. Although Mr Smith's interpretation of [6] itself is arguable (as Steyn J recognised in giving permission) the Deputy Master's reference, at the end of this paragraph, to the particulars not being able to be *"sensibly considered by the trial judge"* if they were struck out indicates that her concern was that the effect of striking these particulars out was that they could no longer play any part in the case, even as contextual material. As I understood it, this was indeed Mr Smith's position as to the effect of these particulars being struck out. As I will explain below, I consider that the Deputy Master was entitled to decline to make an order which had this effect.

62. In any event, the central thrust of the Deputy Master's decision was that, as a matter of discretion, it was not appropriate to strike out parts of the case on harassment. Rather, the court should examine the full picture in the light of all of the evidence at the trial. Her reference to the additional reason of not tying the hands of the trial judge and preventing Ms Poulton from making out her case in relation to the Category 2 particulars ([9] of her judgment) shows that the overarching reason at [6] was not the only reason for her decision, and is consistent with this interpretation. So is her statement at [10], in relation to the Category 3 particulars, that it was not appropriate for her to determine the merits of this issue at this stage, particularly given that this was not an application for summary judgment i.e. she had not seen all of the evidence.

63. On the basis of this interpretation, in my view the Deputy Master's decision was right or, at least, was entirely open to her. But, in any event, having effectively reheard the application which Mr Smith made to her myself, I consider that she came to the right conclusion.

The Category 1 particulars

64. I did not accept Mr Smith's arguments based on the proposition that it was not clear whether Ms Poulton was contending that he and Mr Hemming were liable for the acts of Mr Laverty and/or that her position might change. The position in this regard has been clear since, at the latest, the hearing before Deputy Master Bard in April 2021, which was attended by the pleader, Mr Munden. The Re-Amended Defence and Counterclaim is specific as to which particulars are alleged against whom and whether they are alleged them jointly or with others. Thus, the Deputy Master said this at [23] of his judgment:

> *"The Counterclaim alleges a course of harassment by each of the Claimant and the Third and Fourth Parties, sometimes acting individually, and sometimes acting in concert) whether two or three of them). Some 23 particulars are now identified .. so far as I can see, eleven of them refer only to the Fourth Party, but the others involve the Claimant, the Third Party, or both (and sometimes also the Fourth Party)."*

65. Apparently addressing a complaint which was made by counsel for the Mr Hemming, the Deputy Master said this at [111]:

> *"I do not consider it a flaw that some allegations are made against one (or two) of the defendants to the Counterclaim, but not against all three. The Defendant identifies, in respect of each allegation, which of the defendants to the Counterclaim is or are said to be responsible for it. It must be open to a party to complain that all three have harassed her, but not always together: a trial judge can separate out the extent (if any) to which each party is liable for any individual act, decide whether and to what extent each party is therefore responsible for a course of conduct, and award different levels of damage reflecting the harassment for which each party is found to be responsible."*

66. Hill J said the following at [27] of her judgment:

> *"The Defendant's Counterclaim alleges a course of harassment by each of the Claimants and the Third and Fourth Parties sometimes acting individually and sometimes acting in concert (whether two or three of them.).."*

67. Moreover, Mr Smith's application notice contended for the striking out of this category of particulars on the basis that they were otiose because they did not plead any case against Mr Smith or Mr Hemming. The premise for his application was therefore that the pleaded position is clear.

68. Ms Poulton would therefore need to apply to amend her statement of case if she wished to depart from the approach which had obtained throughout the proceedings i.e. to claim against Mr Smith and Mr Hemming on the basis of the Category 1 particulars. And they would have the opportunity to object if she did.

69. Second, it did not follow from the fact that there was no longer a claim against Mr Laverty, and virtually all of the particulars complaining about his actions were complaints against him alone, that background evidence about Mr Laverty's dispute with Ms Poulton in 2015 or evidence about publications by him from 9 October 2020 onwards would necessarily be irrelevant and inadmissible. Nor did this follow from the fact that, as Mr Smith submitted, on the face of Ms Poulton's pleaded case there is no basis for concluding that whatever happened in 2015 formed part of a continuous course of conduct with events from 2020 onwards, still less that Mr Hemming and Mr Smith were involved in what happened in 2015. Insofar as the objective of this aspect of Mr Smith's application to the Deputy Master was to achieve this result, she was entitled to reject it. Such evidence was capable of forming part of the context for Ms Poulton's other complaints and her harassment case as a whole.

70. Third, this position does not have major implications for the cost and scope of the trial. It clearly is not being alleged that Mr Hemming and Mr Smith had any part in Mr Laverty's tweeting activities on 2015, or were liable for them. Any evidence about the earlier dispute between Mr Laverty and Ms Poulton would be no more than background and therefore unlikely to require detailed evidence on either side, still less to give rise to disclosure battles. Mr Smith and Mr Hemming would not be able to give disclosure in relation to events in which they were not involved and the burden of disclosure would fall on Ms Poulton in any event. Any such issues would be addressed by the court (if necessary) in a proportionate way and in the light of the fact that there is no longer any claim against Mr Laverty. Similarly, any evidential or disclosure issues in relation to the challenged particulars of publications by Mr Laverty in 2020 would fall to be dealt with on the basis that they were allegations against him only and it was not being said that Mr Smith or Mr Hemming were liable for them.

71. Fourthly, if, as appeared to be Mr Smith's position in the appeal, the Deputy Master should have decided that a line was to be put through this category of particulars rather than them being deleted, this part of his application served no useful purpose and it was open to her to reject it on this basis. Even if a line was put through the Category 1 particulars it would still be the case that Ms Poulton was able to adduce contextual evidence in relation to Mr Laverty. Moreover, the court was perfectly capable of understanding the position in the light of the settlement between Ms Poulton and Mr Laverty, whether or not a line was put through these parts of her pleaded case, and of approaching any issues in relation to these parts of the Re Amended Defence and Counterclaim accordingly. The level of trust between the parties as to whether there

might be a change of approach, and their understanding of the issues would be unlikely to be affected one way or the other.

72. So for all of these reasons I agree with the Deputy Master's decision, in the exercise of her discretion, not to strike out the Category 1 particulars. In coming to this conclusion I have taken account of Mr Laverty's email submissions of 25 October 2024. I note that he puts forward an additional argument that it would be inconsistent with the settlement agreement between him and Ms Poulton for her to give any evidence which disparaged him. Having read this document I very much doubt that it would. But, in any event, this was not a basis for Mr Smith's application to the Deputy Master or his appeal. Nor did Mr Laverty make any application to the Deputy Master on this ground and nor did he file a Respondent's Notice or take any part in the hearing below or before me. In my judgment it is too late to raise this issue in the context of this appeal.

73. All of this having been said, and bearing in mind the need for clarity and the desirability of avoiding further proliferation of issues and applications, I consider that Ms Poulton should clarify what reliance, if any, she intends to place on the Category 1 particulars so that Messrs Hemming, Smith and Laverty are given notice of what evidence, if any, they may need to adduce in response. Although it is clear that she does not allege that Mr Hemming or Mr Smith are liable for the tweets, emails and other publications pleaded at paragraphs 131(a)-(f), 131(vi-a), 131(ix-a), 131(k), 131(l) and 131(xiii-a) of the Re Amended Defence and Counterclaim, the extent to which she will include them in her evidence as background or context is not. Accordingly, pursuant to CPR Rule 18 I will direct that she file and serve a document which states whether she intends to rely on these particulars as part of her evidence and, if so, the basis on which she alleges that such matters are relevant to her case.

The Category 2 particulars

74. The short answer to Mr Smith's application in relation to the Category 2 particulars is that there is an open question of law as to whether the type, or arguably types, of absolute privilege on which he relies applies at all, or in the same way, in the context of a harassment claim. It was and is not appropriate to determine this issue in the context of an application to strike out in any event. Rather, it should be determined at trial, when the facts can be found after consideration of all of the evidence. On Mr Smith and Mr Hemmings' case, the legal issue will not arise in any event because, even assuming that Ms Poulton is entitled to rely on all of her pleaded particulars, she will not satisfy the overarching test for harassment on the evidence. Any determination of it at this stage would therefore be hypothetical.

75. But, in addition to this, there is authority at Court of Appeal level, in the form of *Iqbal (No 2)* (supra), for the proposition that it is arguable that absolute privilege does not apply or does not apply in the same way in the context of claims in harassment based on communications with legal representatives in the context of litigation. Moreover, there are also indications in the caselaw that the application of this type of immunity should be approached on a more flexible and fact specific basis than has previously been the case: see *XGY v Chief Constable of Sussex Police* [2024] EWHC 1963. On the basis of *Iqbal* alone, the challenge to the Category 2 particulars on the grounds that it is not realistically arguable that they are actionable in law is unsound.

76. For essentially the same reasons there is no prospect that I would grant an application by Mr Smith for a leapfrog appeal to the Supreme Court so as to determine an issue of law which may or may not arise in relation to this part of the case. In my judgment the Supreme Court would unhesitatingly decline to adjudicate the operation of the relevant privilege in the context of a claim for harassment based on hypothetical facts or admitted communications but without context.

77. As for Mr Smith's argument that there is no plea of targeting in relation to the Category 2 particulars, this overlooks the preface to the relevant particulars which reads as follows:

> *"The Claimant, Mr Smith and Mr Laverty have acted in concert to vex and harass the Defendant under the guise of "legal correspondence" or "news articles" about the vast amounts of litigation they each generate. They blur the line between litigation and acts which by themselves constitute harassment. They create rather than report news. They pass information amongst themselves in relation to these proceedings and their respective legal proceedings, primarily to Mr Smith to publicise online. He will then publish the updates in a menacing manner, to pressurise and bully the Defendant into submission to each of the spurious allegations currently being litigated by each of them."* (emphasis added)

78. Moreover, paragraph 131(n)(iv) pleads as follows:

> *"In or around 5 November 2020, Mr Smith reported the Defendant's solicitor to the SRA for "dishonesty" in legal correspondence. The allegation was not upheld. This was clearly done in an attempt to cause distress to the Defendant by disarming her of legal representation and wasting her legal funds."* (emphasis added)

79. Paragraph 131(n)(v) alleges that *"On the same day and for the same purpose"*, (emphasis added) Mr Hemming sent the email of 5 November 2020 to Ms Poulton's solicitor to which Deputy Master Bard referred at [115] of his judgment (see [16] above) threatening repercussions for his political aspirations.

80. It is therefore plain that Ms Poulton's case is that the threats to, and complaints about, her solicitor were targeted at her. Whether or not that case ultimately succeeds on the evidence is another matter and will need to be determined at trial. Mr Smith showed me the complaint to the SRA and Ms Poulton showed me a witness statement from Mr O'Donnell but these did not assist. This appeal is not concerned with an application for summary judgment and, in any event, the court will need to look at these items of evidence in the context of the evidence relating to the alleged course of conduct as a whole.

81. So I agree with the Deputy Master's decision in relation to the Category 2 particulars. Mr Smith did not establish his legal proposition that these parts of the Re Amended Defence and Counterclaim were bound to fail or were abusive because any complaint about them is barred by absolute privilege. The Deputy Master was in any event right, in the exercise of her discretion, to conclude that the appropriate course was for the evidence and arguments in relation to these particulars to be considered at trial.

The Category 3 particulars

82. I see the force of Mr Smith's arguments in relation to the Category 3 particulars. It was not disputed that the publications complained of were made on Mr Smith's blog. On the face of it they appear to have been made to the public at large rather than sent specifically to Ms Poulton and to be material to which the principles which I have summarised at [37], above, apply. There is also no plea, in terms, that the relevant particulars amounted to a conscious or negligent abuse of media freedom. Nor, in the case of two of the posts published by Mr Smith, complained of at paragraphs 131(n)(i) and (ii), is there any indication of what content, if any, is said to be offensive or capable of amounting to harassment.

83. However, I do not accept that there is no plea of targeting or abuse of media freedom. The particulars at paragraph 131(n)(i)-(iii) were preceded by the passage which I have set out at [77] above which, as I have said, clearly alleges that Ms Poulton was being targeted. Although it is not stated in terms in this passage that the conduct complained of amounted to "a conscious or negligent abuse of media freedom", that is the effect of what is alleged in this passage. The particulars at paragraphs 131(p), (q) and (w), which refer to publications by Mr Smith on the same blog as part of the same course of conduct should be read in this context. And, in any event, 131(p) alleges that comments about Ms Poulton's appearance were published *"with the intention of causing her further upset"*; 131(q) alleges that the publication complained of was about her relationship with BNT and implied that the latter should terminate her employment; and 131(q) pleads that the publication complained of alleged that she was a child abuser and incited readers not to follow her on what was then Twitter. Reading Ms Poulton's pleaded case as a whole, then, it seems to me that Mr Smith could be under no illusions about the fact that he is alleged to have been using his blog to target Ms Poulton rather than genuinely being in the business of publishing news about her or this case in the public interest.

84. Of course, none of this means that Ms Poulton's allegations of targeting and abuse will necessarily succeed. But, as is quite apparent, the higher protection which is afforded to journalistic material under Article 10 ECHR does not mean that there is absolute protection for any blogger, regardless of what they write or why. The relevant principles have to be applied to the particular facts of each case. In my view the arguments and the evidence in relation to the Category 3 particulars should be explored at trial and these particulars should not be viewed in isolation and without full visibility as to context. The harassment case is not based on these particulars alone and, like the other particulars of harassment, they should be considered in the context of the course of conduct alleged by Ms Poulton as a whole. The court's view of Mr Smith's journalistic material argument will no doubt be influenced by its view of the evidence as a whole, which will also include the evidence in the Claim. I consider that this is what the Deputy meant when she referred to Mr Smith's application not being an application for summary judgment and it not being appropriate for her to determine the issue on the merits at this stage. But, in any event, her conclusion was the right one.

85. As for Mr Smith's complaint that in the case of at least two of the publications complained of Ms Poulton has not pleaded which words she alleges were words of harassment, the contents of the posts complained of are presumably a matter of record. Mr Smith is therefore able to advance any case in relation to them which he wishes to, including that there is nothing offensive about their contents. If there was any difficulty

on his side in addressing these particulars it was open to him to ask for further information under CPR Part 18 but in my view there was not.

Conclusion on the appeal

86. It was therefore open to the Deputy Master to decide, as a matter of discretion, that the right approach was for the whole of the course of conduct alleged by Ms Poulton to be examined at trial, in the context of all of the evidence. Having examined the arguments myself I also agree with that conclusion for the reasons I have given. In disposing of the appeal I will, however, make the direction indicated at [73], above.

Abuse of process

87. I have considered the question of abuse of process given Ms Poulton's allegations pursuant to her Respondent's Notice, given the concerns expressed by Hill J to which I have referred at [45] above and given that this litigation is ongoing, so that my findings may be of assistance to judges who deal with this matter in the future.

88. On the evidence which I have seen I do not accept Ms Poulton's allegation that Mr Hemming was acting abusively in making his application at the 1 May 2024 hearing. The evidence which has been put before me, not least that his application was granted by Deputy Master Sabic, does not support this conclusion. I was not shown the Deputy High Court Judge's decision on meaning or the application for permission to appeal from this decision, and was certainly not prepared to infer from the mere fact of such an application that he was adopting an approach which was abusive.

89. However, it does seem to me that there was an additional reason for rejecting Mr Smith's application to strike out. This was that, whether or not it was an abuse of process, it was made far too late in the proceedings, after he had failed to take other opportunities to make it, after he had consented to amendments to introduce a number of the particulars which he now said were unarguable and/or an abuse of process and, indeed, after Deputy Master Bard had decided that the particulars of her case, as at April 2021, gave rise to an arguable case of harassment.

90. Practice Direction 3A - "Striking out a Statement of Case" - states as follows at [5.1]:

> *"Attention is drawn to Part 23 (General Rules about Applications) and to Practice Direction 23A. The practice direction requires all applications to be made as soon as possible and before allocation if possible."*

91. Practice Direction 23A provides, at [2.5] and [2.6]:

> *"2.5 Every application should be made as soon as it appears necessary or desirable to make it.*
>
> *2.6 Applications should wherever possible be made so that they can be considered at any hearing for which a date has already been or is about to be fixed by the court."*

92. These statements are, with respect, no more than common sense given the importance of the overriding objective. Quite apart from the fact that Mr Smith could have made an application and asked for a hearing of it in any event, in the case of a number of the

particulars now objected to by him, there was also an opportunity for the issue of their feasibility to be raised and adjudicated before Deputy Master Bard in April 2021. There was a further opportunity in October 2023 before Hill J, at which stage all of the points now taken by Mr Smith were there to be taken:

i) The Category 1 particulars were part of Ms Poulton's pleaded case at the hearing before Hill J, two years after the settlement between her and Mr Laverty which, Mr Smith argued, amounted to a change of circumstances justifying his application. As I have noted, Hill J determined no fewer than six applications, but there was no application at that stage to strike out the Category 1 particulars.

ii) Paragraph 131(n)(iv) (the Category 2 particular which complained about Mr Smith's complaint to the SRA) had been part of Ms Poulton's pleaded case from the outset. It was also part of the pleading which Deputy Master Bard held to give rise to an arguable case in harassment.

iii) Paragraphs 131(n)(v), 131(n)(vi) and 131(r) (the other Category 2 particulars which were said to be barred by absolute privilege) were, in fact, allegations of acts by Mr Hemming, albeit acting in concert with or on behalf of Mr Smith and Mr Laverty as I have noted. They had been added with Mr Smith's consent at the hearing before Deputy Master Bard. They were also part of the pleaded course of conduct which the Deputy Master Bard had held to give rise to an arguable case in harassment and he had specifically referred to these particulars in [113] and [115] of his judgment (cited at [15] and [16] above).

iv) Save for paragraph 131(w), which had been added by consent at the hearing before Hill J, the other Category 3 particulars were either pleaded from the outset or were added by consent at the hearing before Deputy Master Bard and had been held by him to be part of an arguable case of harassment.

93. Any defects in Ms Poulton's pleaded case were known when they were pleaded or proposed to be pleaded. That was the time to argue that the relevant particulars were bound to fail or were abusive and even more so when the parties were before the court in any event and, at least before Master Bard, an application to strike out was being made by Mr Hemming in relation to the harassment case. As for Mr Smith's wish to keep his powder dry, it is difficult to see how he can have thought that this approach was in accordance with the overriding objective. Evidently Mr Hemming did not consider that it was appropriate to await the close of pleadings before making this type of application, as Mr Smith must have been aware. Moreover, Mr Hemming was challenging certain of the particulars which Mr Smith now challenges.

94. A Reply by Ms Poulton would not change the fact that there had been a settlement with Mr Laverty. If certain particulars were barred by absolute privilege, a Reply was unlikely to change that. If they were journalistic material and protected etc it is difficult to think of what pleaded fact might have appeared in a Reply which fundamentally altered Mr Smith's position. Even if this was a possibility – for example she might have expressly pleaded targeting or a deliberate abuse of media power - the appropriate course was to raise his objection and ask for it to be determined. If Ms Poulton was then able to make good any defect by amendment or the provision of further particulars then that was likely to be the just and proportionate course for the court to take: see *In Soo Kim Park & Others* (supra) and the other authorities referred to at [56] above.

95. The fact that instead of raising his objections and/or joining in with Mr Hemming's application to strike out before Deputy Master Bard, or making his objection to Hill J and asking her to determine it, Mr Smith consented to the amendments, compounds the unattractiveness of his raising these issues at a late stage in the proceedings.

96. Moreover, Mr Smith's explanation for his approach appeared inconsistent. On the one hand his position in his application notice and before Deputy Master Sabic was that he chose to keep his powder dry until the close of pleadings in case the defects which he perceived were cured in a Reply; on the other, he took stock with lawyers at the close of pleadings and the decision was made. I recognise, however, that he may have been saying that he had always planned to make his application but the lawyers helped him to draft it. Mr Hemming, with whom Mr Smith has common cause, was represented by Mr Hodson at the April 2021 hearing and Mr Hodson was one of the barristers who assisted Mr Smith to make his application to strike out. I also note that Mr Smith articulated his current position in relation to the Category 3 particulars before Hill J, albeit in the context of consenting to the amendments. It therefore seems likely that the alleged flaws in Ms Poulton's pleading and proposed amendments were considered at the time of the application to Deputy Master Bard and were appreciated at the time of the hearing before Hill J. Whether or not that is so, in my view Mr Smith could and should have applied at or before the earlier hearings if this was thought to be an appropriate application to make.

97. I was also unable to accept that Mr Smith was attempting to reserve his position in what he said to Hill J in the context of consenting to the amendments which were before her. On the contrary he stated in writing that he believed it was in the public interest for the relevant allegations to be litigated: see the judgment of Hill J at [163]. Again, this makes his change of position by mid-March 2024 all the more surprising.

98. Finally, as a result of his consent, the orders of Deputy Master Bard and Hill J gave permission to amend. Deputy Master Bard allowed the amendments which related to the events pre 30 April 2021 by consent and ordered that Ms Poulton pay the costs occasioned by reason of the amendment. Similarly, Hill J allowed the amendments and made the same order in relation to the costs of some of them. I do not know whether Ms Poulton paid any costs as a result, but this tends to underline the fact that Mr Smith was attempting to unwind the effect of orders which had been made some time earlier in the proceedings and to which he had consented despite having every opportunity to raise any objections.

99. As to whether Mr Smith's conduct amounted to an abuse of process, I can well understand why Ms Poulton argued that in making his application in this way he was treating the litigation as if it was a game. It does appear that Mr Smith considered, entirely inconsistently with the overriding objective, that cards could be held back for tactical reasons and then played at a later stage in the proceedings. However, I do not consider that it would be fair for me to make a finding of bad faith against him given that his decisions may have been the result of a mistaken understanding of the nature of the litigation process rather than a deliberate attempt to game the system. Moreover, no findings on this issue were made by the Deputy Master and nor was I given any real assistance as to the precise principles to be applied where abuse of process is alleged in this type of situation, nor as to the position where a litigant in person is effectively seeking to unwind an earlier order to which they consented and, arguably, mounting a collateral challenge to a decision taken earlier in the litigation.

100. What can be said, however, is that whether or not he was deliberately abusing the process, Mr Smith's approach was not in accordance with the overriding objective or Practice Directions 3A and 23A to which I have referred at [90] and [91] above. By the time of the Case Management Conference before Master Sabic the sensible course was to prepare for trial rather than become waylaid by disputes of the sort raised in Mr Smith's application. This, in itself, afforded an additional reason to dismiss his application to strike out and, indeed, to reject his appeal.

Outcome

101. I therefore dismiss the appeal.