Neutral Citation Number: [2020] EWHC 1884 (QB)

Case No: QB-2020-000588

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2020

Before :

THE HONOURABLE MR JUSTICE SAINI

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Between :

(1) DAVID COLLIER **(2) RACHEL RILEY** **(3) TRACY ANN OBERMAN**	**Claimants**
- and –	
DANIEL BENNETT	**Defendant**

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- -

Eric Shannon (instructed by **Patron Law**) for the **Claimants**
Gervase de Wilde (instructed by **Vardags**) for the **Defendant**

Hearing dates: 10 July 2020

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Approved Judgment

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

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MR JUSTICE SAINI

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00am on Wednesday 15 July 2020

MR JUSTICE SAINI :

This judgment is in 5 parts as follows:

I. Overview

1. This is the trial of CPR Part 8 proceedings which arise out of tweets from an anonymous Twitter account ("the Account") of a person calling themselves *Harry Tuttle* and using the handle *@arrytuttle*. The true identity of *Harry Tuttle* is not known.

2. The broad issue raised is the scope and nature of the court's powers to assist potential victims of claimed civil wrongs, in the form of libel and harassment, said to have been committed by the operator of the Account. The issue arises in a context where some clues as the operator's identity have entered the public domain, but the holder has taken steps to delete (and remove from public view) the tweets which are the evidence of alleged wrongdoing.

3. As is well-known and now notorious, substantial numbers of tweeters keep their identities secret and seeking to obtain disclosure of the identity of account holders from Twitter is likely to be a fruitless exercise. It also only takes a few keystrokes for such a person to remove their tweeting history from view although of course historic traces and screenshots may exist.

4. The Claimants say that they are each the victim of a campaign of defamation and harassment conducted by the operator of the Account. Basing themselves on a number of evidential clues which are addressed below, they seek *Norwich Pharmacal* relief in order to identify the author of the tweets and to obtain copies of the tweets (which they say the Account holder has deleted from view). In the alternative, they seek relief under CPR 31.16 for pre-action disclosure ("PAD") of the tweets and surrounding metadata and analytics.

5. The First Claimant, Mr David Collier ("Mr Collier") is a blogger, researcher and campaigner against anti-Semitism. Ms Rachel Riley ("Ms Riley"), the Second Claimant, is a television presenter on the Channel 4 programme *Countdown*. Ms Tracy Ann Oberman ("Ms Oberman"), the Third Claimant, is a television, theatre and radio actress.

6. Each of the Claimants is Jewish and takes active positions against the rise of anti-Semitism in the UK over recent years. They also each actively use Twitter in order to speak out against this phenomenon. The feature which makes them co-claimants in these proceedings is the commonality of the Account which they say was used to defame and harass them. It is accepted however that their factual and evidential positions in this claim need to be considered separately.

7. The Defendant, Mr Daniel Bennett ("Mr Bennett") is also Jewish. He is a Member of the Bar of England and Wales and practised from Doughty Street Chambers until August 2019. The Claimants strongly suspect that Mr Bennett is *Harry Tuttle* and that he was the author of the tweets on which they wish to base their defamation and libel claims.

8. The case has some rather unusual and striking feature that I need to identify at the outset:

   (i) Mr Bennett says through his Counsel and Solicitors that he "admits responsibility" for the Account, and that he has "publicly accepted responsibility (and, thereby, legal liability for the Account)".

   (ii) Mr Bennett accepts that he controls the Account (now dormant) and can readily access the tweeting history, which he deleted from view in or around July 2019.

   (iii) Because, somewhat to my surprise, the issue was not dealt with at all in his Solicitor's detailed evidence in opposition to the application, I asked his Counsel at the hearing whether Mr Bennett's position at this trial was: (i) that he was the author of the tweets, (ii) that he was not was not the author of the tweets, or (iii) that he declined to answer.

   (iv) Counsel (having taken careful instructions over the adjournment) said that Mr Bennett took the third position, namely that he was not willing to answer my question.

   (v) I refer to these matters at this stage because they become relevant to the exercise of the *Norwich Pharmacal* jurisdiction.

9. Mr Bennett strongly opposes the applications. He also refutes the suggestion that any of the Claimants are victims of wrongdoing and says the Claimants have not shown even an arguable case. As I will describe more fully below, it is argued on his behalf that the Claimants have not met the jurisdictional pre-requisites for disclosure and that this is essentially a "fishing" exercise.

10. In their Solicitors' evidence, the Claimants appear to suggest that Mr Bennett's apparent earlier assertions (recorded in the media) that he is not *Harry Tuttle* are untruthful. Referring to material in the public domain which recorded Mr Bennett stating he was not responsible for the tweets and that he did not approve of their content, the Claimants' Solicitors have not drawn back from positively asserting those accounts to be dishonest.

11. Before me, the Claimants' Counsel rightly does not rely upon any such allegation and I would not have considered it appropriate for them to make such a case in a Part 8 claim without oral evidence.

12. The claim as argued has been advanced principally on the basis that Mr Bennett is not the author of the tweets and the Claimants say the relief they seek will reveal the true identity of *Harry Tuttle*, and will provide disclosure of the content of the tweets enabling them to pursue the appropriate defendant (which may or may not be Mr Bennett) and to prepare a detailed pleading concerning the specific publications.

13. I also note at the outset that the evidence and correspondence before me include a lengthy and, I regret to say, often intemperate debate between the parties' respective Solicitors in relation to alleged waiver of without prejudice privilege and allegations of professional misconduct. Those are irrelevant satellite issues. I informed the parties at the Skype hearing that I would not be drawn into these matters.

14. Given the strength of feeling on both sides of the Solicitors' debate, I should however record that I express no views as to who was in the "right" on these matters. I do not need to consider the claimed without prejudice material to decide this claim and have ignored that material in the evidence and substantial correspondence bundle before me.

II. The Background Facts: who is *Harry Tuttle*?

15. I need to address these background issues because one of the main points Mr Bennett deploys in opposition is claimed delay by the Claimants in bringing any claim. The Claimants say that it was not until mid-2019 that they had any clues as to the true identity of *Harry Tuttle* and that they have acted with due expedition since then.

16. The background is also relevant to the context in which the Claimants say they were defamed, namely the debate during 2018-2019 concerning alleged anti-Semitism without the Labour Party.

17. My summary below is based on the witness statements before me and the exhibits which included a number of media reports. The basic factual background seemed to me at the trial to be largely uncontroversial.

18. The Claimants' evidence is that the account @arrytuttle was used for some time as a medium to attack a number of Jewish people, by harassing and defaming them. It is said that in addition to the Claimants the victims included a number of barristers including David Wolfson QC, Simon Myerson QC, Adam Wagner and also Mr Lewis (the Claimants' Solicitor in these proceedings). As to the time when this type of tweeting took place, it is said that it was at its high point around 2017 but that it continued into 2019.

19. As I have already indicated, the true identity of *Harry Tuttle* was hidden. He was described by Hugo Rifkind in *The Times* as "a pro-Corbyn footsoldier in the Labour antisemitism wars". Mr Rifkind reported that *Harry Tuttle* used to tweet him

sometimes, and describes him as a person who was "challengingly smart and tenacious, but also all not all that nice". He was said by Mr Rifkind to frequently "heap scorn on prominent Corbyn-sceptic Jews".

20. The Claimants say that the fact that the Account was anonymous meant that these individuals were not able to take remedial action to find the identity of the individual even though the attacks were both personal and highly abusive. The evidence is that even Twitter does not know the identity of the person who operated the Account. That has not been contradicted.

21. Clues as to the identity of Harry Tuttle began to emerge in mid-2019 when four tweets from the Account provided the following biographical information regarding the person operating the @arrytuttle account:

    i) He was a barrister;

    ii) His area of practise was workplace injuries;

    iii) He lived in Bristol; and

    iv) As a young person he had lived in Liverpool and attended King David School there.

22. In relation to these four pieces of information an important event in the procedural history took place on 9 July 2019 when a Twitter account *@12scouts* tweeted *@arrytuttle* and suggested (it said, ironically) that he ought to meet Daniel Bennett who shared all those characteristics with *Harry Tuttle*. There is no evidence before me as to the identity of this detective tweeter *@12scouts*.

23. The Claimants say that this was in effect the "outing" of Mr Bennett as *Harry Tuttle.*

24. It is common ground that following the t*@12scouts* tweet, the Account @arrytuttle immediately became private and deleted all its followers. The tweeting history of the Account was also removed from public view.

25. At that point the Claimants' Solicitors emailed Mr Bennett indicating that litigation was likely and that he must preserve the tweets for the purpose of disclosure. He agreed through his Solicitors to do this.

26. On 10 July 2019, the Jewish Chronicle published an article in relation to the above matters. It recorded that in a new Twitter account established by Mr Bennett he had apologised to various people, such as David Wolfson QC and Adam Wagner, about what had been said by @arrytuttle. Mr Bennett also said in the apology that @arrytuttle had been set up by him in 2010 to counter allegations in the media against locals in a Town Green dispute concerning Bristol City FC. He stated that since 2013 the account "has drifted with many involved", and that the tweets sent by @arrytuttle to Mr Wolfson were not written or authorised by him. In oral argument before me it was not suggested any of these matters recorded in the Jewish Chronicle article were incorrect.

27. There followed both open and without prejudice correspondence which I do not need to set out. The latter correspondence created some of the disputes which have been debated at length in the witness statements before me. The present claim was issued on

12 February 2020. It was released by the Master for hearing before a High Court Judge, hence the delay in the trial before me.

III. The *Norwich Pharmacal* Application

28. The scope and nature of the relief originally sought in the *Norwich Pharmacal* application was, as Counsel for the Claimants ultimately accepted, far too wide. They originally sought not only the identity of the user of the Account but all tweets, metadata and analytics referring directly or indirectly to the Claimants from 2010 to 2019.

29. With some encouragement from me, the Claimants narrowed their application to focus on just the identity of *Harry Tuttle* and on a much shorter time period for documentary disclosure (from March 2018 to 9 July 2019) and to confine the disclosure request to tweets concerning the Claimants but in relation to confined subject-matter. I will return to the nature of the final order at the end of this judgment.

30. In the remainder of this Section, I will first summarise the relevant legal principles and then turn to the evidence before concluding with my analysis.

(a) Norwich Pharmacal: Legal Principles

31. The *Norwich Pharmacal* jurisdiction is expressly preserved by CPR 31.18. A large number of cases were cited to me, but both parties principally placed reliance on Flaux J's summary of the governing conditions in Ramilos Trading Ltd v Buyanovsky [2016] EWHC 3175 (Comm); [2016] 2 C.L.C. 896 at [11].

32. Detailed reference was also made to The Rugby Football Union v Consolidated Information Services Limited [2012] 1 WLR 3333, [2012] UKSC 55, and for completeness, I drew the attention of the parties to the recent decision of Baker J in Burford Capital Limited v London Stock Exchange [2020] EWHC 1183 (Comm) and his instructive review of the authorities, including Blue Power Group SARL et al. v ENI Norge AS. [2018] EWHC 3588 (Ch).

33. The Claimants placed some reliance on the fact that it was odd that Mr Bennett, unlike most respondents to *Norwich Pharmacal* applications, actively opposed the relief. I was not impressed by that argument. Although unusual, respondents to *Norwich Pharmacal* applications do sometimes positively oppose relief, and with success.

34. The Burford case and Clift v Clarke [2011] EWHC 1164 (QB) are good examples of this type of opposition. Mr Bennett was fully entitled to require the Claimants to satisfy the court to exercise its powers in what it is accepted is an exceptional and intrusive jurisdiction.

35. Based principally upon the above case-law (and specifically upon the way in which more recent cases have refined and explained the original tests), I suggested to the parties, and they accepted, a broad formulation of a workable and practical test under CPR 31.18 as follows:

i) The applicant has to demonstrate a good arguable case that a form of legally recognised wrong has been committed against them by a person (**the Arguable Wrong Condition**);

ii) The respondent to the application must be mixed up in so as to have facilitated the wrongdoing **(the Mixed Up In Condition)**;

iii) The respondent to the application must be able, or likely to be able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued (**the Possession Condition**);

iv) Requiring disclosure from the respondent is an appropriate and proportionate response in all the circumstances of the case, bearing in mind the exceptional but flexible nature of the jurisdiction (**the Overall Justice Condition**).

36. The Arguable Wrong, Mixed Up In, and Possession, Conditions each raise threshold hurdles and one does not get to the Overall Justice Condition unless the applicant overcomes those three hurdles. However, certain matters which arise in relation to the Arguable Wrong Condition, such as the strength of what has been established as a good arguable case, will feed into the Court's assessment when considering the Overall Justice Condition.

37. Based on the submissions made to me, I would identify a number of particular points which require emphasis when applying these conditions.

38. First, in relation to condition (i), Arguable Wrong, as Ramilos makes clear at [17], showing a good arguable case requires more than "an honest and reasonable belief that there has been wrongdoing".

39. Second, the court has to be vigilant in guarding against "fishing exercises" in what is regarded as an exceptional jurisdiction. Flaux J in Ramilos cited Lord Mance JSC's analysis of the scope of the jurisdiction in the Privy Council in Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36; [2015] AC 1675 at [139]-[140] and at [62] held that:

> "As that analysis demonstrates, the *Norwich Pharmacal* jurisdiction remains an exceptional jurisdiction with a narrow scope. The court will not permit the jurisdiction to be used for wide-ranging disclosure or gathering of evidence, as opposed to focused disclosure of necessary information: see the judgment of Rimer J in *Axa* and the Divisional Court in *Mohamed* at [133]. It clearly does not extend to the sort of wide-ranging requests set out in the schedule to the draft order in the present case. Furthermore, it is impermissible to use the jurisdiction as a fishing expedition to establish whether or not the claimant has a good arguable case or not. This emerges from the decision in *Norwich Pharmacal* itself, particularly in the speech of Lord Cross of Chelsea, in the passage where he approves the *Post* case to which Rimer J refers in *Axa* as cited at [23] above. I agree with Rimer J that Lord Cross was approving the whole of the passage he cited from the *Post* case, including the statement that bills of

> discovery could not be used: "to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendant…"

40. Third, in relation to condition (iv), the Overall Justice Condition, the principles to be derived from the authorities generally, including the factors relevant to the exercise of the Court's powers were considered by the Supreme Court in The Rugby Football Union v Consolidated Information Services Limited [2012] 1 WLR 3333, [2012] UKSC 55 (Lord Kerr) at [15]-[17]. I will not set out that lengthy extract which is now well-known. Lord Kerr's summary is helpful but not intended to cover every possible factor which might go to the Overall Justice Condition. It is not intended to be used as a form of statutory check-list.

41. Finally, I observe that it is not necessary to resolve the issue raised before me as to whether the Court is conducting some form of discretionary exercise in applying the Overall Justice Condition. It is simply a heavily fact-specific judicial assessment of whether the remedy is required to do justice. I refer to Andrew Baker J's observations in Burford Capital at para. 42.2 where he neatly summarises what I think is the nub of the question the court must answer in relation to the Overall Justice Condition.

(b) Norwich Pharmacal: the evidence and the satisfaction of the four conditions

42. The essence of Mr Bennett's opposition to both the *Norwich Pharmacal* Application and the PAD application is that the Claimants do not have a good arguable case in relation to either defamation or harassment. Counsel for Mr Bennett made forceful submissions that the Claimants cannot satisfy the threshold Arguable Wrong Condition.

43. As indicated above, the position of each Claimant needs to be looked at separately. But it needs to be noted that in each case the relevant tweets have been deleted by the operator of the Account. The direct evidence of publication is in Mr Bennett's electronic possession. The Claimant's evidence on what the tweets say is indirect and inferential. I will seek to summarise that evidence below.

44. The @arrytuttle account had over 2700 followers as at January 2019.

45. In relation to Mr Collier, the evidential position as to the content of the tweets is as follows:

45.1 On behalf of Mr Collier, who tweets as @mishtal, the evidence says that a substantial number of tweets were made by Harry Tuttle to the effect that he acts against the best interests of Jewish people, that he is dishonest and falsely fabricates allegations against Mr Corbyn, is hypocritical, a fraudster a racist and supports violence.

45.2 Although such tweets, if they existed, have been deleted from the Account, it is clear to me on the evidence that there are what I would call "trace elements" of tweeting of this nature, as I describe below.

45.3 The Google searches I was taken to in argument show the beginning of tweets made by @arrytuttle. They then provide hypertext links to the Internet pages where such tweets were posted. However, on arrival at the page, it appears that the tweet has

been deleted. I will identify some specific examples below (and provide dates where available and some observations where appropriate).

45.4 A screenshot shows a tweet by the Account following one by Mr Collier which says "*David likes to support violent fascist racists when it suits his purposes. He seems to consider them to be "innocent"".*

45.5 A screenshot shows a tweet by the Account which says, "*another Day and David Collier is falsely….*" Followed by "*this tweet is unavailable".* This tweet, if seen in full, would appear to be making an accusation of falsehood by Mr Collier.

45.6 A screen shot shows (following wording "*this tweet is unavailable*") Mr Collier saying, "*Not a racist, sorry*". From which it may be inferred he is replying to a tweet asserting that he is a racist.

45.7 A screenshot shows, under the heading *anti-Semitism and contemporary politics – one touch football*, part of a tweet from the Account saying: "*In particular the tweeters known as gnasherjew and Mishtal are right wing and…* " The remainder of this tweet is deleted. @Mishtal is Mr Collier's twitter handle, and the evidence is that many people using the Twitter account know @Mishtal as Mr Collier, indeed his photograph and name appear above it.

45.8 A screenshot shows that the Account tweeted on 10 January 2019 saying: "*David Collier @mishtal Yesterday Amazing Collier defends people who boast about looking Aryan and not Jewish."*. The evidence is that the person referred to is Ms. Riley.

45.9 A screenshot shows a tweet by the Account saying, "*Why was the far right David Collier there...*" [remainder deleted]. Here it is said this was alleging far right politics by Mr Collier.

45.10 A screenshot of 26 March 2019 shows the Account saying: "*David Collier is the liar. His associates are facing arrest for failing to turn up at court to face criminal charges against them. These are violent…*" On their face these seem to be assertions of dishonesty on the part of Mr Collier, and condoning of violence or association with violent persons.

45.11 A screenshot shows a thread in which five tweets have been deleted. A person called Gilead Ini intervenes in the exchange between Mr Collier and Harry Tuttle. Mr Ini states: "*Oddly, the only one I see slurring Jews as anti-Semites in this thread is you Harry, who with this Niemoller reference casts @mishtal , an honourable opponent of anti-Semitism, as a Nazi who will soon throw the Jews in concentration camps.*" And also *"… Your earlier entreaty, 'stop harassing Jewish people' applies to everyone but you. You harass and slur Jews who are concerned about anti-Semitism."* It is arguable that one can infer from Mr Ini's comments that the deleted tweets were accusing Mr. Collier of being a Nazi who will soon throw the Jews in concentration camps.

46. As to Ms. Riley, there is no evidence of actual tweets (even partial trace elements as above in relation to Mr Collier) but sworn evidence from her Solicitor, based on her instructions, to the effect that the Account tweeted statements that her assertions of anti-Semitism in the Labour Party were deliberately dishonest. The tweets are said to have made serious allegations of hypocrisy on her part, and are said to have stated that she had knowingly made false allegations of anti-Semitism in order to discredit Jeremy Corbyn. This was said in the tweets to be so that she could "save tax", amongst other things, rather than out of any genuine concern. It is said she was identified in certain tweets as an "Aryan looking Jew" (misquoting comments she is said to have made herself at an earlier stage).

47. Counsel for the Claimants accepted that the evidence in relation to Ms Oberman was substantially weaker than in respect of the other Claimants. The evidence concerning tweets about her is put in a very general way to the effect that "similar" false statements were made about her and added to by ironic accusations to the effect that she is a troll and a bully on Twitter.

48. Based on this relatively limited evidence in respect of publication and the alleged defamatory content of the publications, adduced by the Claimants, Counsel for Mr Bennett forcefully deployed a range of arguments in support of his overall submission that none of the Claimants could satisfy the Arguable Wrong Condition. He first focussed on how the Claimants' case on libel had developed over the course of time between letters before action and the present hearing. He made fair points in this regard but my focus has to be on the case as finally deployed by the Claimants in the evidence and argument before me at the trial.

49. Counsel for Mr Bennett reminded me of the ingredients of the cause of action. These elements – publication to a third party, of words concerning the Claimant which are defamatory, and which cause serious harm to reputation – are conveniently summarised in a recent case Johnson v McArdle [2020] EWHC 644 (QB), to which I was taken. Counsel also referred to the Supreme Court's decision in relation to s.1 of the Defamation Act 2013 in Lachaux v Independent Print Ltd [2019] UKSC 27; [2020] A.C. 612.

50. The essential argument made on Mr Bennett's behalf was that the Claimants could not show, to the requisite degree, that the statements in issue were likely to be defamatory or that the serious harm test would even arguably be met. It was also said that the law of defamation is concerned with the publication of "a statement" which is defamatory of the claimant, but it will only meet that definition if it has caused, or is likely to cause, serious harm to the reputation of the Claimant. In this regard, Counsel argued that only one of the Claimants has identified any statement which has been published about them (Mr Collier). However, it was argued that he has not explained how he would establish a viable cause of action in defamation in respect of those statements. It was also argued that the request for documents was a "fishing expedition" to find a claim.

51. Substantial reliance was placed on the fact that the Claimants are active and vigorous participants in the heated Twitter debates surrounding issues of anti-Semitism which involve serial allegations and counter-allegations. They are said to have been active in what Counsel called "bad-tempered" debates. These are said to be part of modern social media debate where the Court's traditional approach to libel law has, because of the context, been somewhat modified. Reference was made in this regard to Stocker v Stocker [2019] UKSC 17; [2020] UKSC 592 at [44]-[45].

52. Counsel for Mr Bennett also argued in his skeleton argument that all of the publications which are before the Court on the application are outside limitation, but in oral submissions he appeared to withdraw from positive reliance on that point. I was referred to evidence that the Claimants individually and their solicitor regularly take action over objectionable material on social media, including over material published anonymously.

53. These submissions were attractively presented, but they ignore the fact that this is by definition a claim seeking material at an early stage and which will enable the Claimants

to pursue a claimed wrongdoer. No claim has been pleaded yet and the wrongdoer may or may not deploy defences such as limitation or lack of serious harm or make arguments about meaning/opinion and the social media context. Those points all remain for argument and the Claimants' claims, if they result in an action, may not be successful. But I cannot decide that issue now.

54. It also seems to sit ill in the mouth of the claimed publisher of alleged libels who has deleted the publications (and thereby denied access to a claimant) to pick holes in the Claimants' cases as to publication (and content of the tweets) and as to harm when he holds the very publications. That point only goes so far and I have to be satisfied that the conditions are met.

55. With that preface and taking each of the Claimants separately, in my judgment, the position in relation to the Arguable Wrong Condition as regards the libel claims is as follows.

i) Mr Collier. On the basis of the limited materials and evidence, I am satisfied that a good arguable case has been established that Mr Collier was the subject of one or more defamatory tweets. I rely on what has been expressly identified from the trace element history, and the inferences one can draw from the partial tweets as to what may have been deleted. The identified statements, if made, are arguably defamatory and I can infer a sufficiently arguable case on serious harm: he was accused of being dishonest and falsely fabricating allegations against Mr Corbyn, as well as being a fraudster a racist and supporter of violence.

ii) Ms Riley. Although not as strong as the case advanced on behalf of Mr Collier, I consider she has satisfied the condition on the evidence before me. Counsel for Ms Riley was right to submit that he could probably plead a case based on what I have recorded above. I would be surprised if the defendant to that claim who had possession of the tweets which published those words (or similar words) would be able to withhold those from disclosure and apply to strike out the claim on the basis of a lack of pleaded publication. The identified statements, if made, are arguably defamatory and I can infer a sufficiently arguable case on serious harm: she was accused of making-up allegations of anti-Semitism in order to discredit Jeremy Corbyn and to achieve some form of fiscal advantage for herself (presumably, by hindering the election of a government which might raise taxes).

iii) Ms Oberman. Counsel for the Claimants was right to recognise that the sparse evidential details given of the publication put her claim in a different category. I am not satisfied on the material before me that she has satisfied the condition. The evidence is vague and non-specific. I say no more about her claim for *Norwich Pharmacal* or PAD (which fails for the same reason).

56. I would emphasise that I do not consider that seeking the identity of a publisher and a limited number of focussed publications, as is the case here, can be regarded as "fishing" for a cause of action in libel.

57. As to limitation, if and when a claim is issued the defendant (Mr Bennett or another) can argue that the claims are time-barred and a judge will determine whether that is the case and consider issues of extension of limitation, concealment and the like. I cannot

say on the materials before me, nor did Counsel for Mr Bennett ultimately strongly argue, that limitation was a matter which meant I could determine at this early stage that there was no good arguable case.

58. As I have identified above, the Claimants also rely upon claims in harassment under the Protection from Harassment Act 1997. The principles relevant to liability for harassment by publication were recently considered by Warby J in Sube v News Group Newspapers Ltd [2020] EWHC 1125 (QB) at [63]-[69]. Although the claim in that case related to allegations of harassment by publication by a conventional media publisher, which does give rise to specific considerations relating to the right of the press to freedom of expression, the relevant principles are broadly applicable to the social media context.

59. Counsel for Mr Bennett reminded me that to cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2 of the 1997 Act. He also submitted that the Court must be especially mindful of the threshold of gravity required before a finding of harassment can be made; and it must be careful to ensure that its approach is compatible with the human rights engaged by the particular facts of the case.

60. I accept these submissions. On the evidence before me I do not consider that the Arguable Ground Condition has been satisfied in relation to the harassment claims. The evidence does not, as it stands, explain how any misconduct is of an order which would sustain criminal liability; or explain how the purported claim engages with the specific rights (namely, the Claimants' Article 8 rights and the Article 10 rights of the Defendant) which are alleged to be in play. Counsel for the Claimants also accepted that there was no reliable evidence before me as to the number of alleged abusive tweets.

61. As to the Mixed Up In Condition and Possession Condition, Counsel for Mr Bennett accepted these were satisfied. As to the former, on his own case Mr Bennett facilitated or authorised the tweets. As to the latter, he accepts that he knows the identity of the Account holder and author of the tweets; and that he has possession of the deleted tweets from the Account.

62. Mr Collier and Ms Riley have satisfied the three threshold conditions and I accordingly turn to the most controversial issue argued before me, the Overall Justice Condition.

63. A wide range of arguments were deployed by Counsel for Mr Bennett in relation to this issue. The principal points were as follows. It was said that the jurisdiction invoked by the Claimants is an exceptional one, and the Claimants have failed to demonstrate on what basis there was a necessity for an order to enable action to be brought against the ultimate wrongdoer. This was said to be because Mr Bennett has publicly and in correspondence admitted responsibility and therefore legal liability for the Account. If there is a viable cause of action arising from the Account, it is said that Mr Bennett would be the correct defendant to any claim. I was told that Mr Bennett accepted liability by reference to the principles in *Gatley* at para.6.10, as a person who participated in, secured, or facilitated, the publication.

64. It was also submitted that the cause of action contemplated by the Claimants is weak, and they have failed to identify any clearly discernible legal rights which require

vindication. This was a repetition of the argument that none of the Claimants have established how they would establish the essential elements of a cause of action in defamation, and in all three cases such claims would be outside (and in some instances substantially outside) limitation.

65. In my judgment, the Overall Justice Condition is easily satisfied in this case for the following reasons:

65.1 As to the disclosure of the identity of the author of tweets, it is not an answer that Mr Bennett has accepted legal liability. That is the major point which Mr Bennett has deployed. However, the Claimants are entitled to sue all wrongdoers and if necessary obtain injunctive relief.

65.2 It is part and parcel of the Claimants' common law rights of access to justice to identify and sue in a public process those who have arguably defamed them. The law does not recognise the ability of one joint tortfeasor to hide others by taking on liabilities himself. The essence of the common law process and rule of law standards (and Article 6 compliant civil process) is a public hearing which includes public identification of the alleged wrongdoer. That applies in all civil claims but one can readily identify why it is of particular importance in the context of libel proceedings and their vindicatory aspect.

65.3 Accordingly, disclosure of the identity of the author of the tweets is plainly necessary if one is to sue that person in such a process.

65.4 As to the nature of the disclosure exercise, this is now very limited. It is not disputed that it requires but a few keystrokes to recover the tweets which Mr Bennett accepts he has deleted from the Account. It is not an onerous exercise. Disclosure will be limited and proportionate

65.5 This is not a fishing exercise. It is a request for a confined category of publications which are readily identifiable and go to the core of cause of action.

65.6 It is highly unmeritorious for Mr Bennett to argue that there is no viable claim in defamation because the Claimants have not pleaded the publications, when he accepts he deleted them and has all the relevant publications to hand.

65.7 Indeed, he has not said in evidence that the alleged libels identified by Mr Collier and Ms Riley were not in fact published. Rather, his strategy has been to poke holes in the case which they have been able to advance while holding the material which would allow them to plug those holes.

65.8 This is not a case where Mr Bennett has argued that he owes some form of confidentiality duty to *Harry Tuttle* (compare Clift v Clarke at para. [41]) or where there is some form of public interest which would be undermined where he required to make disclosure.

65.9 Counsel for Mr Bennett argued that the Claimants' application was a "continuation of politics by other means", rather than a genuine attempt to protect legal rights. The answer to that is "so what?". Absent special situations governed by the tort of abuse of process, the civil law is not concerned with why victims of wrongs seek relief from the courts. The sole issue is whether they have a sound legal claim.

65.10 Finally, as to Mr Bennett's argument that there have been delays in making these claims, Counsel for the Claimants was right to argue that once material in the public domain suggested that Mr Bennett was Harry Tuttle (tweets from an account @12scouts on 9 July 2019), the Claimants' solicitors did act with due expedition in seeking a remedy. I have set out the chronology of events in **Section II** above.

66. The *Norwich Pharmacal* claims of Mr Collier and Ms Riley succeed on the basis of the modified and more limited relief which I will set out in **Section VI** below, my conclusion.

V. The Pre-Action Disclosure Application

67. This is an alternative to the *Norwich Pharmacal* application which has succeeded on the basis identified above. I will however address it for completeness, albeit more briefly, in the event that this matter goes further.

68. One of the main purposes of the *Norwich Pharmacal* application was obtaining the identity of Harry Tuttle by way of a requirement that Mr Bennett simply answer that question. The PAD application cannot obtain answers to questions but seeks disclosure of documents.

69. The PAD application has been modified to seek a more limited category of documents which I can summarise as follows: that Mr Bennett discloses all tweets on the Harry Tuttle twitter account between March 2019 and 9 July 2019 which referred to the Claimants by name or other reference and which contain statements to the effect set out in paragraph 7 of the skeleton argument (essentially summarising the claimed defamatory tweets).

70. Pre-action disclosure is governed by CPR r31.16:

> "Disclosure before proceedings start
>
> 31.16—(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where—
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
>
> (d) disclosure before proceedings have started is desirable in order to—
>
> (i) dispose fairly of the anticipated proceedings;
>
> (ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

…"

71. The notes to the White Book 2020 at 31.16.4 (p 1031) helpfully explain the required approach to this rule:

> "The structure of r.31.16 formally requires a two-stage approach. The first stage is to establish whether the jurisdictional thresholds prescribed by heads (a) to (d) in subrule (3) are satisfied; if they are, the court proceeds as a second stage to consider whether, as a matter of discretion, an order for disclosure should be made (*Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585; [2014] 1 W.L.R. 2283 at [10]). For the purpose of satisfying the jurisdictional criteria in heads (a) and (b) in sub-rule (3) an applicant does not have to demonstrate an "arguable" or "prima facie" case; there is no jurisdictional "arguability threshold" (above at [23]). A party is not entitled to pre-action disclosure where there is no prospect of his being able to establish a valid claim; but in such a case disclosure could and no doubt would be refused in the exercise of discretion which arises at the second stage of the enquiry (above). See further para.31.6.5 below.
>
> …
>
> The documents or classes of documents sought should be carefully circumscribed, and the application limited to what is strictly necessary: *Snowstar Shipping Co Ltd v Graig Shipping Plc* [2003] EWHC 1367 (Comm); [2003] All E.R. (D) 174 (Jun) at [35]. Attempting to obtain pre-action disclosure of documents that would not in due course be subject to standard disclosure by simply calling for classes or categories of documents in which some documents would be disclosable is not permissible: *Hutchison 3G UK Ltd v O2* (UK) Ltd [2008] EWHC 55 (Comm). It is, further, inappropriate to require a respondent to identify which of its documents are within the scope of standard disclosure. All the documents within a class or category sought under r.31.16 must be within standard disclosure and cannot encompass categories of documents that might prove to be relevant only as "background". An applicant must show that it is more probable than not that the documents are within the scope of standard disclosure should an action commence: *Hutchison 3G UK Ltd v O2 (UK) Ltd* [2008] EWHC 55 (Comm)."

72. I have also borrowed with gratitude parts of Freedman J's summary of the relevant principles in Zenith Insurance Plc v LPS Solicitors Ltd [2020] EWHC 1260 (QB).

73. It was common ground that the leading case in which the operation of the jurisdictional and discretionary tests was considered in detail is Black v Sumitomo Corp [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562.

74. The following points in Rix LJ's judgment in that case are relevant to the application before me:

i) For the purposes of 31.16(3)(c) the extent of standard disclosure cannot easily be discerned without clarity as to the issues which would arise once pleadings in the prospective litigation had been formulated [76];

ii) If there would be considerable doubt as to whether the disclosure stage would ever be reached, that is a matter which the court can and should take into account as a matter of its discretion [77];

iii) For jurisdictional purposes the court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced, or of assisting the parties to avoid litigation, or of saving costs in any event [81]; and

iv) In relation to the discretionary stage [88]:

> "That discretion is not confined and will depend on all the facts of the case. Among the important considerations, however, as it seems to me, are the nature of the injury or loss complained of; the clarity and identification of the issues raised by the complaint; the nature of the documents requested; the relevance of any protocol or pre-action inquiries; and the opportunity which the complainant has to make his case without pre-action disclosure."

75. Reliance was placed by Counsel for Mr Bennett on the fact that in Black, disclosure was refused, including on the basis that "the complaint, its factual and legal basis, and the issues which it raises, are speculative in the extreme" at [82]. The Court should not allow the replacement of "focused allegation by a roving inquisition", at [92]. Further, it was explained at [95], that "[t]he more diffuse the allegations, however, and the wider the disclosure sought, the more sceptical the court is entitled to be about the merit of the exercise".

76. The question of the relevance of merits of the future claim is addressed in the commentary in the White Book 2020 at 31.16.5 (p1032):

> "In *Rose v Lynx Express Ltd* [2004] EWCA Civ 447; [2004] 1 B.C.L.C. 455, the Court of Appeal held:
>
> "… courts should be hesitant, in the context of an application for pre-action disclosure, about embarking upon any determination of substantive issues in the case. In our view it will normally be sufficient to found an application under CPR r.31.16(3) for the substantive claim pursued in the proceedings to be properly arguable and to have a real prospect of success, and it will normally be appropriate to approach the conditions in CPR r.31.16(3) on that basis."

> The applicant must show at least a prima facie case of entitlement to substantive relief: *Mars UK Ltd v Waitrose* [2004] EWHC 2264 (Ch); [2004] All E.R. (D) 136 (Jul), Ch at [5] and [10] (there the court refused to make an order as a prima facie case had not been shown). In *Jay v Wilder Coe* [2003] EWHC 1786 (QB); [2003] All E.R. (D) 526 (Jul) at [19] the court was willing to grant an order despite reservations that there may be substance to complaints that the application was merely speculative; though the judge held that he would not have struck out the claim if it had been presented at that point. However the merits of the future claim should be relevant to the assessment to be conducted under r.31.16(3)(d); this appears to be the analysis in *Snowstar Shipping Co Ltd v Graig Shipping Plc* [2003] EWHC 1367 (Comm); [2003] All E.R. (D) 174 (Jun) at [33]."

77. It is clear that where the Court is unable to conclude that there will be a claim at all, let alone a claim with a real prospect of success, whatever the jurisdictional position it should not permit this application under the exercise of its discretion: Gwelhayl Limited v Midas Construction Limited [2008] EWHC 2316 (TCC); 123 Con. L.R. 91, at [27]. Finally, an order for pre-action disclosure "even if not exceptional, is unusual": First Gulf Bank v Wachovia Bank National Association [2005] EWHC 2827 (Comm) at [24].

78. For the reasons already given in relation to Ms Oberman's *Norwich Pharmacal* claim, I consider she cannot at this stage show a sufficient prospect of success and none of the Claimants can show this at present in relation to the harassment claims.

79. I am satisfied however that Mr Collier and Ms Riley would have succeeded in their PAD application in respect of the libel claim for the reasons I set out briefly below.

80. As to the jurisdictional thresholds prescribed by heads (3)(a) to (d) of the rule:

    80.1 As to (a) and (b), Mr Bennett accepts that he and the Claimants are likely to be parties to putative subsequent proceedings of the kind referred to by the Claimants in relation to the Account. Indeed, he accepts a form of liability on the basis I have described above.

    80.2 As to (c), in my judgment Mr Bennett's duty by way of standard disclosure in any proceedings would extend to the confined documents now sought. They are simply the publications and surrounding metadata/analytics on which the libel claim are based.

    80.3 As to (d) the First and Second Claimant have established a "real prospect" of the disclosure meeting the criteria at (i)-(iii). The tweets are crucial in disposing fairly of the proceedings and/or for promoting compromise.

81. Finally, as to discretion, the reasons I have set out above in relation to the satisfaction of the Overall Justice Condition all point firmly towards the discretion for PAD being exercised in the First and Second Claimants' favour. These Claimants merely seek the limited core documents which show publication of content which they argue is defamatory. The nature and scope of these documents is narrow and it is not in dispute that they can be easily provided.

VI. Conclusion

82. In the result, Mr Collier's and Ms Riley's modified and narrowed claims for *Norwich Pharmacal* relief and for pre-action disclosure succeed. Ms Oberman's claims are dismissed.

83. The successful Claimants are entitled to information stating who used and had access to the *Harry Tuttle* twitter account between March 2018 and 9 July 2019 (when it became dormant). This information must specifically disclose the identity of the person or persons posting tweets on the said account referring to Mr Collier and Ms Riley or replying to these Claimants.

84. By way of disclosure, Mr Bennett will be directed to disclose all tweets on the *Harry Tuttle* twitter account in the period March 2018 to 9 July 2019 which referred to these Claimants by name or other reference and which contain statements to the effect (or to similar effect) to those I have summarised in para [45.1], as regards Mr Collier, and para. [46], as regards, Ms. Riley. The metadata and analytics in respect of such tweets must also be disclosed. I will settle the precise form of the Order if it cannot be agreed between the parties.

85. There is however one point in this regard which I need to mention. In oral argument I raised the question as to whether a witness statement from Mr Bennett or his Solicitor in respect of the above orders was necessary and appropriate.

86. I expressed the provisional view that in the circumstances of this case a witness statement was necessary and it should come from Mr Bennett. That statement should provide both the identity information and explain the nature and scope of the search undertaken in meeting the disclosure obligation, as well as verifying the completeness of the disclosure.

87. Counsel for Mr Bennett did not consider a witness statement was appropriate but time did not permit detailed submissions on this issue. This is an important issue and I will hear the parties further in relation to it when I deal with consequential matters, and finalisation of the order.