[2019] EWHC 2040 (QB)

Case No: HQ17C03429

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2019

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

ZC	**Claimant**
- and -	
ROYAL FREE LONDON NHS FOUNDATION TRUST	**Defendant**

- -
- -

The Claimant appeared in person
Christopher Loxton (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing dates: 8 and 9 April 2019

- -

Approved Judgment

The Honourable Mr Justice Julian Knowles:

1. In this action the Claimant, ZC, seeks damages for libel from the Defendant, the Royal Free NHS Foundation Trust (the Defendant/the hospital/the Trust). The words complained of in the Particulars of Claim were contained in an email sent on 12 September 2016 by a solicitor employed by the Defendant. She also claims damages for misuse of private information and breach of Article 8 of the European Convention on Human Rights.

Anonymisation

2. The hearing before me was listed in open court and the names of the parties appeared on the court list in the normal way. Accordingly, they were available to the public at the Royal Courts of Justice and online. Towards the end of the first day of the trial the Claimant applied for an order pursuant to CPR r 39.2(4) that the judgment be anonymised so that she be referred to by her initials and other potentially identifying information be redacted from the judgment. I made a temporary order that the court list for the second day simply refer to the Claimant by her initials and I indicated I would hear submissions on the issue. On the second day I heard submissions from the Claimant and from the Defendant, and I also heard submissions from the Press Association. Both the Defendant and the Press Association opposed the application. There was no application by the Claimant that the trial be heard in private. Although I indicated a tentative view, I reserved my decision.

3. CPR r 39.2(4) provides:

> "(4) The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness."

4. The test to be applied where a party seeks anonymisation is set out in Vol 1 of the *White Book 2019* at p1248:

> "The power of the court to order that the identity of any party or witnesses must not be disclosed is a broad power and the 'interests' involved may include, although they are not limited to, privacy and confidentiality … The question of whether a court should grant an order under r 39.2(4), or any other anonymity order, is not a matter of the judge's discretion, but is a matter of obligation under the Human Rights Act 1998, s 6 and ECHR art 8. The test to be applied is whether there is sufficient public interest in publishing a report of proceedings that identifies the party to justify any resulting curtailment of that party's art 8 rights."

5. In *Re Guardian News and Media Ltd* [2010] 2 AC 697, [52], Lord Rodger said:

> "52. In the present case M's private and family life are interests which must be respected. On the other side, publication of a report of the proceedings, including a report identifying M, is a matter of general, public interest. Applying Lord Hoffmann's

> formulation, the question for the court accordingly is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life."

6. In *Commissioners for Her Majesty's Revenue and Customs v Banerjee* [2009] EWHC 1229 (Ch), [26], Henderson J said:

> "In determining whether it is necessary to hold a hearing in private, or to grant anonymity to a party, the court will consider whether, and if so to what extent, such an order is necessary to protect the privacy of confidential information relating to the party, or (in terms of Article 8 of the Convention) the extent to which the party's right to respect for his or her private life would be interfered with. The relevant test to be applied in deciding whether a person's Article 8(1) rights would be interfered with in the first place, or in other words whether the Article is engaged so as to require justification under Article 8(2), is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy: see *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, at paragraph 21 per Lord Nicholls of Birkenhead, and *Murray v Express Newspapers Plc* [2008] EWCA Civ 446, [2008] 3 WLR 1360, at paragraph 24 of the judgment of the court. If Article 8(1) is engaged, the court will then need to conduct a balancing exercise on the facts, weighing the extent of the interference with the individual's privacy on the one hand against the general interest at issue on the other hand. In cases involving the media, the competing general interest will normally be the right of freedom of expression under Article 10 of the Convention. In cases of the present type, the competing interest is the general imperative for justice to be done in public, as confirmed by Article 6(1) of the Convention."

7. Having considered the matter further, for the reasons contained in a separate judgment that is confidential to the parties I conclude that this test is not satisfied, and I refuse the application for anonymisation.

8. However, I have anonymised this judgment on a temporary basis until the time for an appeal against my decision not to order anonymisation has expired, so as not to render an appeal otiose. In the event that no such application is made, or one is made and refused, I will issue a revised judgment identifying the Claimant.

Interlocutory appeal and application to adjourn

9. On the first day of the trial I heard and refused an application for permission to appeal by the Claimant against the decision of Master Yoxall of 31 January 2019 in which the Master extended time for service by the Defendant of its witness evidence and awarded the Claimant some limited costs following the Defendant's unsuccessful strike-out application. Sir Alistair MacDuff refused permission on the papers saying that '[t]he learned Master was correct to permit late service of statements and the

costs order was entirely proportionate.' I agreed with those reasons and for that reason refused permission. Both decisions fell well within the range of reasonable decisions open to the Master and there was no proper basis for interfering with either of them: see *HRH Prince Abdulaziz Bin Mishal Bin Addulaziz Al Saud v Apex Global Management Ltd* [2014] 1 WLR 4495, [13] for the proper approach by an appellate court to case management decisions taken below. In particular, the Claimant asserted that the Defendant's counsel (not Mr Loxton) had been responsible for altering the amount of costs; further investigation showed that not to be so.

10. I also heard and refused an application for an adjournment by the Claimant. The principal basis for that application was a supposed failure in disclosure by the Defendant of the Claimant's medical records concerning her admission to the accident and emergency department at the Defendant's hospital in December 2015. It did not appear to me that these documents were capable of advancing the issues to be decided on this claim and so I refused the application for an adjournment. The publication complained of took place in September 2016, the trial had been listed since June 2018, and I was satisfied that the Claimant had had ample opportunity to prepare her case for trial.

Other procedural matters

11. I received Skeleton Arguments from the parties in advance of the trial. The case was opened by the Claimant, and she gave evidence on oath and was cross-examined. I then heard from Joanne O'Sullivan, who sent the email complained of. At the time she was the Defendant's Deputy Head of Legal Services. I then heard oral closing submissions from the Claimant. Mr Loxton for the Defendant submitted written closing submissions in response, which the Claimant then replied to in writing.

12. Whilst I was preparing this judgment the Supreme Court gave its decision in *Lachaux v Independent Print Ltd* [2019] UKSC 27 on the meaning of 'serious harm' in s 1 of the Defamation Act 2013 (the 2013 Act). As this is a matter in issue before me, I invited written submissions from the parties, which I received.

13. Accordingly, I am satisfied that both parties have had a full opportunity to present their cases orally and in writing. In preparing this judgment I have taken into account all of the points that they have made. The fact that I do not mention any particular point does not mean that it has been overlooked.

The factual background

14. The Claimant's case is that on 11 December 2015 she was involved in an incident with her GP, whom I shall call Dr X. She said she needed hospital treatment as a consequence. On 12 December 2015 the Claimant attended the Defendant hospital's accident and emergency department (A&E). She gave the name SC. That was not her real name. She said that she used a false name because she did not want the hospital to send her notes to Dr X, thereby giving her the opportunity to amend them by way of a 'cover-up'. She was treated at the hospital. One of the doctors who treated her was a Dr Suliman (spelt in some of the documents as 'Soliman').

15. The Claimant used false names on other occasions in her dealings with the hospital. She said in evidence that she had good reasons for doing this. I will return to this later.

16. Following the alleged incident with Dr X, the Claimant reported the matter to the police, however they took no action. The Claimant then began a private prosecution against Dr X. She attended Westminster Magistrates Court on 7 September 2016 in order to obtain a summons. Her case is that the district judge told her to obtain a medical report from the doctor who had examined her at the hospital in December 2015. That was Dr Suliman.

17. In the following days the Claimant contacted the hospital numerous times by phone and in person to try and obtain this medical report. She had a meeting at the hospital on 7 September 2016 when she met with a Ms Sanders and a Mr Evans and told them that she needed a medical report. She also discussed other complaints she had against the hospital regarding treatment she had received there.

18. During the trial the Claimant played parts of recordings she made of some of these telephone conversations with hospital staff. She supplied me with these in M4A file format after the trial, together with a letter dated 11 April 2019 in which she said it was important for me to 'listen to all of the voice recordings as this will be of great assistance to have a true picture of what happened.' I have listened to the recordings in the form supplied by the Claimant.

19. The first recording is contained in a file entitled 'Dr Soliman (1) 9 Sep2016'. In it, the Claimant telephones the Royal Free Hospital. She is eventually put through to A&E, where she speaks to a female. The Claimant asks to speak to Dr Khalid Suliman. It takes the Claimant several attempts to get the female to understand who she is asking for. It seems the line is bad. The female asks who is calling. The Claimant replies, 'Tell him someone from the research team, please.' After some minutes the female comes back on the line to say that she cannot find Dr Suliman. The Claimant asks for a time when she can call to speak him. The female tells the Claimant she cannot give a time because it is a busy A&E department. She asks the Claimant, 'Where are you calling from again ?' The Claimant replies, 'I'm calling from the hospital, from the research team'. A few seconds later she says, 'I'm calling from another hospital'. A short time later Dr Soliman comes on the phone. He asks who he is speaking to. The Claimant then begins to tell him that she would like him to write a statement. He again asks who he is speaking to. The Claimant explains he examined her. She says her name is SC. He asks her to call back on a different extension because the line is bad, and he gives the hospital extension number. She asks him for the first part of the phone number. He replies, 'It's the Royal Free, the same Royal Free Hospital, extension [XXXXX]'. The conversation then ends.

20. Hence, in this conversation, as well as falsely pretending to Dr Suliman that her name was SC, the Claimant lied at least three times to the female staff member in order to persuade her to get him to come to the phone by pretending to be someone she was not ('someone from the research team'), and by pretending to work at a place she did not work ('the hospital'/'another hospital').

21. The next file is 'Dr Soliman 9 (2) Sep 2016 11.07AM'. It is a continuation of the first call. The Claimant dials the hospital and is put through to the extension number

Dr Suliman gave her. After a few minutes he comes onto the line. She asks him whether he would be willing to write a statement of two pages which she says she needs urgently. He asks who she is. She agrees it is important he know who she is otherwise they cannot speak. She begins to explain that she attended A&E on 12 December 2015. He interrupts her and asks for her name. She spells out the name 'SC'. She says she has her discharge letter and offers to give the reference number. She again begins to explain about needing a statement and attending in the early hours and Dr Suliman interrupts to say he remembers her 'very well'. He asks what exactly she wants. She tells him that she wants a statement explaining why she attended, and what the examination and diagnosis was. He says a request will have to go to the secretary of the A&E Department and it will be dealt with by one of the consultants. She relays the background to what led her to go hospital. She says the case is at court and that the judge has asked her to ask him to give a statement. He replies that now the case is in court she cannot ask him in person for a statement, but it needs to go through the secretary. He says he would need to take advice from a consultant, and it might then be referred to him, but he cannot do it 'just like that'. He says because it is in court it needs to come through the 'proper pathways'. She says she only has a few days to sort it out, but he says he cannot help, and that it has to be done this way. She asks for the secretary's email address. She says that she needs him to see the email she will send. He replies that he cannot see it, and that is the hospital's procedure. He tells her to call the A&E secretary via the switchboard. They discuss the secretary and Dr Suliman tells her that the secretary will tell her the proper pathway to follow. He says the request will be seen first by a consultant and, if it is reasonable, it will be referred back to him. He says he is not a consultant. The conversation then ends.

22. In this call, therefore, the Claimant again lied to Dr Suliman by maintaining her false identity of SC.

23. Following this conversation, on 9 September 2016 the Claimant sent an email to Ms Gouveia, a Service Manager at the hospital, the relevant part of which was as follows:

> "Patient: [SC],
>
> Dear Mrs Rebecca Gouveia,
>
> Re: Statement from Dr Khaleed Yaseen Soliman
>
> ….
>
> The case is at Magistrates Court and the Judge presiding over the case has asked me to obtain a statement as a matter of urgency from Dr Soliman. The statement should not be short or long, two or three pages should be enough and it is must be available on 12 September 2016.
>
> …
>
> I have discussed this with Dr Soliman on the telephone today and he advised me to make a request of this statement to the Secretary of the A&E department. The request will be sent to one of the

> A&E consultants and the consultant will pass on this request to Dr Soliman.
>
> ….
>
> Regards,
>
> [SC]"

24. In this email, therefore, the Claimant lied to Ms Gouveia that her name was SC.

25. On 12 September 2016 Ms Gouveia replied saying that it would be usual practice for a police officer overseeing a case to request a medical report.

26. The next sound file to which I refer is 'Ms Gouveia 12 Sep 2016 at 1212'. This is a recording of a conversation between the Claimant and Ms Gouveia. Ms Gouveia answers the phone and the Claimant begins to say that she received Ms Gouveia's email regarding a witness statement. Ms Gouveia asks who she is and the Claimant replies 'C'. The Claimant then begins to say that sometimes the police are involved. It would therefore appear the email in question is the one I have referred to in the previous paragraph. The Claimant says that in this case the police are not involved and that the judge told her to obtain a statement from the doctor. Ms Gouveia asks for a written statement from the judge requesting the evidence. The Claimant replies that she needs the statement today. Ms Gouveia replies asking for proof of the court proceedings. The Claimant says that 'today is the deadline'. Ms Gouveia replies that two days is not enough notice as they are a 24-hour A&E department and the doctors work day and night, and they are not therefore in every day. She points out that even a freedom of information request requires 21 days for a response. The Claimant again emphasises the deadline and Ms Gouveia replies that if she can be given some paperwork she will try and chase it as quickly as possible, but that 'realistically' two days is not enough notice. She says that she only received the Claimant's email on Friday afternoon and that today is Monday. She says that A&E is 'incredibly busy' that morning. In response to Ms Gouveia's inquiry the Claimant says the police are not involved. She explains why she needs a statement from Dr Suliman (namely, because he examined her on 12 December 2015). Ms Gouveia replies that if she can be given written confirmation from the court that they are requesting the evidence, or proof that the Claimant is going through court proceedings, then she will try and get it expedited. The Claimant says she will deal with it 'right now' because 'she does not want to waste any more time.' The conversation then ends.

27. At 12.30 the same day (which, I infer from the time on the sound file, was a few minutes after their conversation) the Claimant sent Ms Gouveia the following email (from which I have redacted personal and other sensitive data):

> "Dear Mrs Gouveia,
>
> Please find enclosed the email received by the Court
>
> [S]

> [Court email address]
>
> Tues 06/09/2016 14.25 [Claimant's email address]
>
> Dear [C],
>
> Your application to adjourn tomorrows hearing has been referred to a District Judge who has asked me to tell you to obtain a witness statement from Dr K Suliman. The hearing will go ahead as planned tomorrow afternoon.
>
> Regards,
> Administrative Officer
> Central London Magistrates Court
> Tel: [Number given]
> [Court email address]"

28. Hence, in this email the Claimant was purporting to forward to Ms Gouveia a written request from the court along the lines that Ms Gouveia had requested in their earlier conversation.

29. In fact the Claimant admitted that what she sent to Ms Gouveia was an amended or doctored email from the court. In her opening the Claimant said this:

> "I had an email, a quick email from the Magistrates' Court initially and I got that email and I send it to Ms [Gouveia] and said this is the email, it says, I just changed my name and I said this is … and the judge is asking for medical report. I wasn't supposed to do that. I was not supposed to do that but if she didn't ask me I wouldn't have done that. I was asked."

30. This was an admission by the Claimant that altering the email was wrong and improper. Under cross-examination by Mr Loxton on behalf of the Defendant the Claimant made the following further admissions:

> "Q. Yes. What I'm suggesting to you is what you put in the body of the email, that main sentence, yes, wasn't written by an administrative officer of the court, was it ?
>
> A. Well, I mean, I've only changed the second part of the email but the email it started something like that-
>
> Q. Okay.
>
> A. -and it was quick like that.
>
> Q. Right, what wasn't said to you was-
>
> A. I've just included that the Judge, what I have included is that the Judge asked for medical reports.

> Q. Yes.
>
> A. That's what I edit."

31. Shortly after this, I asked the following questions by way of clarification:

> "Q. So you added the words to the effect 'who has asked me to tell you to obtain a written statement'.
>
> A. Yes, yes.
>
> Q. Right, thank you.
>
> A. Because they wanted me to show them something there is ongoing proceedings, so…
>
> Q. Yes.
>
> And then you also where it says, 'Regards', you also removed the name of the person who sent you the original email.
>
> A. Oh yes, definitely I removed his name because you know, I wasn't – I knew that I wasn't supposed to use an email but they asked me to show them something. I mean, it's not something that I invited by myself, it's not something that I offered them by myself. It's something that they asked me and I felt, you know, I shouldn't have been using email and this but there was no other option for to me only because they wanted to see something. Yes, I took his name, yes, definitely.
>
> Q. Because you didn't want the trust or anyone else to contact-
>
> A. No, no, no. No, no, because, you know, at the time I wrote this, I didn't feel, you know, I was supposed to do this but I had no other option but to send this email to show them there is ongoing proceedings."

32. Hence, the Claimant took an email from the court and added in the words, 'who has asked me to tell you to obtain a written statement from Dr K Suliman'. She also removed the original sender's name from the email signature, as again she admitted in evidence. She said, 'Oh yes, definitely I removed his name …'. It must therefore be the case that the original email from the court was along the following lines:

> "Your application to adjourn tomorrows hearing has been referred to a District Judge. The hearing will go ahead as planned tomorrow afternoon."

33. Thus, the original email from the court was merely a refusal of an adjournment, to which the Claimant added in words to make it appear that the district judge had also

requested, at the same time, a witness statement from Dr Suliman. She then sent the altered version to Ms Gouveia.

34. After this exchange with Ms Gouveia, the Claimant's evidence was that although she contacted the hospital on a number of occasions to try and obtain the medical report, the hospital's staff declined to deal with her any further. I accept this evidence.

35. I turn to the evidence about the Claimant's use of false names. In her evidence the Claimant did not deny using false names to obtain treatment from the Defendant hospital. In her witness statement of 8 November 2016 she said that she had used the name SC in December 2015 because she did not want the hospital to send her notes to Dr X because 'this would have allowed her to make alteration to my medical record to cover up what she did'. She said that she used the name MD on another occasion when seeking treatment from the Defendant because 'there was also a culture within the NHS doctors and bias whereby, doctors do not bother to deal with the sources of the problem instead, they rely heavily on the past history of the patient because was as a matter of convenience for them'. She went on to say, in effect, that if the doctors had known her real identity she would not have received what she regarded as proper treatment and so she used a false name.

36. The Claimant did not merely use false names in order to obtain treatment from the hospital. Another sound file supplied by the Claimant is entitled 'Dr Costello 2 feb 16 1314'. This is a recording of a conversation between the Claimant and Dr Costello concerning medical reports, which I assume took place on 2 February 2016. The recording begins with a bleep, which I infer is the Claimant turning on her equipment to record the conversation. She does not tell Dr Costello she is recording the conversation. He addresses her as 'S'. She asks him to send the results to 'a friend's' email address that she has supplied. Dr Costello refuses to do so unless she confirms her identity. He suggests leaving them in hard copy to be picked up by her. She says she cannot do this and that 'no-one is available'. The email address she has supplied is for 'CZ'. She tells Dr Costello that 'CZ' is a legal adviser. She supplies her hospital number. Dr Costello asks her to send written email consent for him to send the reports to the email address of 'CZ'. She claims not to have an email address herself. He suggests she send a fax to the hospital. He says she will get her 'legal adviser' to send in written confirmation. In her evidence the Claimant accepted that, in fact, the person she referred to as 'CZ' was herself.

37. I turn to the Defendant's case and evidence of Joanne O'Sullivan. She is a solicitor and at the time, as I have said, was the Defendant's Deputy Head of Legal Services. I accept Ms O'Sullivan's evidence in full. At a number of points during cross-examination the Claimant accused her of lying. I reject those suggestions. Ms O'Sullivan was an honest, truthful and straightforward witness who was able to support her evidence in significant part by reference to her contemporaneous attendance notes. I also reject the Claimant's suggestions in her witness that Ms O'Sullivan was actuated by malice and improper motives towards the Claimant. I accept Ms O'Sullivan's evidence that throughout she was concerned to protect patient confidentiality in the face of a request for a statement from a doctor from a person whose identity could not be verified and who (as it now transpires) had manufactured an email from a court.

38. Ms O'Sullivan told me that her recollection was that on 12 September 2016 Ms Gouveia contacted her and told her that she had a request for a statement for court proceedings and which she thought was unusual. Ms O'Sullivan said that Ms Gouveia had investigated and found four different names for the same date of birth on the system and so she approached Ms O'Sullivan for her advice because of the email from the court about the medical report. Ms O'Sullivan said, 'That would be quite usual in our practice, in the legal services department, that staff would approach us with unusual queries, if there was a legal element to them.' She said that Ms Gouveia:

> "… read the email that you sent her, which starts, 'Dear C, your application to adjourn tomorrow's…', I believe she read that email to me explaining that the Trust had received a request for a statement from Dr Suliman and she was concerned because normally, any such requests come through a detective and they fill in a form called a 172 form, and therefore she contacted me to say that she thought this was unusual.
>
> As part of that conversation, she explained that her concern was further compounded because when she checked the name you had provided, which at that time I understand was SC, she found that there were three other names, along with the SC name for the same date of birth and the same address, and she contacted me to find out what we thought, from a legal perspective, about producing a statement."

39. The Claimant then asked her:

> "Q. What are trying, why is the email of concern to you ?
>
> A. Sure. So part of our role, and it's a very involved role, in the legal services department, but part of it would be privacy of patients and Rebecca [Gouveia] was contacting me with regard to finding out whether it would be appropriate to obtain a statement from Dr Suliman, in circumstances where we were not able to identify the… we were not able to confirm the identity of the person requesting the statement."

40. Later, she added:

> "My concern was, there was apparently an urgent hearing about to take place in relation to a[n] [SC], and a statement had been requested, but we were unable to verify the identity of the requestor and in those circumstances, I contacted the court, as I did not want a statement to be written and sent to the court, if it referred to the wrong patient."

41. Ms O'Sullivan said that she then made contact with the Central London Magistrates Court. Her purpose for calling the court was to identify whether there were proceedings ongoing for an SC. She spoke a person called Moises, whom she understood was one of the court administrators. He checked the court record for SC

and found no case. He checked for the name MD and found no case. He then checked for ZC and found a 2015 case. He then confirmed that colleague, Ian Cadogan, was the administrative assistant in relation to that case.

42. Ms O'Sullivan then spoke with Mr Cadogan. He told Ms O'Sullivan that there were no listed cases for an 'SC', and that every email should have a court officer's name on it. He also told her that the email which the Claimant had sent to Ms Gouveia and which purportedly came from the court had been doctored and that the email address was fabricated. He confirmed that the Claimant's real name was ZC. In her evidence Ms O'Sullivan referred to her attendance note of her call with Mr Cadogan:

> "So, I appreciate C, if it's a little unclear but it's my telephone attendance note, I have poor writing, but it says, 'email from C saying need statement', that's me writing down what I said to Mr Cadogan.
>
> The next sentence is Mr Cadogan saying, 'she's amended the email from him', and it's in single inverted comma's saying, 'doctored it', so they were his words to me about the email in question, which we've discussed this morning.
>
> He then goes on to say, 'it's entirely fabricated', again, my recollection is, the words, 'entirely fabricated', are words that were used by Mr Cadogan."

43. Later she said:

> "It was on the email that you sent Ms [Gouveia] and I think you confirmed this morning that word says, regards, administrative officer, that you'd removed the name of Mr Cadogan and indeed when I spoke to Mr Cadogan, and I forwarded him a copy of this email, he confirmed that that was not his email, that had been changed and although that was his telephone number, his name had been removed from between the words, regards and administrative officer."

44. After that, Ms O'Sullivan spoke to Mr Tennant of the Medical Defence Union, who was acting for Dr X. She told me that Mr Cadogan was acting as a 'conduit' from the district judge and that:

> "… Mr Cadogan informed me that the district judge had asked that I contact Mr Tennant as part of my investigation to verify the identity of [SC], with regards to confirming whether it was the same person as [ZC], with the proceedings.
>
> So the only proceedings, as I've said earlier on, that they were able to identify, that were ongoing, were in the name of [ZC], but the person requesting the statement from the court, was [SC], and in the circumstances, the district judge communicated to Mr Cadogan, that he wished for me to speak to Mr Tennant to verify the identity of the author of the email, [SC]."

45. The Claimant put to Ms O'Sullivan that she was lying about this and she was not asked to contact Mr Tennant. She denied she was lying. As I have said, I accept her evidence.

46. Ms O'Sullivan told Mr Tennant that the court had told her about the claim against the GP. Ms O'Sullivan said that she was concerned that the Claimant was using emails from the court to insinuate that there was a claim against one of the Trust's clinicians. As I shall explain further in a moment, Ms O'Sullivan was mistaken in that belief.

47. On 12 September 2016 at 16.38 Ms O'Sullivan sent an email to Mr Cadogan at the magistrates' court. The email was copied to Mr Tennant; to Ms Delia, a legal assistant in the Defendant's legal team; and to Mr Pohle, the Defendant's Head of Legal Services. This email (which I shall call 'the Email') contains the words complained of by the Claimant.

48. In the Email, Ms O'Sullivan wrote to Mr Cadogan as follows (irrelevant parts omitted and names redacted):

> "Dear Mr Cadogan,
>
> Re [ZC]
>
> Further to my email to your colleague and our phone call. I have copied in Mr Nicholas Tenant of the MDU whom I understand to be representing a GP against whom … cha[r]ges have been made by [C].
>
> … C has been holding herself out to be at least four different individuals, [ZC], [SC], [CZ] and [MD]. I understand that her correct name is [ZC].
>
> It would seem, further to your helpful clarification, that the emails received by our Trust purporting to be from Central London Magistrates Court are, in fact, which you sent to [Z] relating to Mr Tennant's client, which, it would seem, [Z] has then falsified to lead us to believe that they relate to an alleged prosecution of a clinician at our Trust. This is most serious indeed.
>
> We have notified our NHS Fraud Investigation team who will be taking measures internally to deal with this matter.
>
> In the circumstances, we shall not be providing the Court with a statement.
>
> Please do let me know if I can be of any further assistance to the Court.
>
> Yours sincerely, etc."

49. Ms O'Sullivan clarified in her evidence to me that the reference to 'emails' in the second line of the third paragraph should have read 'email'.

50. Within minutes of sending the Email it was pointed out to Ms O'Sullivan that she had been mistaken in suggesting the purpose of the falsified email was to target one of the

Defendant's doctors. She said in evidence that she could not now recall where or from whom she had formed that impression. But at 17:05, or 27 minutes after her first email, she wrote again to Mr Cadogan:

> "Dear Mr Cadogan,
>
> It has been pointed out to me that there is an error in my email below. [C] did not allege that there was a potential prosecution against our Trust in relation to [an incident]. Instead, she appears to have falsified an email from you indicating that the Court have requested a medical report from our clinician relating to alleged treatment received concerning an [offence] … (presumably relating to the action against the MDU GP).
>
> Apologies for any confusion. Again, in light of the information you provided we will not be providing this statement."

51. In her evidence Ms O'Sullivan explained that the referral to the NHS Fraud Team meant she had asked the Trust's Local Security Management Specialist to make NHS Protect and the Trust's Counter Fraud Team aware of the situation. This was as a result of the Claimant using different names and the fact that she had sent an email which Ms O'Sullivan had been told had been doctored.

52. The Claimant's case is that Ms O'Sullivan's purpose in sending the Email was to pervert the course of justice in order to protect Dr X by trying to prevent the prosecution from proceeding. Paragraphs [49]-[50] of her witness statement 7 November 2018 was as follows:

> "49. The acts of the defendant Trust were well calculated and deliberate acts of malice to seriously undermine the administration of justice. The defendant trust has perverted the course of justice this in itself very serious and it is a gross misconduct in public office. The defendant Trust objective and only mission was to protect and save Mr Tennant's client to prevent successful prosecution of Dr [X] whilst showing complete disregard to me as to whether I was going to be tainted forever by the allegations.
>
> 50. At no stage the defendant trust took steps to investigate the allegations, to check and verify if they were true or false. Ms O'Sullivan said she referred me to the hospital fraud team to investigate, but this team never contacted me. The allegations of Ms O'Sullivan showed a calculated, reckless indifference to the truth or falsity of the allegations and I anticipate malice to be inferred from the grossness and the falsity of the assertion made by Ms O'Sullivan on behalf of the defendant Trust."

53. I reject this accusation.

The parties' cases

The Claimant's case

54. The Claimant's pleaded case in libel as to the meaning of the words complained of in the Email is as follows (Particulars of Claim, [17]):

> "In their natural and ordinary meaning, the above publication meant and are understood to mean that I am fraudulent and under the investigation by the defendant's Fraud team."

55. In her trial Skeleton Argument the Claimant asserted at [1]:

> "In the whole context of the statement it meant that the claimant has a history of dishonesty that she is fraudulent and that was under investigation of the defendant's fraud team."

56. In her oral submissions the Claimant expanded on and amended her pleaded case to allege that to the ordinary and reasonable reader the Email conveyed the following meanings, none of which were substantially true:

a. That she was dishonest;

b. That she was fraudulent;

c. That she was suffering from a mental illness, which she specified as multiple personality disorder.

57. Notwithstanding that these were not the pleaded meanings in the Particulars of Claim, the Defendant was content to meet the Claimant's case on this basis and it did so in its Closing Written Submissions.

58. In her post-*Lachaux* submissions of 5 July 2019 the Claimant sought to expand her case by alleging that there were other defamatory emails (see at [2]: 'It is disputed there is only one defamatory email in this case.') However, her pleaded case relates only to the Email, and it is obviously not open to the Claimant to try and expand her case after the trial has concluded.

59. At [18] of her Particulars of Claim the Claimant pleaded that:

> "By reason of the publication of the said words, my reputation is tarnished, my feeling is badly injured and this potentially can bring me into contempt and odium. The said words have also meant to assist and protect the defendant GP to escape from being prosecuted hence, the words deliberately and maliciously meant to obstruct and pervert the course of justice."

60. The Claimant's case is that the Email was sent as part of a conspiracy against her, and specifically a conspiracy by a group of Jewish people, or 'a group of jewish conspiring', as she put it. A number of Trust and NHS staff are identified as Jewish by the Claimant in her Particulars of Claim including Dr X; Dr Costello; Mr Pohle; Mr Tennant; Ms Katy (a radiologist whom the Claimant alleges in [28] of her Particulars of Claim x-rayed her 16 times 'for fun', and about whom she has complained in a separate complaint); and Ms O'Sullivan.

61. The Claimant adduced no evidence about the religious beliefs (if any) of the persons whom she alleged are Jewish.

62. The Claimant's case on this alleged conspiracy is as follows. At [31]-[32] of her Particulars of Claim she pleaded that:

> "31. The defendant has no defence and cannot plead qualified privilege nor absolute privilege. The publication was made out of grudge, revenge, hate of Muslims, selfishness, fear from being sued for the wrongdoings and was in complete disregard of human dignity and the law.
>
> 32. The publication was against my wishes and it was without my knowledge or permission. I did not give my permission to the defendant hospital to make such publication of the said words to the defendant GP's solicitor and in the situation whereby it was either me getting justice for the harm I suffered or have group of jewish conspiring and obstructing the course of justice to save the skin of another jewish. There is no special or privileged relationship between the two bodies and no communication between the two especially of this kind and in circumstances is allowed."

63. At [22-]-[24] of her Reply to Defence the Claimant pleaded:

> "22 Paragraph 8(i) (ii) and (iii) of the defendant's defence are disputed. The defendant is well aware that the all the defendant's employees involved in these proceedings are Jewish except Dr Soliman who is Egyptian. The defendant is well aware that Mr Nicholas Tennant is Jewish the same as Ms Joanne O'Sullivan.
>
> 23 It is well understood that the top floor of the defendant's hospital is occupied by Jewish and exclusively for Jewish only and this is understood to be a matter of fact and the rest of the defendant's floors are mixed.
>
> 24. Even if the claimant is mistaken in her paragraph 22 of her reply as shown above, the issue is not that all of the defendant's employees involved are Jewish. The claimant believes this is a matter of fact that the defendant's employees involved are Jewish, but even if it is not a matter of fact and that she is mistaken in this particular fact, having a group of people conspiring to obstruct the course of justice to save the skin of another in such circumstances where the claimant was a victim of very serious crime and was seeking justice it is very abominable crime, which should be punished by prison. Therefore the claimant believes that being a group of people conspiring to achieve common objectives is more serious than having a group of Jewish people conspiring to save the skin of another Jewish."

64. This allegation was repeated by the Claimant in her evidence at [11] of her witness statement of 27 July 2018:

> "The defendant trust through own in-house solicitor, Ms Joanne O'Sullivan, voluntarily disclosed strictly private and confidential information about the claimant which was false and seriously defamatory of her to Mr Tennant, and as a matter both Ms O'Sullivan and Mr Tennant are Jewish. They are not only ones who are Jewish some other individuals involved are also Jewish."

65. At [39] of her witness statement of 7 November 2018 the Claimant said:

> "The publication was against my wishes, without my knowledge and without my permission. I did not give my permission to the defendant Trust or to Ms O'Sullivan to make such publication of the said words to [Dr X's] solicitor and in the circumstances whereby, it was either me getting justice for the harm I suffered or have a group of Jewish people working for the NHS conspiring and obstructing the course of justice to save the skin of another Jewish. There is no special or privileged between the two bodies except they are all Jewish and no communication between the two, especially or this kind and in such circumstances is allowed."

66. In her opening, the Claimant said of Ms O'Sullivan:

> "You can ask her later under cross-examination, you can ask her and she will tell you she is Jewish or not. I'm judge she is Jewish. She is a bloodline, her father is a Rabbi and I have no dispute with that."

67. I asked Ms O'Sullivan if she was Jewish. She told me that she is a Roman Catholic, as are her parents. I accept her evidence.

68. The Claimant elaborated on her case in her written closing submissions, as follows. The Defendant's allegation that she had used false names 'was taken out of its real context' because the Defendant deliberately failed to specify the circumstances the Claimant used these false names (which the Claimant says in her evidence was to obtain proper treatment which would have been denied if she gave her real name) and the Defendant's statement was calculated and planned to mislead the reader to believe that the Claimant had used false name to defraud the Defendant and this was confirmed by the Defendant statement that the Claimant was the subject of investigation by the D's fraud team.

69. Further, the Claimant argues that it is substantially untrue that there was any criminal conduct or behaviour by the Claimant which could have justified any suspicion on the part of the Defendant that she was guilty of dishonesty and fraud.

70. The Claimant did not lie to make the Defendant believe there were court proceedings. Moreover, the Claimant:

> "… did not falsify email of Mr Cadogan in order to make D believe there were Court Proceedings. It is true C re-used an email sent to her on 6 September 2016 to confirm the genuine existence of Court proceedings. It was D's dishonest implication without consent or knowledge of C to attack C in retaliation to C having made three complaints, which D failed to investigate and in order to boycott Dr [X]'s prosecution."

71. This is a reference to separate complaints by the Claimant against the Defendant in relation to other matters.

72. The Claimant says that the Defendant lied to her, 'trapped' her, and misled her to believe that once she emailed court papers to the Defendant, it would expedite Dr Suliman's statement.

73. The Claimant also says that there were no reasonable grounds for the Defendant suspecting the Claimant of dishonesty and fraud. She says that the words complained of bore accusations of dishonesty and fraud which were not warranted and untrue.

74. In her witness evidence the Claimant alleged that the Email has the potential to cause her serious harm including by being used to defeat her civil claim for compensation; and that it will be used (or have the effect of) to prevent her from getting a job. In her written submissions following *Lachaux*, supra, the Claimant maintained that the Email caused her serious harm because it was the reason the district judge declined to issue the summons against Dr X.

75. The Claimant's case on breach of confidence (which I will treat as a claim for breach of privacy for the reasons given in *Campbell v Mirror Group Newspapers* [2004] 2 AC 457, as the Claimant rightly identified in her closing submissions) and Article 8 is that the Email constituted or resulted in the unauthorised disclosure of private information because it was, in essence, the unauthorised disclosure of medical records or medical information about her.

76. Overall, the Claimant alleged that she has suffered harm as a result of the Defendant's conduct going beyond the damage to her reputation which she alleges as a consequence of the Defendant's libel. She seeks 'compensatory and aggravated damages', the particulars of which are pleaded at [27]-[33] of her Particulars of Claim. They include, but are not limited to, the allegation I have already set out that she has been the victim of a Jewish conspiracy.

The Defendant's case

77. The Defendant's case as pleaded in its Defence is that:

    a. the Email did not constitute an allegation of fraud within the legal definition of that term but did constitute a statement that a referral had been made to the NHS Fraud investigation team;

b. the contents of the Email were substantially true and so any imputations conveyed by those contents were substantially true and thus the Defendant has a defence pursuant to s 2 of the 2013 Act;

c. further and in the alternative, the Email was a statement of opinion which also indicated the basis of that opinion and thus the Defendant has a defence under s 3 of the 2013 Act.

78. The Defendant further denied (per [18] of the Particulars of Claim) that there had been any intention or attempt to assist the GP from being prosecuted or that the Email amounted to an attempt to pervert the course of justice.

79. Further, the Defendant pleaded that the Claimant was required to show that the Email caused or was likely to cause 'serious harm' to her reputation within the meaning of s 1 of the 2013 Act and that she could not discharge this burden. In its Closing Written Submissions and its post-*Lachaux* submissions the Defendant elaborated upon this argument as follows.

80. Lord Sumption, who gave the only judgment in *Lachaux*, supra, made it clear that the Claimant has the burden of proving that the publication complained caused serious harm to her reputation, or that serious harm was likely to be caused. The Defendant denies that the Email had this effect.

81. The Defendant asserted that neither in her witness statement, nor in cross-examination, could the Claimant evidence, to the civil standard, serious harm to her reputation in the eyes of the recipients of the Email, or anyone else. It said that there was no written evidence, other than her own, showing her reputation had been seriously harmed (e.g. from the Magistrates Court, the Defendant or the Medical Defence Union), that there was no evidence that anyone had initiated or threatened a civil or criminal suit against her as a result of the Email's publication.

82. Overall, on the question of serious harm, the Defendant said the Claimant's case is synonymous with the example given by Lord Sumption in [16] of his judgment, namely that the Email was published to a small number of people among whom the Claimant had no reputation to be harmed given her own conduct.

83. The Defendant noted that the Email was published only to the four people whom I identified earlier. Of these, Mr Cadogan and Mr Tennant already knew about the private prosecution and thus they would have known, or been bound to find out, that the Claimant had used the name of SC whilst attending the Defendant's A&E department, and therefore the medical notes of that attendance were under that name, and yet the private prosecution was brought under the name of ZC. They therefore knew she had used a false name at the hospital. For the same reason, both would have found out about the Email being 'doctored'. Also, Ms O'Sullivan said in her written and oral evidence that she had already spoken to Mr Cadogan before she sent the Email so the information contained within it had already been shared beforehand. Ms O'Sullivan's evidence was that the district judge (via Mr Cadogen) had asked her to liaise with Mr Tennant in order to try to confirm the Claimant's identity. As to the other two recipients, the Defendant says there is no evidence that either considered the

Claimant's reputation to be seriously harmed by the Email being sent, as opposed to say, the Claimant's own conduct in bringing the Email about.

84. In relation to the Claimant's three asserted defamatory meanings of the Email:

a. the Defendant denied that it was intending to suggest that the Claimant was dishonest, but concedes that the Email could, to the ordinary reasonable reader, be read as imputing that the Claimant was dishonest, however, it is submitted that the Defendant had reasonable and truthful grounds to suspect and investigate whether the Claimant was dishonest and therefore can rely on the defence of truth.

b. the Defendant denied that it was suggesting in the Email that the Claimant was fraudulent and also that the ordinary reasonable reader would conclude in reading the Email that Claimant was fraudulent. In any event, it says that the Defendant had reasonable and truthful grounds to suspect and investigate whether the Claimant might be guilty of fraudulent behaviour and therefore can rely on the defence of truth.

c. the Defendant denied that the ordinary reasonable reader would conclude in reading the Email that Claimant was suffering from a mental illness, whether multiple personality disorder or anything else.

85. In relation to the defence of truth, the Defendant said that evidence establishes, and the Claimant admitted in evidence, using false names, and hence the second paragraph of the Email, whilst potentially defamatory, was substantially true. As to the third paragraph, whilst this paragraph was partly incorrect, (for which the Defendant raises the defence of honest opinion), the mistake was rapidly corrected and so any factual inaccuracy in this paragraph could not have caused serious harm to the Claimant's reputation.

86. The allegation in the third paragraph of the Email, namely that the court email had been falsified, was true, and the Claimant admitted as much in her evidence.

87. The fourth paragraph was substantially true, and to the extent that it carried the imputation that the Claimant had been dishonest, that was also substantially true based on the Claimant's admitted use of a false email and multiple identities.

88. The Defendant also said that the defence of honest opinion in s 3 of the 2013 Act is made out.

89. In relation to the Claimant's claim regarding breach of privacy (in other words, misuse of private information) and breach of Article 8, the Defendant's case is that the information contained in the Email was not private and therefore was not protected by Article 8.

The issues

90. The issues which fall for determination are as follows.

91. In relation to the libel claim:

a. What if any was/were the meaning(s) of the Email ?

b. Is the test of 'serious harm' in s 1 of the 2013 Act made out in respect of one or more of those meanings, so that they are defamatory ?

c. If so, does the Defendant succeed on the defence of truth in respect of each defamatory meaning, or the defence of honest opinion ?

92. In relation to the privacy/Article 8 claim:

a. Was there a reasonable expectation of privacy in relation to the information in the Email ?

b. If so, must the privacy interests under Article 8 of the owner of the private information (the Claimant) yield to the right of freedom of expression conferred on the publisher (the Defendant) by Article 10 ? The answer to this question depends upon an application of the principles set out in *McKennitt v Ash* [2008] QB 73, [11] and *PJS v News Group Newspapers* [2016] AC 1081, [20].

Discussion

The libel claim

The meaning of the words complained of

93. The approach to meaning in defamation actions was recently re-stated by Lord Kerr in the Supreme Court in *Stocker v Stocker* [2019] UKSC 17, [25]:

> "Therein lies the danger of the use of dictionary definitions to provide a guide to the meaning of an alleged defamatory statement. That meaning is to be determined according to how it would be understood by the ordinary reasonable reader. It is not fixed by technical, linguistically precise dictionary definitions, divorced from the context in which the statement was made."

94. The essential principles that apply in relation to this approach were set out by Nicklin J in *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB) [11-12] (internal citations omitted):

> "11. The Court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways: *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 173D– E, per Lord Diplock.
>
> 12. The following key principles can be distilled from the authorities:

(i) The governing principle is reasonableness.

(ii) The intention of the publisher is irrelevant.

(iii) The hypothetical reasonable reader is not naïve, but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.

(iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

(v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.

(vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.

(vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

(viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).

(ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.

(x) No evidence, beyond the publication complained of, is admissible in determining the natural and ordinary meaning.

(xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge but should

> beware of reliance on impressionistic assessments of the characteristics of a publication's readership.
>
> (xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.
>
> (xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning)."

95. Adopting this approach, I have no hesitation in rejecting the Claimant's case that the ordinary reasonable reader could have read the Email as meaning that she was mentally ill with a multiple personality disorder, or at all. The use of false names is commonplace and done for a variety of reasons and does not begin to support the inference that anyone doing so must be mentally ill. To draw that inference would be utterly unreasonable.

96. As for the other two alleged meanings, in relation to the imputation of dishonesty, the Defendant denies that it intended to suggest the Claimant was dishonest. The intention of the publisher is irrelevant, however: *Koutsogiannis*, supra, [12(ii)]. The Defendant is right to accept that the Email could, to the ordinary reasonable reader, be read as imputing that the Claimant had behaved dishonestly. That arises from the allegation she had used false names, falsified an email, and been reported to NHS Protect and the Trust's Counter Fraud Team.

97. The Defendant denied that the Email could to the ordinary reasonable reader be read as imputing that the Claimant had been fraudulent. I disagree. The dictionary definitions of the two terms 'dishonest' and 'fraudulent' may be subtly different, at least to lawyers. But to approach the matter in this way would be to fall into the trap identified by Lord Kerr in *Stocker*, supra. In determining meaning, over-elaborate analysis should be avoided and the court should certainly not take too literal an approach to the task. I am satisfied that the ordinary reasonable reader could read the Email as imputing that the Claimant had been fraudulent as well as dishonest, the two terms meaning essentially the same thing: see *Blackstone's Criminal Practice 2019*, [B7.12].

98. I therefore uphold two out of the three allegedly defamatory meanings asserted by the Claimant.

Serious harm

99. Section 1 of the 2013 Act states:

> "(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."

100. Section 1 was very recently considered by the Supreme Court in *Lachaux*, supra. Lord Sumption's judgment can be summarised as follows.

101. Lord Sumption said that s 1 was to be interpreted in the light of the common law background, which he summarised as follows [6-7]:

> "6. [A] working definition of what makes a statement defamatory, derived from the speech of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237, 1240, is that 'the words tend to lower the plaintiff in the estimation of right-thinking members of society generally.' Like other formulations in the authorities, this turns on the supposed impact of the statement on those to whom it is communicated. But that impact falls to be ascertained in accordance with a number of more or less artificial rules. First, the meaning is not that which other people may actually have attached to it, but that which is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it. Secondly, in an action for defamation actionable *per se*, damage to the claimant's reputation is presumed rather than proved. It depends on the inherently injurious character (or 'tendency', in the time-honoured phrase) of a statement bearing that meaning. Thirdly, the presumption is one of law, and irrebuttable.
>
> 7. In two important cases decided in the decade before the Defamation Act 2013, the courts added a further requirement, namely that the damage to reputation in a case actionable *per se* must pass a minimum threshold of seriousness."

102. The case on behalf of the Respondent (Mr Lachaux) was that the common law presumption of damage remained unaffected by s 1(1) but that its effect was 'that the inherent tendency of the words must be to cause not just some damage to reputation but serious harm to it' ([11]). In other words, the argument was that the presumption of harm remains, and all that s 1 did was to 'raise the bar' so that the claimant has to show a tendency to cause *serious* harm to reputation. This is the approach which was endorsed by the Court of Appeal: [2018] QB 594.

103. The Appellants, who were two news organisations, submitted that s 1(1) had effectively abolished the common law presumption of damage. They argued that it introduced a new hurdle to be satisfied before a statement can be regarded as defamatory. This is that the words complained of must not only be inherently injurious but *'*must also be shown to produce serious harm in fact*'*, which may require extraneous evidence to be submitted. This was the view taken by Warby J in his judgment on the trial of preliminary issues ([2015] EWHC 2242 (QB)).

104. The Court of Appeal favoured Mr Lachaux's interpretation of s 1, and found in favour of him.

105. The Supreme Court disagreed with the Court of Appeal and upheld Warby J's interpretation of s 1 (although it, too, found for Mr Lachaux on the facts). Lord

Sumption gave four main reasons for favouring the Appellant's construction of s 1(1) which Warby J had also favoured.

106. First, he said it took into account Parliament's objective as stated in the preamble to the 2013 Act, which was to *'*amend the law of defamation*'* ([13]). In the light of this, he considered that Parliament's choice to use the wording of *'*serious harm' could only have represented an intentional departure from the previous decisions in *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 74 and *Thornton v Telegraph Media Group* [2010] EWHC (QB) 1414.

107. Second, he considered that the words *'*has caused' in s 1(1) naturally and necessarily referred to some actual historic harm and that 'likely to cause' must therefore refer to probable future harm. He rejected the view that serious harm could be established simply on the basis of the words' *'*inherent tendency' to cause harm ([14]).

108. Next, he explained that s 1(1) must be read alongside (and consistently with) s 1(2), which requires an investigation of the actual impact of the statement ([15]).

109. Finally, he concluded that Warby J's interpretation was the only one which could bring about the substantial change to the law of defamation which was clearly intended by the significant amendment represented by s 1(1). It is worth quoting [16] in full as it has a bearing on the issues in the present case:

> "16. Finally, if serious harm can be demonstrated only by reference to the inherent tendency of the words, it is difficult to see that any substantial change to the law of defamation has been achieved by what was evidently intended as a significant amendment. The main reason why harm which was less than "serious" had given rise to liability before the Act was that damage to reputation was presumed from the words alone and might therefore be very different from any damage which could be established in fact. If, as Ms Page submits, the presumption still works in that way, then this anomaly has been carried through into the Act. Suppose that the words amount to a grave allegation against the claimant, but they are published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed. The law's traditional answer is that these matters may mitigate damages but do not affect the defamatory character of the words. Yet it is plain that section 1 was intended to make them part of the test of the defamatory character of the statement."

110. However, Lord Sumption went on to conclude that even in light of the higher threshold imposed by s 1 as compared with the common law, the news organisations' case failed on the facts ([21]-[26]).

111. The effect of the Supreme Court's decision on the present case is that in order to satisfy the test in s 1(1), the Claimant must prove on the balance of probabilities as a fact that the Email has caused her serious harm, or that it is likely as a matter of fact to do so in the future (see [12], [21]).

112. I have reached the clear conclusion that she has failed to discharge this burden, for the following reasons.

113. The starting point is that the Email was published to just four people, whom I have already identified. I recognise that the question of serious harm does not necessarily depend on whether there has been publication to a large number of people. But, as Lord Sumption made clear in [16] of his judgment where, as here, it can be shown that the publication was only to a small number of people then that is an important factor to be taken into consideration in determining whether, as a matter of fact, serious harm has been caused or is likely to be caused.

114. Second, there was no evidence from any of the four publishees as to the effect the Email had on their view of the Claimant. There is nothing to suggest that they had any particular opinion of the Claimant which was capable of being affected by the Email. Nor is it pleaded, for example, that the Claimant had a close relationship with any of the publishees, or that their attitude to her is a matter of importance to her personal or professional life. As to the latter, in [1] of her post-*Lachaux* submissions the Claimant asserted for the first time that she is a 'legal professional but without a licence to practise'. No evidence to this effect was given at the trial.

115. Nor was there any evidence that the Email was forwarded or copied by any of the recipients to any other person, save as I explain below. Nor was there any evidence of any 'grapevine effect'.

116. In her post-*Lachaux* submissions the Claimant denied that the Email had only been published to four people and said that it was published more widely. For example, she asserted at [3], [4] and [12] that (*sic*):

> "3. It is disputed the publication was very limited circulation EMAIL. The EMAIL in C's particulars of claim was sent to WMC's generalised email address. The general email address is accessed by court's staff on daily basis and the court has at least 223 staff most of who are administrative staff with direct access to the generalised email address.
>
> 4. D has around 10,000 staff and at least three more hospital sites in another locations in London with thousands of staff have direct access to information held about C. During cross-examination Ms O'Sullivan insisted all D's administrative staff have access to information held about C despite it was suggested to her for her ease and assistance that the information is only available to D's data subject office Ms O'Sullivan disproved this and insisted that all D's administrative staff have access.
>
> …
>
> 12. The EMAIL and all subsequent communication were distributed to and circulated between individuals and third parties and ended up stored in D's computer system and data record, it is

> also in the possession of other people and organisation with at least 420 staff (MUD (sic)) and stored in their computer system and data record and can be accessed by unlimited number of people and exploited in the course of their employment to attack C's character and integrity it is thus, not fair to C to have to live with such denigration and stigma for the rest of her life, which has the potential of causing her or likely to cause her serious harm."

117. There was no evidence to support any of these assertions, and I reject them. There is no evidence anyone read the email sent to the Court's generalised email address. Moreover, the Claimant's assertions are inherently implausible. Emails sent to one person in an organisation are not, in general, accessible by anyone and everyone within that organisation, and there would be serious data protection and privacy issues if they were.

118. In relation to Mr Cadogan and Mr Tennant, there are additional reasons for rejecting the conclusion that the Claimant suffered serious harm as a consequence of the Email. It was Ms O'Sullivan's evidence that *before* she sent the Email she had spoken on the telephone to both Mr Cadogan and Mr Tennant: see her witness statement at [12], where she produces her attendance note. I therefore infer that the information contained within had already been shared with them by the time she sent the Email to them. In other words, before receiving the Email, Mr Cadogan already knew as a result of talking to Ms O'Sullivan that the Claimant had falsified the court's email (indeed, it was he who informed Ms O'Sullivan of that); and he also knew that the Claimant had used one name at the hospital, and begun criminal proceedings in another name. Mr Tennant was also in possession of the information in the Email as a consequence of talking to Ms O'Sullivan. It is impossible in these circumstances to conclude that the Email caused serious harm to the Claimant when the two men already knew the Claimant had falsified the Email. It added little or nothing to what they already knew.

119. I deal now with the Claimant's claim that the Email caused the summons against Dr X not to be issued, and thus that she suffered serious harm. The Claimant asserted in her Particulars of Claim at [16] that 'the email contained among other things his submission from the Magistrates Court not to issue the summons'. She said at [13] of her Reply to Defence that Mr Tennant 'used the statement to argue his client's case in attempt to prevent the court from issuing the summons.' This was echoed in [12] of her witness statement of 27 July 2018. She went on to allege at [13] of her Reply that this was the 'direct cause' of the judge not issuing a summons against Dr X. In her evidence I asked why her application for a summons had been refused. She said (*sic*):

> "Because there was no evidence of injury. I said that earlier in my beginning [opening].
>
> … And the defamatory statement inflamed the whole thing, the submission of Mr Tennant saying that, you know, I'm not fit to be prosecutor because I'm holding myself to be different people and I have falsified this and that, she has a history of dishonesty. That has, you know, very badly affected my integrity. I was seen as not fit to be a prosecutor and I'm not trustworthy, I'm not truthful,

> I'm dishonest person. And the Judge in his judgment said, 'This is a matter for the police to investigate', after the statement of the defendant came to his attention."

120. I have already noted that it is the Claimant's case is that she is the victim of a 'Jewish conspiracy' motivated (at least in part) by hatred of Muslims. She said that the sending of the Email was an overt act in furtherance of this conspiracy. That is an extraordinary claim to make, to say the least. It is wholly unsupported by any evidence. Not only that, it is directly contradicted by the fact that Ms O'Sullivan is a Roman Catholic. Whatever the overall merits of the Claimant's libel and privacy claims, I completely reject her suggestion that she is the victim of any sort of conspiracy.

121. I also reject the Claimant's suggestion that Ms O'Sullivan's intention in sending the Email was to pervert the course of justice and to protect Dr X. I also reject the Claimant's case that the Defendant was motivated by malice, whether evidenced by Ms O'Sullivan's actions or otherwise.

122. As I have already found, the Claimant lied several times to hospital staff on 9 September and she admitted falsifying the email of 12 September 2016. She has also admitted using false names when she feels it is justified in order to receive medical treatment. As I will discuss later, this amounts to a pattern of dishonest conduct by the Claimant. This, together with her incredible and unjustified allegation that she is the victim of a Jewish conspiracy, have led me to conclude that I must treat her evidence with real caution. I therefore decline to rely on it, save where it is against her interests; or is clearly supported by other evidence; or is not disputed by the Defendant.

123. Paragraph 16 of the Particulars of Claim is a reference to a letter from Mr Tennant to Mr Cadogan at Westminster Magistrates Court dated 22 September 2016 which was copied to the Claimant. She has included an incomplete copy of it in her trial bundle. The letter was headed '[ZC] v [Dr X] – Westminster Magistrates Court 7 September 2016 at 2pm for Preliminary Hearing'. That date must obviously be an error. The letter began:

> "We would be grateful if this letter could be placed before District Judge Purdy at your earliest convenience. This letter should be read in conjunction with the Skeleton Argument 'the Skeleton' and Appendixes served on the Court under cover of our letter 25 July 2016'."

124. The letter continued at [2]:

> "2. As per Paragraph 5 of the Skeleton, Dr X seeks the refusal of the summons and/or a stay of the proceedings on the following grounds:
>
> a. There is no *prima facie* evidence capable of providing the legal ingredients of the offence alleged."

125. The next section of the letter in the bundle stated as follows:

> "11. In addition to the submissions made within the Skeleton, C has further demonstrated her willingness to be untruthful both generally and specifically in respect of these proceedings:
>
> a. C altered an email from the Court and then presented this to the Royal Free Hospital as though she has received a written instruction to take a statement from Dr Suliman (see attached email).
>
> b. C has a habit of dishonestly using false names (see email from Royal Free Hospital).
>
> c. C has a history of making unsubstantiated complaints against other medical practitioners which demonstrate a prejudice towards the profession (see post). This is further supported by her determination to covertly record appointments with medical practitioners."

126. Neither this letter, nor anything else relied on by the Claimant, in my judgment amounts to sufficient evidence that the defamatory statements made by Ms O'Sullivan to Mr Tennant in the Email were republished by him in a way which caused the Claimant serious harm. The Claimant has not produced any note or transcript of the hearing and there is no note of the judge's reasons for not issuing the summons. As the letter itself made clear, those acting on behalf of Dr X supplied a Skeleton Argument and Appendices in July 2016 (two months before the Email) opposing the grant of a summons. It appears that there were a number of grounds of resistance, the first one being that there was no *prima facie* evidence of an offence. Because, for the reasons I have given, I must approach the Claimant unsupported evidence with caution, in the absence of corroboration, I reject her bare assertion that the Email was *the* cause, or even *a* cause, of the district judge refusing to issue the summons. There is no evidence to suggest that it was even specifically drawn to the judge's attention. Even if it was, there is no evidence that the Email had any impact on the judge at all.

127. Although not raised by the Defendant, it seems to me that if I had reached a contrary conclusion then difficult issues concerning absolute privilege might have arisen. These may have included whether the deployment of defamatory material in court in criminal proceedings to the detriment of a party can be relied on by that party to prove serious harm in subsequent defamation proceedings.

128. In [22] of her witness statement the Claimant claims that she could not pursue a job in healthcare because of the Email. I reject this suggestion, which seems to me to be implausible. There is no supporting evidence. Also, the Claimant does not say her prospective employer was aware of the Email.

129. I turn to the question of whether the Email 'is likely to cause' serious harm to the reputation of the claimant. This refers to what may happen in the future. I have considered the Claimant's assertions at [22] of her witness statement, eg, that the Email will be used to prevent her claiming compensation, or that it might be used to

defeat a claim for civil compensation. She also suggests it will 'go viral'. Further, she says she 'is likely to face … attacks and intimidation from other doctors or GPs in the future' and that the Email will be used 'to defeat any criminal proceedings and to make sure to prevent the claimant from receiving any compensation she is entitled to'. She amplified these assertions in her evidence. For example, she said:

> "What I am saying is this is that: now, there is a record of dishonesty with the MDU. Now, if, for instance, in the near future, I have another GP abuse me, for instance, and I try to take him to court, civil or criminal, this MDU have on their system, this allegation of dishonesty, they will use it."

130. There is no supporting evidence for any of these assertions. I regard them as remote and speculative in the extreme and I reject the suggestion that the Email would be forwarded on or otherwise published to cause any serious harm to the Claimant.

131. I am therefore satisfied that the Claimant has failed to show the Email caused her serious harm in fact or that it is likely to do so. In summary, the evidence shows that the number of publishees was very limited; that there was no grapevine percolation; that two of the four publishes knew about the contents of the Email in any event before receiving it; and thus that there is no evidence that anyone thought any the less of the Claimant by reason of the publication of the Email or its deployment to resist the summons. As for the other two recipients of the Email, Mr Pohle is mentioned in passing in the Claimant's evidence, while Ms Delia is not mentioned at all. In the absence of any evidence that they had any connection with the Claimant, or that they even read the Email, or formed any view about its contents, I decline to find there the Claimant suffered serious harm as a consequence of it being published to them.

132. I therefore find that the Email has not caused the Claimant serious harm within the meaning of s 1(1) of the 2013 Act, nor that it is likely to, and thus that the words complained of were not defamatory of her. The Claimant's claim in libel therefore fails.

133. But in case I am wrong in that conclusion, I go on to consider the next issue, which is whether the Defendant is able to reply upon the defences of truth and/or honest opinion in ss 2 and 3 of the 2013 Act.

The defences of truth and honest opinion

134. I begin with the defence of truth in s 2 of the 2013 Act. It is a fundamental tenet of libel at common law that a defamatory imputation is presumed to be false and, accordingly, the burden is upon the defendant to show that the imputation is substantially true: see Gatley on *Libel and Slander,* 12th Edn [11.4]. This principle has been enshrined in s 2: *Serafin v Malkiewicz and others* [2019] EWCA Civ 852, [95]. If the defendant discharges this burden then the claim in libel fails.

135. Section 2 provides:

> "(1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
>
> (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
>
> (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.
>
> (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed."

136. In my judgment the Defendant has succeeded in showing that the imputations conveyed by the Email that the Claimant is dishonest and fraudulent are substantially true. The defence of truth therefore succeeds. That is because:

a. The Claimant admitted falsifying the court's email before sending it to Ms Gouveia on 12 September 2016. As I set out earlier, she took a genuine email from the court concerning a request for an adjournment and added in the words 'who has asked me to tell you to obtain a written statement from Dr K Suliman' and removed the sender's name, thereby fundamentally altering the meaning of the email. That was obviously a dishonest thing to do, and the Claimant admitted that she should not have done what she did.

b. The Claimant admitted that she used false names in her dealings with the hospital in order to obtain treatment. Notwithstanding her professed reasons for doing so, I find that that was also dishonest.

c. The telephone recordings which the Claimant put into evidence show the Claimant repeatedly maintaining her false identity to hospital staff in several recorded telephone conversations. That was also dishonest.

d. In addition, she lied three times to the hospital female in the call on 9 September when she said she was calling from 'a hospital' and a 'research team' in an attempt to get her to get Dr Suliman to the phone and away from his other duties. In another call she lied to Dr Costello that 'CZ' was her legal adviser when in fact it was herself.

e. The fact that Ms O'Sullivan made a mistake in the Email did not prevent the imputations within it from being substantially true, and in any event the mistake was swiftly corrected in a matter of minutes.

137. In my judgment this conduct reveals a pattern of dishonest and fraudulent behaviour by the Claimant in relation to the Defendant and demonstrates that the imputations arising from the Email are substantially true. In reaching this conclusion I have

applied the test for dishonesty in *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391, [74]:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

138. So far as the falsified email is concerned, as I have found (and the Claimant admitted), she did indeed falsify it. As well as the Claimant's submissions, Ms O'Sullivan said:

> "… when I spoke to Mr Cadogan, and I forwarded him a copy of this email, he confirmed that that was not his email, that had been changed and although that was his telephone number, his name had been removed from between the words, regards and administrative officer."

139. It is abundantly clear from the recording of the Claimant's conversation with Ms Gouveia that the reason she falsified it was because Ms Gouveia had requested written evidence that the court was requesting a statement. No such written evidence then existed, so the Claimant simply fabricated it. The Claimant's words at the end of the conversation following Ms Gouveia's request are telling:

> "Let me deal with this right now because I don't want to waste any more time."

140. The falsified email was sent minutes later.

141. It is nothing to the point that the district judge might have orally requested the Claimant to obtain a medical report at some stage. I am prepared to assume that he did. But it is obviously dishonest to falsify a court email. Indeed, in some circumstances, it may a criminal offence to do so, although I do not need to make such a finding here. The Claimant's actions speak for themselves. I conclude that the Claimant well knew that what she was doing was improper. She removed the original sender's name from the court email so that Ms Gouveia would find it harder to trace the original sender. The Claimant therefore took active steps to make it less likely that her falsification would be discovered. In fact, the Claimant admitted in cross-examination that she knew what she was doing was wrong. She said:

> "I didn't feel, you know, I was supposed to do this but I had no other option but to send this email to show them there is ongoing proceedings."

142. In relation to the Claimant's use of false names, the Claimant accepted in her Particulars of Claim and her evidence that she had used false names when attending at the hospital for medical treatment. In [2] she said that when she attended on 12 December 2015, she gave the name SC because she did not want the hospital to send information to her GP, Dr X (who was the reason she attended hospital). At [19] she alleges that Dr X would have tampered with her notes.

143. At [20]-[21] of her Particulars of Claim the Claimant explained why she had used a false name on another occasion, not connected with the alleged offence by Dr X. The relevant parts are:

> "20. It was similar story with MD …. [She then describes her symptoms] … I was left to feel hopeless by my GPs and hospital doctors. There was also a culture and a prejudice whereby doctors do not bother to get to the sources of the problem instead they heavily rely on my past history as a matter of convenience for them and they deal and treat my symptoms only. This led to my illness to get worse …
>
> 21. It happened to me when doctors feel okay for them to make same diagnosis by just looking at my past history through my health records, but they were not taking into account that their attitude was preventing me from receiving the right care and treatment. Changing my name was the only option I had in front of me to get a second opinion from doctors without prejudice or bias."

144. The Claimant repeated this explanation in [34]-[35] of her witness statement of 7 November 2018. Earlier, in her witness statement of 28 July 2018 the Claimant said at [5]-[7]:

> "5. The claimant attended the hospital of the defendant trust on a number of occasions seeking medical attention and treatment using different names. The claimant used different names first to have second opinion(s) for her ongoing medical condition because if she gave her name the defendant trust would have had access to her GP's notes and this was likely to have affected the opinion(s) of the doctors at the hospital and second to not to allow her GP against whom she was going to bring a private prosecution to have access to the hospital notes to prevent her from interfering with the notes …
>
> 6. For the claimant giving different names was a remedy of last resort as she needed to protect herself from further harm. The claimant considered changing her GP this is normally not that

> easy and the process of transferring medical notes to another GP's surgery normally takes many weeks sometimes months.
>
> 7. At no stage before and even after issuing her claim, the defendant trust showed no interest in knowing the reasons for claimant using different names. There was no express willingness by the defendant trust to sit down with the claimant and go through her ordeal with her to find a way to assist her. However, when the trial at City Westminster Court was going to set a trial date for Mr Nicholas Tennant's client and claimant's former GP to stand trial, the defendant trust disclosed private and confidential information about the claimant without her consent or knowledge and made defamatory statemen on purpose to undermine the prospect of successful prosecution of Mr Tennant's client."

145. In cross-examination the Claimant admitted using false names, not in order to commit a fraud, but to access treatment. She said, 'I went to the hospital to seek treatment. That's all. I didn't go to the hospital to be dishonest with them …' The Claimant's case is therefore that she was entitled to use false names to access treatment, but that this was not fraudulent or dishonest. I disagree.

146. In my judgment, despite the Claimant's belief (which I am prepared to accept is genuinely held), ordinary and reasonable people would regard her behaviour in deceiving hospital professionals in the way she did as dishonest, even though she thought she was entitled to do as she did in order to get treatment. The Claimant was not entitled to assume that medical staff would not treat her properly if they knew who she really was. Medical staff have a professional duty to do what is in their patients' best interests. A patient's medical history is an important part of the diagnostic process. By giving a false name the Claimant was depriving hospital staff of information which they needed to know in order to give her proper treatment. By acting as she did, there must have been a risk that the Claimant would obtain treatment which was inappropriate, or to which she was not entitled, thereby placing an additional burden on an already overstretched NHS. I do not say that she did, but there must have been such a risk.

147. Nor do I accept that her reason for giving a false name on 12 December 2015 was a valid one. I have no doubt that if she had asked that details of her treatment not be passed on to Dr X, and explained the reason why, that request would have been honoured and suitable safeguards would have been put in place.

148. Furthermore, the Claimant did not just use false names to obtain treatment. As I have said, she lied at least three times in the first call on 9 September in order to get Dr Suliman to the phone and (I assume) away from his other duties treating patients. Also, throughout her dealings with hospital staff, she maintained the false identify of SC instead of revealing her true identity. This conduct can only be described as dishonest.

149. The Claimant's dishonest conduct did not end there. As I explained earlier, in a telephone call on 2 February 2016 the Claimant tried to trick Dr Costello into sending a confidential medical report to 'C Zahoor', who she said was a legal adviser. In fact,

it was herself. That lie was told in the face of Dr Costello repeatedly impressing upon the Claimant the need to preserve patient confidentiality. What the Claimant did was dishonest. She lied to a doctor in order to get him to send medical information to a person who did not exist.

150. Finally, I have not overlooked that in the Email Ms O'Sullivan wrongly stated that the purpose of the falsification had been 'to lead us to believe that they relate to an alleged prosecution of a clinician at our Trust'. In my judgment, that does not prevent the imputed meaning that the Claimant was dishonest and fraudulent from being substantially true. The Claimant's pleaded case on imputation does not include the misstatement by the Defendant of her purpose in falsifying the email. In other words, she does not allege that the imputation of dishonesty was untrue because Ms O'Sullivan misstated the purpose of the falsification. But even if she had, I would still have held that the imputation of dishonesty was substantially true because of the Claimant's acceptance that she falsified the email. A defendant does not have to prove that every word he/she published was true. He/she has to establish the substantial truth, or the 'sting', of the libel. The sting of the imputation, had it been pleaded, was the dishonesty in the falsification of the email rather than the purpose behind it. The Claimant's purpose was essentially irrelevant to the question of her dishonesty. To falsify a court email in the way that the Claimant did was dishonest, no matter what the purpose of the falsification. In any event, the matter was corrected, as I pointed out earlier, within 27 minutes.

151. Overall, I find that on a number of occasions including in 2015 and 2016 the Claimant engaged in dishonest and fraudulent conduct towards the Defendant's staff. For these reasons, I am satisfied on the balance of probabilities that the imputations arising from the Email that the Claimant is dishonest and fraudulent are substantially true. The Defendant's defence under s 2 therefore succeeds.

152. It is not therefore necessary for me to consider the defence of honest opinion.

Libel claim: conclusion

153. For these reasons, the libel claim fails and is dismissed.

The privacy/Article 8 claim

154. I can deal with this claim altogether more shortly.

Legal principles

155. Article 8 of the Convention provides:

> "*Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of

> national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

156. Article 10 provides:

> *"Freedom of expression*
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

157. Where a court is considering a claim for misuse of private information it has to decide two issues, which should be kept separate. In *McKennitt v Ash* [2008] QB 73, [11] the two issues were described in the following terms:

> "First, is the information private in the sense that it is in principle protected by article 8? If 'no', that is the end of the case. If 'yes' the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10 ?"

158. In *Murray v Express Newspapers Limited* [2009] Ch 481, [35]-[36] Sir Anthony Clarke MR explained the first question in the following way

> "35 … The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in *Campbell v MGN Ltd*. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said, at para 99: "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity." We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee.

> 36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant 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 came into the hands of the publisher."

159. If this question is answered positively then the court has to go on to consider the second question. This requires the application of Article 8(2), and when freedom of expression is involved (as it is in this case, because the alleged misuse arose a consequence of the publication of a book), the court must undertake a balancing exercise to decide whether in all the circumstances the interests of the owner of the private information (in this case, the Claimant) must yield to the right to freedom of expression conferred on the publisher (in this case, the Defendant) by Article 10.

160. How this balancing exercise is to be carried has been explained in a number of cases. In *Re S (A Child)* [2005] 1 AC 539, [17], Lord Steyn said:

> "First, neither article (8 or 10) has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

161. In *PJS v News Group Newspapers*, supra, [20], Lord Mance summarised the relevant principles as follows:

> "(i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the proportionality test must be applied: see eg *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17, per Lord Steyn, with whom all other members of the House agreed; *McKennitt v Ash* [2008] QB 73, para 47, per Buxton LJ, with whom the other members of the court agreed; and *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) at [28] per Eady J, describing this as a 'very well established' methodology. The exercise of balancing article 8 and article 10 rights has been described as 'analogous to the exercise of a discretion': *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554 at [8]."

162. Also of assistance is Baroness Hale's analysis in *Campbell v MGN Ltd* [2004] 2 AC 457, [140]-[141], where she explained that when two Convention rights are in play 'the proportionality of interfering with one has to be balanced against the proportionality of restricting the other.' This involves:

> "… looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each."

163. In conducting this balancing exercise, it is clear that it is not sufficient simply to consider whether publication is in 'the public interest' in some general sense. I must balance the public interest in favour of publication against the public interest in maintaining the right to privacy by reference to the specific facts in question and the nature of the public interest said to justify publication.

First question: Is the information private ?

164. The starting point is to identify what allegedly private information the Claimant is complaining about. At [24] of her Particulars of Claim she asserts that:

> "The defendant had breached my confidentiality and my privacy by deliberately and maliciously communicating my confidential and private information to a third party namely the defendant GP's solicitor when they were not supposed to do so. The Communication with the defendant GP's Solicitor was unacceptable, it was without my knowledge or consent and it was legally wrong. The defendant hospital has a duty towards me as being one its patients and should not have breached my privacy in any shape or form."

165. Earlier, at [19] and [20] under the heading 'Particulars of breach of confidence and Art 8 of the ECHR' the Claimant explained why she had used the names SC and MD.

166. At [28] of her Reply to Defence she pleaded that:

> "The defendant's GP's solicitor Mr Tennant did not have the right to know about the claimant's use of different names to seek medical treatment at the defendant's hospital this is private information relating to the defendant's patient and this is a type of information if communicated to a third party without the consent and the permission of the claimant/patient will lead and will amount to a breach of confidentiality."

167. Under cross-examination the Claimant said this in relation to her use of false names:

> "… those names I have used to seek medical treatment, they form part of my health records, okay? And they are protected. They are private and confidential and protected by Article 8. They form part of my health record. Whatever name I have given to access

> medical health, to access treatment, it's part of my medical record, okay?"

168. It is therefore the Claimant's case that the Defendant wrongly disclosed that she had used a number of different names, and therefore false, names when accessing medical treatment at the hospital. Thus, the private information in question is her attendance at the Defendant hospital and her use of different names.

169. Applying the test in *Murray v Express Newspapers Limited* [2009] Ch 481, [35]-[36] I do not consider that there was a reasonable expectation of privacy in relation to the Claimant's use of different names when seeking treatment at the Defendant hospital. Having regard to the various factors in [36] of that case (including the nature of the activity in which the Claimant was engaged), this is not information that a reasonable person of ordinary sensibilities would feel was private if she was placed in the same position as the claimant and faced with the same publicity.

170. The context is all important. I accept that the mere fact of having had hospital or other treatment (without anything more) may itself be private information, for example, if someone has attended at a clinic from which the nature of their illness can readily be inferred. But everything depends on the circumstances. I entertain doubts that the mere fact of a person's attendance at an A&E department would, without more, constitute private information. But I need to decide that in this case. Here the Claimant cannot have been a reasonable expectation of privacy about mere fact of her attendance at the Defendant hospital's A&E department because the private prosecution she sought to launch would have had, as part of the evidence, her very attendance at that department in December 2015. She chose to make that fact public when she applied for the summons against Dr X, with the result that the judge asked her to obtain a medical report from the Defendant. Therefore, to the extent that the fact of her attending for treatment in December 2015 at A&E was private (which I assume but do not decide), she waived that privacy when she began her private prosecution. Hence, by the time Ms O'Sullivan sent her Email on 12 September 2016, privacy had been lost.

171. For the same reason, she cannot have had a reasonable expectation of privacy about her use of the false name SC, because that would inevitably have come out as part of the evidence, given the medical report would have been in that false name. Following on from that, had there been a trial, then the Claimant's use of other false names would almost certainly also have come out. She would have been bound to have been asked in cross-examination whether she had ever used any other names in her dealings with the hospital and she would have been bound to have answered truthfully. Also, as a prosecutor, the Claimant would have had duties of disclosure during the criminal prosecution. It is therefore possible (I would say likely) that she would have had to disclose to Dr X's defence lawyers all of the occasions on which she had used different names when seeking treatment. That is because these are matters which would have been relevant to her credibility.

172. Her use of the name 'CZ' potentially falls into a different context. As I have said, she used that name in an attempt to deceive Dr Costello into sending over medical reports in February 2016. There can be no expectation of privacy in relation to an attempt to deceive a hospital professional.

173. For all of these reasons, she could not have had a reasonable expectation of privacy in relation to the information she complains about.

174. These findings are sufficient to dispose of the privacy/Article 8 claim.

Second question: balancing exercise

175. Although I need not decide it, had I had to go on to consider the second question arising under *McKennitt*, supra, I would have held that the balance came down in favour of publication. Whilst I recognise that medical information is strongly protected by Article 8 (see, for example, *Z v Finland* (1998) 25 EHRR 371, [95]), here there was no disclosure of medical information, only the bare fact of the Claimant's attendance at the hospital using different names without any details of why she attended, and nor could that be inferred from the information disclosed. There was only a modest infringement of the Claimant's Article 8 rights. On the other hand, the communication of the information was made to the court, and copied to a limited number of people, for the purposes of criminal proceedings in order to explain to the court why the Defendant would not be providing the report which the court had requested.

Privacy claim: conclusion

176. The Claimant's claim for breach of privacy/Article 8 therefore also fails.

Conclusion

177. It follows that the Claimant's claims are dismissed.

Post-script

178. Whilst I was writing this judgment I received correspondence from the parties. In an email dated 21 May 2019 (and again in her post-*Lachaux* submissions) the Claimant asked for 'injunctive relief' in the form of:

    a. an order that the Defendant must 'delete and/or destroy all the false allegations they made about me from their records …';

    b. an order 'that I should have access to my health records …'.

179. So far as the first claim is concerned, for the reasons I have given, the defamatory imputations in the Email are substantially true. The one error in the Email (which, as I have explained, is irrelevant to the outcome of the libel claim) was corrected shortly afterwards. I need not say anything more.

180. So far as the second claim is concerned, there may be legal mechanisms available to the Claimant by which she can try and access her medical records. It is open to her take legal advice about those if she wishes to do so. However, that is not a matter for me. It formed no part of the libel and privacy claims which I have determined in this judgment.