Neutral Citation Number: [2022] EWHC 2693 (KB)

Case No: QB-2019-000557

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 October 2022

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Stephanie Rebecca Hayden	**Claimant/Applicant**
- and -	
Associated Newspapers Limited	**Defendant**
- and -	
His Majesty's Courts and Tribunals Service	**Respondent**

- -

The Claimant appeared in person
Alex Ustych (instructed by **Government Legal Department**) for the **Respondent**
The Defendant did not attend and was not represented

Hearing date: 24 May 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties or their representatives by email and by release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 28 October 2022.

The Honourable Mr Justice Nicklin :

1. This judgment resolves the Claimant's Application for an order requiring the Respondent to provide documents that will provide the identity (and associated information) of a person who obtained a copy of a Court order made in these proceedings from the Court file.

A: Background

2. In February 2019, the Claimant brought a claim for libel and alleged harassment arising from an article published by the Defendant in the *Mail on Sunday* on 10 February 2019. The claim for defamation was dismissed, on 11 March 2020, after a ruling that the article bore no meaning defamatory of the Claimant (see [2020] EWHC 540 (QB)). The Claimant was ordered to pay the Defendant's costs. On 26 May 2020, the Claimant's claim was stayed by a Tomlin Order following a settlement between the parties.

3. The costs order made on 11 March 2020, however, remained unsatisfied and so, on 23 April 2021, the Defendant made an application for an order that the Claimant attend court for questioning. As a result of that Application, on 11 February 2022, Master Davison made an order requiring the Claimant to attend Court, on 31 March 2022, to provide information about her means and any other information needed to enforce the order for costs that remained unpaid ("the Davison Order").

4. On 15 February 2022, someone using the name "Notso jolly Halliday" posted a copy of the Davison Order on the website kiwifarms.net ("the KiwiFarms Post"). The website allows users who sign up for accounts to post on "threads" in various forums. The Davison Order was posted in the KiwiFarms Post on one of the threads which concerned the Claimant (amongst others), together with the following message:

> "[The Claimant] is in hock to the Daily Mail for £28k. Their legal costs would have been substantially more, so this is a reduced figure.
>
> He's got to attend court on 31st March for questioning over his financial circumstances and how he intends to pay this back.
>
> Better fess up to your Revolut and Monzo accounts… Bad news for [G] and [M] who can expect to receive the square root of Jack Shit towards their legal costs.
>
> [The Claimant] reaps what he has sown. Glorious."

5. The Claimant was misgendered in the KiwiFarms Post. The Claimant is transsexual. The misgendering of her in the post would have been deliberate. She has become a target for hostility, particularly on the KiwiFarms website. Some of that has been directed at her because she is transsexual, but significant interest and commentary has also been provoked by the large number of legal actions that the Claimant has brought in recent years.

6. The Claimant, I am satisfied, regularly monitors what is said about her on the KiwiFarms website. As a result, she became aware of the KiwiFarms Post shortly after it was posted and took immediate action. For someone who complains about harassment, visiting the website on which this alleged harassment is posted is not

altogether easy to understand. The Claimant told me, at the hearing, that she does not post on the KiwiFarms website "*in any guise*".

B: The application for disclosure of the identity of the person who obtained a copy of the Court order

7. On 15 February 2022, the day of the KiwiFarms Post, the Claimant issued an Application Notice in the claim against the Defendant (but without notice to the Defendant) for an order that the Respondent ("HMCTS") should disclose the identity of the person who had obtained a copy of the Davison Order from the Court which had then been included in the KiwiFarms Post. I shall refer to this person as X. The grounds on which this order was sought was that the Davison Order had been "*posted on a harassment website to intimidate the Claimant*".

8. In the draft order that accompanied the Application Notice, the Claimant sought an order requiring HMCTS to provide the full name, address, email address and method of payment used by X. The draft order also sought a direction that HMCTS should serve a copy of the Application Notice, evidence in support and the Order upon X. In other words, the Claimant was proposing that the Order that she sought should be made without notice to X. The Claimant asked that her Application be dealt with without a hearing.

9. The Application was supported by a witness statement from the Claimant, also dated 15 February 2022. The Claimant exhibited the KiwiFarms Post and explained the background to the Davison Order and its subsequent posting on the KiwiFarms website.

> "The order has been posted as part of a longstanding thread of posts on the KF website, which are calculated to harass, smear, abuse and intimidate me. I have had to issue several claims in this court as a result of this harassment campaign… This court in *Hayden -v- Dickenson* [2020] EWHC 3291 (QB) at [90] has stated that the campaign on KF is a targeted campaign of oppression against me, which is significantly aggravated by it being a group activity. The ["Notso jolly Halliday"] account on KF has targeted me since September 2019. It has posted confidential information about my family, my friends, my ex-partner, and me. The abuse is relentless and includes homophobic and transphobic slurs. Although the sealed order of Master Davison is a document within the public domain, nevertheless, there is no right for any member of the public to obtain that document to then use as part of a harassment campaign calculated to smear, humiliate, and intimidate me online. I should be free to litigate in this court without fear of intimidation…
>
> As such, I am applying for disclosure of information from "HMCTS" in terms of the draft order. The information will be used to identify [X] and will be provided to the Police, the Defendant's solicitors, and used by me for the purpose of conducting ongoing proceedings in this court and/or commencing further proceedings for harassment. The information will be used for no other purpose.
>
> "HMCTS" holds the information and is in a position to provide the information to me at minimal cost without delay. As a party to this claim, I have a legitimate reason to obtain this information and share it with the Defendant and use it for the purposes outlined above. [X] did not obtain the office copy [of the Davison Order]

for a legitimate reason, but rather for the purpose of conducting a campaign of criminal harassment against me…"

10. The Claimant did not, in her Application Notice or evidence in support, identify the jurisdiction that she contended enabled the Court to make the order that she sought.

11. The Claimant's Application was referred to me and, on 25 February 2022, I made an order directing that the Application would be dealt with at a hearing (not on the papers). As the Application was seeking an order against HMCTS, I directed that the Claimant must serve it (and the evidence in support) upon the Treasury Solicitor. Further directions were given for the fixing of the hearing and the filing of any further evidence by the Claimant and the Respondent. The Order explained my reasons as follows:

"(A) The Application has been referred to me by the Master because it raises an important point of principle: in what circumstances can the Respondent (whether voluntarily or by Court Order) provide information about the identity of a person who has obtained a copy of a document required to be open for public inspection from the Court File in civil proceedings. The Application has echoes of the *Norwich Pharmacal* jurisdiction, but the point needs proper investigation. It is not suitable for resolution without a hearing, or without the Respondent being properly served.

(B) The Respondent is an Executive Agency of the Ministry of Justice. I have therefore directed service of the Application on the Treasury Solicitor (CPR 6.10(b) and PD 66).

(C) I have given directions ultimately leading to the Hearing which will be fixed as directed...

(D) The Defendant is not a respondent to the Application. The directions do not require the Defendant to do anything. If the Defendant wanted to participate and make submissions at the Hearing, then it should ensure that it too complies with the directions given … above as they apply to the Respondent."

12. Ultimately, the hearing was fixed for 24 May 2022. The Defendant has not participated. Beyond confirming that it does have information and documents identifying X, including X's name, email address and method of payment used, the Respondent has adopted a neutral position, contending that it is a matter for the Court whether to allow the Claimant's Application.

C: Involvement of X in the Application

13. Following the Order of 25 February 2022, the Respondent sent a letter, dated 9 May 2022, to X to advise X of the application and that a hearing that had been fixed.

14. On 12 May 2022, X sent a response to the Government Legal Department ("GLD"), who were representing the Respondent. X objected to the short notice and sought an adjournment of the hearing, fixed for 24 May 2022, on the grounds that X wanted to take legal advice. X also objected to the Respondent's adoption of a neutral position on the Application. X provided a list of 27 actions that X alleged the Claimant had brought since 2014. X raised several points, but principally X was concerned that disclosure of

X's identity to the Claimant would be likely to lead to the Claimant issuing a legal claim against X. In the letter, X stated:

> "In any event, disclosing my identity will not reveal the identity of the 'KiwiFarms' poster. The Order was lawfully shared in several private groups with multiple people where Ms Hayden's conduct is occasionally and legitimately discussed, and where I am able to evidence that I neither encouraged the posting of, or posted, the Order on KiwiFarms. I was however entitled to purchase a copy of, and to share that copy of the Order with others lawfully and lawful purposes if I wished to, which means there is no wrongdoing on my part. It was not intended that Ms Hayden would know about this so there was no intention to harass her, even if can be shown that it being posted caused harassment (which is not accepted)."

15. On 16 May 2022, the Claimant responded. She objected to X providing information in a letter, rather than a witness statement, and she contended that some of the information was inaccurate. The list of actions brought by the Claimant, and their outcome, was said by the Claimant to be "*entirely misleading*". The Claimant also objected to X attempting to use GLD as a representative to oppose the Application on X's behalf. The Claimant argued that if X wanted to oppose the Application, then X would have to instruct lawyers to represent him/her. Nevertheless, the Claimant was prepared to agree to the adjournment of the application to enable X to take advice and to "*become a party to the proceedings*".

16. Having considered X's position, and the Claimant's response, I directed that the hearing would go ahead, but that the Application would be dealt with in stages. Initially, it would be for the Claimant to satisfy the Court that there was jurisdiction to make the Order sought and, if established, then to raise a prima facie case that the Court should make an order. If the Court were satisfied of these two things, then the hearing would be adjourned to enable representations to be made by X. X would be required to file a witness statement putting forward any evidence in resistance to the application. A suitably redacted copy of X's witness statement would be provided to the Claimant. The practicalities of the hearing – particularly the protection of the identity of X – would have to be resolved at a later point. GLD notified X that the Application was to be dealt with in stages.

17. The Claimant filed a further witness statement on 4 April 2022. She provided further information about the harassment to which she feels she has been subjected arising from postings on two particular threads on the KiwiFarms website. The Claimant also put forward a theory, based on her analysis of these posts, that the "Notso jolly Halliday" account was operated by someone with connections to the legal profession. It is impossible to reach any conclusion, on the presented evidence, whether this is correct.

D: Legal Principles and parties' submissions

18. In her original Application Notice, the Claimant had sought an order that the Respondent should provide *information* to her about X. In her skeleton argument, and at the hearing, the Claimant's application was focused on an order requiring the Respondent to provide documents that would identify X. The Claimant advanced her argument that the Court had jurisdiction to make the Order that she sought on two established bases. First, under CPR 5.4B or, in the alternative, under the *Norwich*

Pharmacal jurisdiction. As a fall-back, the Claimant contended that the Court could make the order that she sought under its "inherent jurisdiction", although this contention was not really pursued at the hearing. The Claimant has also narrowed her application to exclude from the information she seeks the method of the payment used by X. Her application therefore is to seek the documents that the Respondent holds that identify the name and contact details that X provided when requesting a copy of the Davison Order.

(1) CPR 5.4B

19. CPR 5.4B provides:

> "(1) A party to proceedings may, unless the court orders otherwise, obtain from the records of the court a copy of any document listed in paragraph 4.2A of Practice Direction 5A.
>
> (2) A party to proceedings may, if the Court gives permission, obtain from the records of the court a copy of any other document filed by a party or a communication between the court and a party or another person."

20. Paragraph 4.2A of Practice Direction 5A provides:

> "A party to proceedings may, unless the court orders otherwise, obtain from the records of the court a copy of-
>
> (a) a certificate of suitability of a litigation friend [CPR 21.5(3)];
>
> (b) a notice of funding;
>
> (c) a claim form or other statement of case together with any documents filed with or attached to or intended by the claimant to be served with such claim form;
>
> (d) an acknowledgment of service together with any documents filed with or attached to or intended by the party acknowledging service to be served with such acknowledgement of service;
>
> (e) a certificate of service, other than a certificate of service of an application notice or order in relation to a type of application mentioned in sub-paragraph (h)(i) or (ii);
>
> (f) a notice of non-service;
>
> (g) a directions questionnaire;
>
> (h) an application notice, other than in relation to –
>
> (i) an application by a solicitor for an order declaring that he has ceased to be the solicitor acting for a party; or
>
> (ii) an application for an order that the identity of a party or witness should not be disclosed;

(i) any written evidence filed in relation to an application, other than a type of application mentioned in sub-paragraph (h)(i) or (ii);

(j) a judgment or order given or made in public (whether made at a hearing or without a hearing);

(k) a statement of costs;

(l) a list of documents;

(m) a notice of payment into court;

(n) a notice of discontinuance;

(o) a notice of change; or

(p) an appellant's or respondent's notice of appeal."

21. CPR 5.4B therefore provides a regime which gives a party to proceedings:

i) a *prima facie* right to obtain the documents listed in PD 5A §4.2A; but the Court can, by order, limit that right; and

ii) standing to apply to the Court to obtain "*from the records of the court*" a copy of any other document filed by a party or a communication between the court and a party or another person.

22. It is to be noted that the regime for party access to records of the court under CPR 5.4B(2) is the same as that for non-party access under CPR 5.4C(2). In both instances, the Court's permission is required, for which an application must be made: CPR 5.4D. A non-party's *prima facie* entitlement to access to documents from the court file is to a more limited category of documents than the parties: see CPR 5.4C(1). Again, that *prima facie* entitlement is subject to the Court making an order restricting that access: CPR 5.4C(4).

(a) What are the "records of the court"

23. The first matter to be resolved in relation to the Claimant's application is whether the documents she seeks are "records of the court" within the terms of CPR 5.4B(2).

24. The CPR contain no definition of "*records of the court*". That remains so, despite the Supreme Court's plea for reform in ***Dring -v- Cape Intermediate Holdings Limited* [2020] AC 629** [19], [50]. As Baroness Hale noted, the CPR do not even specify or mandate what the records of the court are to contain: [19].

25. Each of the documents listed in PD 5A §4.2A (where they exist) would appear to be a record of the court, but this list is not exhaustive (as CPR 5.4B(2) and 5.4C(2) recognise). A review of the PD 5A §4.2A documents arguably demonstrates some surprising omissions. Given their importance to modern civil litigation, perhaps the strangest absences are skeleton arguments, witness statements and expert reports. Oddly, PD 5A §4.2A(i) *does* include witness evidence that has been relied upon in support of various applications, but not witness evidence relied upon at the final trial.

Another anomaly is that the CPR *requires* relatively few documents to be filed. The list of documents in PD 5A §4.2A are generally documents that are required by the CPR to be filed (an exception is evidence in support of an application notice that is not being served by the Court: see CPR 23.7(2)). Beyond documents that are required by the CPR to be filed, what is available, therefore, from the court file is entirely dependent upon what the parties – or the Court – have chosen to file.

26. Arguably, this omission has become more important since the High Court has adopted electronic court filing for civil claims ("CE-File"). Before the advent of CE-File, Judges would have been very familiar with the unstructured and haphazard contents of a paper court file. CE-File has done little to improve that. In terms of structure, the electronic court file largely mirrors the predecessor paper file. As to what documents are available on CE-File, this remains largely dependent upon what the parties have filed. Typically, the parties file a wide range of documents (not all accurately described), going well beyond those that are required to be filed under the CPR. It is now commonplace for entire electronic trial bundles to be uploaded to CE-File.

27. In the absence of reform from the Civil Procedure Rules Committee, ***Dring*** remains the key authority on the approach to be adopted to applications for documents from the Court's records:

> [22] The essence of a record is that it is something which is kept. It is a permanent or long-term record of what has happened. The institution or person whose record it is will decide which materials need to be kept for the purposes of that institution or person. Practice may vary over time depending on the needs of the institution. What the court system may have found it necessary or desirable to keep in the olden days may be different from what it now finds it necessary or desirable to keep. Thus one would expect that the court record of any civil case would include, at the very least, the claim form and the judgments or orders which resulted from that claim. One would not expect that it would contain all the evidence which had been put before the court. The court itself would have no need for that, although the parties might. Such expectations are confirmed by the list in Practice Direction 5A.
>
> [24] However, current practice in relation to what is kept in the records of the court cannot determine the scope of the court's power to order access to case materials in particular cases. The purposes for which court records are kept are completely different from the purposes for which non-parties may properly be given access to court documents. The principle of open justice is completely distinct from the practical requirements of running a justice system. What is required for each may change over time, but the reasons why records are kept and the reasons why access may be granted are completely different from one another.
>
> [23] The "records of the court" must therefore refer to those documents and records which the court itself keeps for its own purposes. It cannot refer to every single document generated in connection with a case and filed, lodged or kept for the time being at court. It cannot depend upon how much of the material lodged at court happens still to be there when the request is made.

28. Those observations came from the era before electronic filing. Unless, exceptionally, documents are removed from CE-File, there will be no question of documents that have

been filed being unavailable at a later point. As noted above, it is now common for the trial bundle(s) in a civil claim being uploaded to CE-File. Those electronic bundles will typically include many of the documents from CPR PD 5A §4.2A, but will also (critically) include witness statements, expert reports, and the key documents in the claim (none of which is required to be filed by the CPR). The answer to what may fall within the definition of the "*records of the court*" may therefore not be as straightforward as it was in the era of paper court files.

29. As Baroness Hale noted, the question what are the "records of court" requires consideration of *why* the records are kept. She identified two objectives: (a) to enable the Court to carry out its work effectively; and (b) open justice. As to open justice, in ***Dring*** [30], Baroness Hale quoted Lord Woolf MR's words in ***Barings plc -v- Coopers & Lybrand*** **[2000] 1 WLR 2353** [43]:

> "As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed adversely affect the ability of the public to know what is happening in the course of proceedings."

30. She went on to explain the impact that open justice had on the issue of access to documents held by the Court:

> [42] The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases—to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In ***A -v- British Broadcasting Corporation*** **[2015] AC 588**, Lord Reed JSC reminded us of the comment of Lord Shaw of Dunfermline, in ***Scott -v- Scott*** **[1913] AC 417**, **475**, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard "with open doors", "bore testimony to a determination to secure civil liberties against the judges as well as against the Crown" ([24]).
>
> [43] But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material.
>
> [44] It was held in ***Guardian News and Media*** **[2013] QB 618** that the default position is that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. It follows that it should not be limited to those which the judge has been asked to read or has said that he has read. One object of the exercise is to enable the observer to relate what the judge has done or decided to the material which

was before him. It is not impossible, though it must be rare, that the judge has forgotten or ignored some important piece of information which was before him. If access is limited to what the judge has actually read, then the less conscientious the judge, the less transparent is his or her decision.

[45] However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said in both ***Kennedy -v- Information Commissioner (Secretary of State for Justice intervening)* [2015] AC 455** [113], and ***A -v- British Broadcasting Corpn*** [41], the court has to carry out a fact-specific balancing exercise. On the one hand will be "the purpose of the open justice principle" and "the potential value of the information in question in advancing that purpose".

[46] On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case.

[47] Also relevant must be the practicalities and the proportionality of granting the request. It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day-to-day control of the court process. The non-party who seeks access will be expected to pay the reasonable costs of granting that access. People who seek access after the proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties may not have done so. Even if they have, the burdens placed on the parties in identifying and retrieving the material may be out of all proportion to benefits to the open justice principle, and the burden placed upon the trial judge in deciding what disclosure should be made may have become much harder, or more time-consuming, to discharge. On the other hand, increasing digitisation of court materials may eventually make this easier. In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate.

31. Baroness Hale noted (in [24]) that the purposes for which (and the reasons why) the Court keeps records are not necessarily aligned with the principles of open justice. Historically, there were compelling practical reasons why there had to be limits on the

documents that the Court could retain. When the Court operated a paper-based system, only a fraction of the documents in a civil claim could be retained because of the limits of practical space, and the need for cumbersome storage and retrieval protocols. That no longer holds true. Since the advent of electronic filing with CE-File, a point to which Baroness Hale adverted (in [47]), there is no *practical* limit to the documents that the Court can retain electronically. Consequently, it may be time for the policy to be considered afresh.

32. As noted by Baroness Hale, an example of the importance to open justice is the availability of skeleton arguments. Arguably, skeleton arguments (and other documents containing a party's written submissions) are some of the most important documents in modern civil litigation. It is a written statement of the party's argument to the Court. The (now ubiquitous) skeleton argument enables more efficient utilisation of Court time because it permits pre-reading by the Judge. The resulting abbreviated oral submissions often mean that a transcript of the hearing would reveal only a fraction of the argument that the relevant party was deploying. The same is true of witness statements when ordered to stand as a witness's evidence in chief. The availability of skeleton arguments, and witness statements, deployed in open court hearings is essential to any meaningful concept of open justice. Parties are aware that they may be required to provide copies of their skeleton arguments to the public and (critically) representatives of the media who attend the hearing, and routinely do so. On rare occasions, parties refuse to provide their skeletons to third parties, and Judges have to enforce their provision to secure open justice.

33. Despite this critical role, there is presently no *requirement* under the CPR to upload a skeleton argument or trial witness statements to CE-File. Whether such a document is so filed, is dependent either upon the relevant party deciding to do so or (unusually) the Court making an order requiring it to be filed.

34. No doubt Courts can effectively manage access to skeleton arguments and witness statements if requests are made at the immediate hearing (or shortly afterwards). But the importance of the contents of these documents may endure (or not become apparent until) long after the hearing at which they were deployed. Currently, the practical viability of an application to the Court by a non-party, under CPR 5.4C (or the Court's inherent jurisdiction, recognised in ***Dring*** [49]), for a copy of a skeleton argument that was used at a hearing is dependent on whether the Court happens still to have a copy of the skeleton argument in its records.

35. Ultimately, what records and documents are kept by the Court is a policy decision. At present, I would suggest that there are two problems. The absence of definition of "records of the court" means that it is unclear what documents, available on CE-File, fall within the definition. The second is the absence of a requirement to file documents that might be thought to be of critical importance to both the resolution and understanding of a civil claim (e.g. witness statements, experts reports and skeleton arguments). There is a clear argument that, to promote and safeguard open justice, documents routinely kept by the Court (and thereafter potentially available to parties and non-parties) should include those that enable an understanding of the issues in the claim, the evidence relied upon in any trial held in public, the arguments advanced by the parties, the ultimate result of the case and the reasons contained in any judgment.

36. This has practical importance as it remains an open question as to whether parties to civil claims remain under a continuing obligation to co-operate with the court to further the open justice principle once the proceedings are over (see ***Dring*** [51]). Of course, the need for such an obligation would be obviated if the Court implemented a coherent policy of requiring documents critical to the promotion and facilitation of open justice to be filed. Thereafter, the Court would retain control of access to such documents and would not be dependent upon the assistance of the parties, possibly long after the event, to provide them.

(b) Further evidence provided after the hearing

37. The importance of the interpretation of "records of the court" under CPR 5.4B(2) only became apparent at the hearing. It was therefore agreed that, following the hearing, the Respondent would file further evidence concerning this point, and specifically CE-File.

38. Geraint Evans, the Acting Senior Operations Manager in the (then) Queen's Bench Division provided a witness statement dated 7 June 2022. His evidence addressed what he described as the "primary court records" held by the Court to be contrasted with the Court's "administrative records". The former would be filed and available on CE-File whereas the latter are not, but nevertheless "held" by the Court.

39. Mr Evans provided the following description of CE-File:

> "CE-File is an electronic case management system which allows for the issue of a claim, the filing of applications, the filing of documents and communication with the court electronically. CE-File was rolled out in the Queen's Bench Division in 2019 and replaced the previous paper-based case management system. The CE-File database contains all documents filed in relation to each claim and allows the parties remote access to the electronic records. In some cases a CE-File claim can by anonymised by order of a Judge.
>
> When any filing on a case is made, all staff and judiciary see an 'alert' on the homepage of a case file which indicates unprocessed filings. Staff or the Judge can click this alert and see what is unprocessed, however, once the filing is processed, the alert disappears. For office copy requests, once the filing is processed, it is not listed in the case file event log, whereas other filings do appear in the event log for both staff and judiciary to view.
>
> The Court does not distinguish how it treats a document or database entry related to obtaining a document (order) by a member of the public. Under the system of paper files, the request would be placed in the court file and not filed separately, under CE-File where requests are now made electronically the request is retained on the case management system under the unique case number relating to the case."

40. He also exhibited to his witness statement the CE-File guide for processing office copy requests ("the Guide"). The Guide contains examples of the two forms that are provided to parties and non-parties who wish to request a copy of a document from the records of the court pursuant to CPR 5.4B(2) or 5.4C(2). Both forms require the relevant applicant to provide the following information: (1) the date of the request; (2) the case number; (3) the name of the Claimant; (4) the name of the Defendant; (5) the name and address of the person requesting the copies; and (6) a telephone number. The non-party

form includes, additionally, a box seeking the applicant's "reason for request". It is unclear to me, on the evidence, whether a refusal to provide an answer to "reason for request" would lead to the request for documents being rejected. As I explain below (see [65]), I do not consider that a non-party is required to provide a reason why s/he wishes to obtain documents that are required to be made available to the public under CPR 5.4C(1).

41. The person making the request can then indicate, by ticking relevant boxes, the copy document(s) that s/he wants. The menu of documents available to parties is those documents identified in CPR PD 5A §4.2A. For non-parties, the choices available are limited to the statements of case, orders and judgments. In the Guide, these are defined as "public documents" reflecting the fact that, under CPR 5.4C(1), once an acknowledgement of service is filed (or another event listed in CPR 5.4C(3) has occurred) such documents are required to be open to public access, subject to the Court making an order restricting public access under CPR 5.4C(4). As noted in the Guide, requests for copy documents made by a party do not need to be made as the relevant party has access to the case documents on CE-File.

42. The Guide explains to Court staff how to process requests for copies of documents on the Court file. On page 21 of the Guide, there appears the following:

> "Note that the claimant may request to know who has requested documents from there (sic) case. If they wish to know the address etc. we must refer this to the Master for directions."

(c) Submissions

43. The Claimant submitted that the submission of the request for a copy of the Davison Order was a "*communication between the court and ... another person*" within the terms of CPR 5.4B(2). Further, she contends that this document forms part of "*the records of the court*". As such, she argues, the Court has jurisdiction to order that the document be provided to her. She submits that this argument is supported by Mr Evans' evidence about the way the request is handled by the Court, in accordance with the Guide, in particular the fact that the request is retained on the case management system even after it has been processed.

44. The Claimant contends that a non-party who seeks copies of documents under CPR 5.4C(1) must accept that his/her request becomes part of the court record. As a result, details of the request, including his/her identity will become information to which the parties to the relevant claim are entitled. She argues, "*public access comes with consequences*". A party has a legitimate interest in knowing who has accessed the court record, or communicated with the Court, in relation to his/her proceedings. A non-party, she argues, exercising his/her rights of open justice cannot complain if a party relies on precisely the same rights to discover the non-party's identity.

45. In support of her argument, the Claimant provided a copy of an Order that had been made in the Leeds County Court in a case in which she was a party. A third party had made a request, under CPR 5.4C(1), for copies of the Claim Form, Particulars of Claim and Defence and Counterclaim. For some reason, the request was referred to a Judge who then made an Order granting "permission" for the statements of case to be "released". Unless the Court had previously made a restriction on the availability of the

requested statements of case (under CPR 5.4C(4)) no "permission" of the Court was required for these documents to be provided to the third-party. The applicant was entitled to them, as documents required to be publicly accessible, under CPR 5.4C(1). Nevertheless, the Claimant argued that this showed that a person applying to the Court for copies of court documents accepts that his/her identity may be revealed to the parties.

46. In his skeleton argument, Mr Ustych did not address 5.4B(2) as the basis for the order sought by the Claimant. In fairness, until he received the Claimant's skeleton argument, she had not identified the jurisdiction which she contended enabled the Court to make the Order that she sought. At the hearing, Mr Ustych suggested that requests from non-parties for documents under CPR 5.4C(1) did not form part of the records of the court. They were administrative documents.

(2) *Norwich Pharmacal*

47. The alternative basis on which the Claimant seeks to establish jurisdiction to make the Order she seeks is under the *Norwich Pharmacal* jurisdiction: ***Norwich Pharmacal -v- Customs and Excise Commissioners* [1974] 1 AC 133**.

48. Conventionally, in order for relief to be granted under the *Norwich Pharmacal* jurisdiction, three conditions had to be satisfied (from ***Mitsui -v- Nexen Petroleum* [2005] 3 All ER 511** [21]):

    i) a wrong must have been carried out, or arguably have been carried out, by an ultimate wrongdoer;

    ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and

    iii) the person against whom the order is sought must (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

49. Subsequent authorities have established the following further principles:

    i) The *Norwich Pharmacal* jurisdiction is a flexible remedy capable of adaptation to new circumstances: ***Ashworth Hospital Authority -v- MGN Ltd* [2002] 1 WLR 2033, 2049F** (CA).

    ii) The wrong alleged in the *Norwich Pharmacal* case was a tort, but it has been established that any type of wrong may be sufficient, whether civil or criminal. However, the applicant must be the alleged victim of the crime. A third-party cannot rely upon detection of crime as a justification for a *Norwich Pharmacal* order if s/he is not the victim of it: ***Ashworth Security Hospital -v- MGN Ltd* [2002] 1 WLR 2033** [54].

    iii) It is not necessary for the applicant for a *Norwich Pharmacal* order to intend to bring civil proceedings. The information may be sought for other avenues of redress, for example a disciplinary action against an employee: ***British Steel Corporation -v- Granada Television Ltd* [1981] AC 1096, 1200**.

iv) The applicant must demonstrate that an order for the information is necessary. This is a threshold condition, not a question of discretion: ***R (Omar) -v- Secretary of State for Foreign and Commonwealth Affairs*** **[2014] QB 112** [30]. As such, if the applicant could obtain the information through other practicable means, the relief will be refused: ***Mitsui*** [24]. The need to order disclosure will be found to exist only if it is a "*necessary and proportionate response in all the circumstances*", but it need not be a remedy of "*last resort*": ***Rugby Football Union -v- Consolidated Information Services Ltd (formerly Viagogo Ltd)*** **[2012] 1 WLR 3333** ("***Viagogo***") [16].

v) Ultimately, *Norwich Pharmacal* relief is an equitable remedy, and the Court has a discretion whether it should be granted. The following factors may be relevant to the Court's ultimate decision (***Viagogo*** [17]):

a) The strength of the possible cause of action contemplated by the applicant for the order.

b) The strong public interest in allowing an applicant to vindicate his legal rights

c) Whether making the order will deter similar wrongdoing in the future.

d) Whether the information could be obtained from another source

e) Whether the respondent knew or ought to have known that he was facilitating arguable wrongdoing.

f) Whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer harm as a result.

g) The degree of confidentiality of the information sought.

h) The privacy rights under Article 8 of the individuals whose identity is to be disclosed.

i) The rights and freedoms under the data protection regime of the individuals whose identity is to be disclosed.

j) The public interest in maintaining the confidentiality of journalistic sources, as recognised in s.10 Contempt of Court Act 1981 and Article 10.

vi) The Court will also have regard to any public interest for or against disclosure: ***Campaign Against Arms Trade -v- BAE Systems plc*** **[2007] EWHC 330 (QB)** [20]. Guidance as to balancing competing rights has been given by the Court of Appeal in ***Dunn -v- Durham County Council*** **[2013] 1 WLR 2305**.

50. One aspect of the jurisdiction that has proved to be controversial is the extent to which the respondent to a *Norwich Pharmacal* application has been "*mixed up*" in the wrongdoing. In the original ***Norwich Pharmacal*** decision, the status of the respondent as beyond something than a 'spectator', 'mere witness', or 'bystander' was a recognised

limit of the jurisdiction: see Lord Reid, **174F**; Lord Morris, **180D-E**; and Lord Kilbrandon, **188A-C**. Similarly, and applying these principles, in ***Ashworth*** [35], Lord Woolf CJ drew a distinction between a person who was "involved" in the wrong and someone who was simply an "onlooker":

> "Although [the] requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement… is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion."

51. Facilitation (as opposed to participation) in the wrongdoing has been held to be sufficient: ***R (Mohammed) -v- Secretary of State for Foreign and Commonwealth Affairs*** **[2009] 1 WLR 2579** [71]. Indeed, facilitation is what usually satisfies this element for *Norwich Pharmacal* orders against the operators of websites on which material has been posted by (anonymous) third parties. The websites have (at least) facilitated the publication that is the arguable wrong.

52. Very fairly in his written submissions, Mr Ustych drew attention to the decision of Mann J in ***Various Claimants -v- News Group Newspapers Ltd*** **[2014] Ch 400**, in which a *Norwich Pharmacal* order was made against the Metropolitan Police to provide material held as a result of the police investigation into alleged phone-hacking at the defendant's newspaper. The police investigation long post-dated the alleged phone-hacking, and was conduct in furtherance of its public duties to investigate alleged criminal activities. As such, in no way could the police be said to have been involved in, or to have facilitated, the alleged phone-hacking. Rejecting the argument that to grant the order was "*heretical*" ([53]), Mann J held [52]:

> "If a participation or facilitation test were the sole test, incapable of expansion, [Counsel for the Metropolitan Police] would be correct. However, I do not think that it is the sole test. It is true that the traditional formulation of the test is in such terms, but that is because those are the usual circumstances in which someone becomes something beyond a mere witness. On the facts of the cases where orders were made, the respondent was usually in that position. In my view the answer to the question lies in recognising that what the cases are doing is contrasting two things—the mere witness on the one hand, and a person who is not a mere witness on the other. On the cases the latter class is generally described in terms of participation/facilitation, as though that were the opposite of being a mere witness. But the real analysis lies in appreciating that the courts are holding not that those factors are indeed the other side of a dichotomy, but that those factors prevent the respondent from being a mere witness. Once that is recognised then it becomes relevant to consider whether there are other facts, short of participation/facilitation, which could prevent a person from being a mere witness. That question has not arisen in the cases in terms, but since the real question is the scope of the mere witness rule it is relevant to consider that particular question. It has been made to arise in the present case because of its unusual facts."

53. One of the textbooks, *Documentary Evidence* (14th edition, Sweet & Maxwell, 2021), suggests that the decision is inconsistent with the Court of Appeal's decision a few

weeks earlier in ***NML Capital -v- Chapman Freeborn Holdings Ltd* [2013] EWCA Civ 589**. In paragraph 4-07, the authors comment (footnotes omitted):

> "It is suggested that it is doubtful whether future cases will follow the wider approach in ***News Group***. It does not seem that ***NML Capital*** was cited to Mann J, although it was decided a few weeks before the ***News Group*** judgment. It seems inconsistent with the decision of Mann J. NML was seeking to enforce a judgment debt against the Republic of Argentina. NML sought *Norwich Pharmacal* relief against Chapman Freeborn, who had entered into a sub-charter with Argentina, seeking details of the sub-charter and bank accounts through which payment may have passed. Tomlinson LJ said that it was clear that if the *Norwich Pharmacal* jurisdiction was not to become wholly unprincipled, the third party must be involved in the furtherance of the transaction identified as the relevant wrongdoing before an order can be made. But that is surely exactly the opposite of what Mann J held. Tomlinson LJ continued [at [27]]:
>
> > 'The present case is in my judgment completely different from one in which assets are removed from a jurisdiction for no purpose other than to insulate them from execution in satisfaction of a judgment debt. Such a transaction would arguably be in itself for relevant purposes wrongful. So too the transfer of assets between persons or companies for a similar purpose, as in the case of transfers of money to Mrs Aiyela by Mr Aiyela and companies which he controlled as arguably had occurred in the ***Mercantile Trust*** case. The evidence in that case demonstrated that that was arguably done for the purpose of frustrating execution against Mr Aiyela's assets. Mrs Aiyela was, in the words of Steyn LJ, mixed up in her husband's attempt to make himself judgment proof.'"

54. I have considered the ***NML Capital*** decision. As to the element of participation/facilitation for a *Norwich Pharmacal* order, and whilst recognising the need for flexibility in granting the relief, Tomlinson LJ held (in the section of his judgment that precedes that quoted in *Documentary Evidence*):

> [25] This notwithstanding, it is in my judgment clear that if the *Norwich Pharmacal* jurisdiction is not to become wholly unprincipled, the third party must be involved in the furtherance of the transaction identified as the relevant wrongdoing. King J put it well in ***Campaign Against Arms Trade -v- BAE* [2007] EWHC 330 (QB)** [12] when he said:
>
> > "The third party has to have some connection with the circumstances of the wrong which enables the purpose of the wrongdoing to be furthered."
>
> [26] It follows that it is important to analyse with some care in what precisely lies the alleged wrongdoing. There is nothing inherently wrong in chartering an aircraft, unless it be said that any trading by a judgment debtor which involves using his assets for that purpose rather than satisfying a judgment debt is in itself wrongdoing. However I reject that proposition. It would lead to a jurisdiction of absurd width. It is no answer to that objection that the exercise of the jurisdiction would be subject to discretionary considerations. It would be absurd and exorbitant if parties were exposed to the risk of having to defend applications for discovery on the basis of no more than

> having traded with a person who turns out to have been at the relevant time a judgment debtor. It would encourage speculative litigation."

55. The ***News Group*** decision does not appear to have been expressly approved by the Court of Appeal or directly applied subsequently. It was cited in ***EUI Limited -v- UK Vodaphone Limited*** **[2021] EWCA Civ 1771** (appeal against refusal of *Norwich Pharmacal* order dismissed, in which ***NML*** was not apparently cited). The claimant insurers sought a *Norwich Pharmacal* order against the mobile phone service provider to disclose the telephone and data account of the mother of the policy holder. This disclosure was sought to establish whether the policyholder's parents had vacated their home when the policy holder moved in and, as such, whether displacement costs covered by the insurers had been obtained fraudulently. The claimant submitted that the defendant had become involved in the wrongdoing because mobile phones have "*enabled people to live in one place and conduct their affairs as if they are living somewhere else*" and mobile telephone providers had "*enabled*" this activity ([17]). Baker LJ rejected this argument [18]:

> "In my judgment, [this] argument is misconceived. If the claimant is right in thinking that the policy holder has fraudulently asserted that his parents moved out of their home for a period to allow him and his family to occupy the house exclusively, it is arguable that his parents were involved in the wrongdoing. But I can see no basis on which it could be said that his mother's mobile phone service provider was more than a mere witness or, in Mann J's phrase [from ***News Group***], engaged with the wrong. The fact that the phone account holder would have been able to pretend she was somewhere she was not does not draw the phone company into her wrongdoing. It is true that the phone records may assist in establishing the truth of the parents' whereabouts. But in that regard the phone company is manifestly a mere witness. Its position is no different from anyone else who may be able to provide evidence about that issue – for example, the nephew living in Milton Keynes, or the neighbours to the parents' property, or, as Lewis LJ helpfully suggested in the course of the hearing, the milkman. The phone company's position seems to me to be analogous to that of a security company which installs CCTV cameras at a property. Such cameras are also a feature of modern life. The purpose of the cameras is to detect or deter burglars who have no right to be at the property, but they may also incidentally detect the presence of the householders who have every right to be there. The security company would therefore be a witness to any unlawful activity engaged in by the householders but it would not be drawn into that activity in any way."

56. Since the hearing in this case, the ***News Group*** decision has also been referred to in ***Royal Borough of Kensington & Chelsea -v- Airbnb Payments UK Limited*** **[2022] EWHC 2209 (Ch)** [11]. Zacaroli J granted *Norwich Pharmacal* upon being satisfied that the Respondent's enabling of payments to hosts of AirBnB properties "*undoubtedly facilitates the wrongdoing [sub-letting] that it is fairly believed is being committed by some of the tenants*" ([13]).

57. The Claimant submits that the posting of the Davison Order on the KiwiFarms website was part of a campaign of harassment against her. As such, she can demonstrate the element of "wrongdoing" required for a *Norwich Pharmacal* order. Relying upon ***Oliver -v- Shaikh*** **[2019] EWHC 401 (QB)** [11], the Claimant contends that the publication of abusive, malicious and offensive material on social media, blogging platforms and websites can amount to the tort of harassment. At the hearing,

the Claimant told me that, if she is provided with the identity of X, she intends to make a complaint to the police about the alleged harassment. The Claimant did not specifically address the factors going to discretion identified in ***Viagogo*** (see [49(v)] above), but the thrust of her submissions at the hearing was that any balancing of these factors would come down firmly in favour of making the order that she seeks. Principally, that is on the basis that she needs the information to pursue remedies against the person responsible for alleged harassment of her in the KiwiFarms website posting under the name "Notso jolly Halliday"; she has no other practicable way of obtaining the information and any privacy/data protection rights of X are outweighed by these factors.

58. Applying the test of what amounts to harassment – see ***Hayden -v- Dickenson*** **[2020] EWHC 3291 (QB)** [44] – Mr Ustych submits that the KiwiFarms Post (which included the Davison Order) cannot, itself, constitute harassment. He contends that the more offensive (and arguably harassing) posts in the thread came from others. As such, even if X is the person who is posting under the name "Notso jolly Halliday", identifying X this would not assist the Claimant to bring a claim over the KiwiFarms Post. As to the separate point of whether X and "Notso jolly Halliday" are the same person, Mr Ustych noted that X has claimed in the letter to the Court that the Davison Order was shared in several private groups with multiple people (see [14] above). Mr Ustych recognised force in Ms Hayden's submissions that this claim ought properly to be put forward in a witness statement if it is to be admitted into evidence.

59. On the issue of necessity, Mr Ustych noted that the Claimant has indicated that she wishes to make a complaint to the police about the alleged harassment. He submitted that, if she were to do so, then in any investigation the police carried out, they could use powers available to them to obtain information held by the Respondent. He suggested that disclosure by HMCTS to the police, rather than the Claimant, might have advantages in terms of balancing the interests of X and the Claimant in terms of limiting the circulation/use of X's identity.

60. Mr Ustych contended that the Respondent was nothing more than an innocent repository of information in this matter. It has not participated in or, in any meaningful sense, facilitated the alleged wrongdoing. As to facilitation, he makes the point that the Order included in the KiwiFarms Post is *required* to be open to public access. Fairly, Mr Ustych acknowledges that, if the Court applies the authority of ***News Group***, the question is whether the provision of the Davison Order by the Respondent is sufficient involvement to justify a *Norwich Pharmacal* order being made. He submits that this point is "untested".

61. Finally, as to discretionary factors, Mr Ustych submits:

    i) There is a public interest in individuals who apply for a copy of an order not to have their identity disclosed unnecessarily, as doing so may have a negative impact on users and deter the use of this valuable facility.

    ii) If the claims in X's letter are correct (and X did not post/was not involved in posting the KiwiFarms Post) then the disclosure of X's identity will reveal the name of an innocent person. This, in turn, may result in harm to an innocent person by being made the subject of possible criminal and/or civil proceedings.

iii) In any event, disclosure of X's personal data would involve an interference with their rights as a data subject and any resulting harm (including distress) must be balanced against the Claimant's interest in being able to seek redress.

iv) If the Court were minded to make a *Norwich Pharmacal* order against the Respondent to disclose the information sought, the Court should consider imposing additional safeguards (in accordance with ***Dunn***) to minimise any risk or harm to X from that disclosure.

E: Decision

(1) CPR 5.4B(2)

62. The first issue is whether the form completed by X and submitted to the court to obtain a copy of the Davison Order is a "*communication between the court and… another person*". In my judgment, it is. It was a request on a standard form for provision of a document from the records of the Court.

63. However, in my judgment, this document is not part of the "records of the court". I accept Mr Ustych's submission that it is properly to be classified as an administrative document that is received by the Court in order to enable the discharge of the obligation to provide third-party access to documents of the Court required to be publicly accessible. Although when initially received, a request for documents under CPR 5.4C(1) is processed using CE-File, that is for good reasons of practicality. Importantly, once the request has been satisfied, the form is no longer available on the electronic court file relating to this case. That is the position in this case. X's original request for the Davison Order is no longer available on CE-File.

64. Applying ***Dring***, requests for documents from the Court file under CPR 5.4C(1) have no bearing on the litigation; they are wholly unconnected to it. They are not required to be kept – and as a matter of fact are not kept – as a long-term record of what has happened in the claim. Although the Claimant attached importance to the note that appears in the Guide (see [42] above), in my judgment this cannot alter the position. The statement that a party may request to know who has accessed documents relating to the case is, at one-level, stating nothing more than the obvious. All that the note states is that such a request must be referred to the Master "for directions". The conclusion of my judgment is that, were such a reference to be made in respect of requests for documents under CPR 5.4C(1), the answer that would be given is that the party is not usually entitled to receive the information.

65. The principles of open justice support this conclusion. CPR 5.4C(1) plays an important role in open justice. It declares that, absent the Court ordering some restriction on access, the documents specified in the rule are to be publicly accessible. They are the documents required to be available on the public record to enable the public scrutiny that is an essential feature of open justice. At least in respect of requests for documents that are required to be publicly accessible under CPR 5.4C(1), I can see no basis on which a person requesting copies of the documents can be required to provide a reason why s/he wants them. That is to be contrasted with applications by a non-party for other documents from the records of the Court under CPR 5.4C(2) in respect of which the reason why the relevant document is sought is a relevant factor to be considered by the Court when considering whether to grant access: ***Dring*** [45]. Equally, those who wish

to exercise the right under CPR 5.4C(1) to obtain documents required to be publicly available should not usually face the prospect of details of their inquiries – and their identity – being provided to the parties (or more widely). The fact that such a person must provide his/her name and address when requesting the documents, is simply to enable the relevant documents to be sent to them. A person attending to watch court proceedings is not required to provide his/her name in order to be permitted to exercise their right to sit in the public gallery of proceedings conducted in open court. A justification would be required before a Court required a person to identify him/herself.

66. The fact that the Respondent, in fact, has nevertheless retained a copy of the original request by X for a copy of the Davison Order does not make it a "record of the court". As ***Dring*** held, not everything that happens to have been "*generated in connection with a case and filed, lodged or kept for the time being at the court*" is a "record of the court" within the meaning of CPR 5.4B(2) or 5.4C(2). Depending upon their contents, some communications with the Court from third parties *may* become "records of the court". For example, if a letter were sent to the Court from a third-party complaining that a party to a claim had been intimidating witnesses in a forthcoming trial, that would be likely to become a "record of the court". Realistically, the Court would be likely to send such a document to the parties, without waiting for a request for a copy of the document under CPR 5.4B(2), but its classification as a "record of the court" would nevertheless be important in respect of any application for a copy made by a non-party under CPR 5.4C(2).

67. For those reasons, and in my judgment, the Court does not have jurisdiction under CPR 5.4B(2) to make the order sought by the Claimant. The document she seeks is not part of the "records of the court".

68. I am conscious that, in the absence of a definition of "records of the court", I am having to interpret this term. I have done so applying ***Dring***. I can only echo the urging by the Supreme Court that there are important questions of principle and practice relating to what records are kept by the Court and access to them in the interests of open justice. Responsibility for this, in England & Wales, lies principally with the Civil Procedure Rules Committee.

(2) *Norwich Pharmacal*

69. There is no dispute that, for the purposes of a *Norwich Pharmacal* order, the Respondent does have at least one document that contains the information sought by the Claimant. The issue is whether the Court should order it to be disclosed to her. In my judgment, the Court should refuse *Norwich Pharmacal* relief for the following reasons. I reach that conclusion without needing to consider any evidence, or submissions, from X.

(a) The alleged wrongdoing

70. First, even on the assumption that X is "Notso jolly Halliday", the KiwiFarms Post does not, itself, disclose wrongdoing sufficient to sustain a *Norwich Pharmacal* order. The wrongdoing alleged by the Claimant is harassment. However, the KiwiFarms Post is, in its terms unremarkable, particularly when compared by the surrounding posts of others. Put simply, it does not arguably disclose a case of harassment with any prospect

of success applying the threshold requirements for harassment by speech set out in ***Hayden -v- Dickenson*** (see [58] above). I am aware from the evidence filed by the Claimant in this claim, and in others, that "Notso jolly Halliday" has posted other material on the KiwiFarms website that the Claimant considers to be harassing of her. But even if I were to assume in her favour that she could credibly advance a claim that, taking these further posts into account, "Notso jolly Halliday" has been pursuing a course of conduct that amounts to harassment (applying the ***Hayden -v- Dickenson*** threshold), a *Norwich Pharmacal* order against this Respondent would be only for a piece of an evidential jigsaw. This point perhaps has more relevance to whether the Claimant can satisfy the requirement that the Respondent has been 'caught up in the wrongdoing' (to use that shorthand for this element of the test).

71. Finally, on this first issue, I consider I am entitled to consider that, evidentially and as a matter of logic, proof that X obtained the Davison Order does not, itself, thereby prove that X is "Notso jolly Halliday". I accept that, were this to be an important consideration, fairness might require that X should provide evidence of the circulation of the Davison Order to others (as claimed in X's letter – see [14] above). That evidence would go to the strength (or weakness) of the inference that X and "Notso jolly Halliday" are the same person. It does not alter the fundamental proposition that proof that X obtained the Davison Order does not, itself, prove that X is "Notso jolly Halliday". Again, this is a point that will have perhaps more force when it comes to discretionary considerations, particularly whether a *Norwich Pharmacal* order would lead to innocent people facing proceedings.

(b) Need for the order

72. I would have been satisfied that, had the Claimant been able to demonstrate the other requirements, there was a need for an order. There is no other practicable way of enabling the Claimant to bring an action against "Notso jolly Halliday". I deal below with whether there are other avenues of redress available to the Claimant which nevertheless lead to the refusal of a *Norwich Pharmacal* order in the exercise of Court's discretion (see [85] below).

(c) The participation/facilitation requirement

73. The basic facts are not in dispute. The Respondent has not in any way participated in or facilitated the publication of the KiwiFarms Post. The Respondent's provision of a copy of the Davison Order – in discharge of the duty under CPR 5.4C(1) – no more "facilitated" the KiwiFarms Post than would a stationery shop selling someone a pen and paper "facilitate" the sending of a defamatory letter.

74. If the well-established principles of the extent of the *Norwich Pharmacal* jurisdiction are applied and not allowed to become "*wholly unprincipled*", then the Respondent's involvement is simply insufficient to justify a *Norwich Pharmacal* order against it.

75. The only authority that could be relied upon by the Claimant is ***News Group***. However, in light of the principles that have been consistently stated in authorities at appellate level, not least in ***Norwich Pharmacal*** itself and most recently in the Court of Appeal decisions in ***NML*** and ***EUI***, I consider I must construe the ***News Group*** decision narrowly, particularly because ***NML*** was not considered in ***News Group***.

76. In my judgment ***News Group*** stands as authority only for the narrow proposition that a *Norwich Pharmacal* order *may* be made against the police if the police have, using their statutory powers, carried out an investigation into alleged wrongdoing and, as a result, now possess information that would assist a claimant in bringing a civil claim for that (or related) wrongdoing, and that the claimant has no other practicable way of obtaining the information. Limited in that way, the ***News Group*** decision, therefore, does not assist the Claimant. The Respondent has not carried out any investigation into the KiwiFarms Post. Its involvement is limited to having provided X with a copy of the Order. On the established authorities, that is insufficient to sustain a *Norwich Pharmacal* order and the Claimant cannot bring her claim within the *ratio* of the ***News Group*** decision. The Respondent is a mere witness, *par excellence*. Moreover, it is a witness to an event which would go only some of the way towards unmasking the person who has posted as "Notso jolly Halliday" on KiwiFarms.

(d) Discretion

77. The decisions I have reached mean that I do not get to the point of deciding whether, as an exercise of discretion, I would grant the order that the Claimant seeks. Had I reached this point, I would nevertheless have refused the Claimant's application.

78. I consider that the strength of any claim that the Claimant might bring against "Notso jolly Halliday" is a neutral factor. Although I have found that the Claimant does not have an arguable claim for harassment arising from the KiwiFarms Post (seen in isolation), I do not have enough information about the other material that has been posted to reach conclusions as to whether there is an arguable claim for harassment against him/her. In consequence, I cannot judge whether there is a strong public interest in enabling the Claimant to bring a claim to vindicate her rights in this respect.

79. The only activity that might be deterred by my making the order sought by the Claimant would be to discourage people from exercising their right to obtain copies of documents required by law to be publicly available from the records of the Court. It would not be in the public interest to discourage that activity as it would undermine open justice.

80. I accept that the Claimant will face difficulties in obtaining the information from another source. Although not in evidence in these proceedings, I think I can properly take notice of the fact that the KiwiFarms website, given its domicile and stated policies of protecting freedom of expression, is unlikely itself to respond to a *Norwich Pharmacal* order, issued by a Court in England & Wales, requiring provision of information capable of identifying the person operating the "Notso jolly Halliday" account.

81. The Respondent had no knowledge of, or reason to suspect, that provision of the Davison Order was likely to be included in the KiwiFarms Post. It therefore neither knew, nor should it have known, that it might be facilitating arguable wrongdoing. As a matter of policy, the Court cannot be held responsible for what people choose to do with copies of documents that have been supplied from its records.

82. For the reasons I have already explained (see [71] above), there is at least a risk that X is not the person who published the KiwiFarms Post. As such, there is a corresponding risk that X will be wrongly identified by the Claimant as a wrongdoer and then be made

subject to a civil claim. On the evidence, it is impossible to resolve whether X published the KiwiFarms Post or not.

83. As to the privacy/confidentiality/data protection rights of X, these are certainly engaged. Those rights might, ultimately, have been outweighed by other considerations, but as a starting point, the names and addresses of those who ask for copies of documents from the records from the court are not made publicly available. People may have many reasons for obtaining court documents. Some may not care whether their inquiries are revealed, but others may have real reasons why they do not wish to be identified. At least in respect of those documents required to be publicly available under CPR 5.4C(1), a person who wishes to obtain copies need not provide a reason why s/he wants them. Court records are frequently a resource used by journalists. I can readily see arguments that journalistic investigations might be inhibited or hindered if the parties (or third parties) were permitted to find out who had been seeking public documents from the records of the court and what they had obtained.

84. Assessing those factors would have led me to have leaned towards refusing the order as an exercise of discretion. The factor to which I would have attached most weight, was Mr Ustych's submission that the better course was to refuse the application and for the Claimant, if she wished, to report the matter to the police. With the other factors, that would have led me to refuse the order sought by the Claimant.

85. The benefit of that alternative avenue of potential redress is that the police could assess the totality of the Claimant's claim for harassment and any further evidence she can provide. If they consider that it meets the threshold to begin an investigation, then the police could use their powers to obtain the relevant records from HMCTS that would identify X. With that information, which the police would not ordinarily disclose to the Claimant, the police could then decide to speak to X (perhaps under caution) to get X's account of whether X was responsible for the KiwiFarms Post. Ultimately, if the Crown Prosecution Service were satisfied that the police had gathered sufficient evidence to provide a realistic prospect of convicting X of an offence, and that it was in the public interest to prosecute, X would be charged. At that point, X's identity would be revealed publicly and, if the Claimant wished to take separate civil proceedings, the Claimant would then be free to do so.

86. As the Claimant has stated that, if she were granted an order requiring the Respondent to identify X, she would intend to report X to the police for harassment, the process I have outlined largely achieves the same result. Importantly, however, the alternative process contains several safeguards for X. If I were to make a *Norwich Pharmacal* order, the Claimant could take other steps, beyond a complaint to the police or bringing a civil claim against X. She may choose, for example, to publish an allegation that X is the person who is operating the "Notso jolly Halliday" account without actually having established that this is in fact the case.

87. Finally, and for completeness, I should deal shortly with the Claimant's claim that the Court could make the order she seeks on the basis of the Court's inherent jurisdiction. I do not accept that submission. I do not consider that the inherent jurisdiction permits the Court to make an order in the terms sought against the Respondent. If the Court's jurisdiction to make the order under CPR 5.4B(2) and/or under the *Norwich Pharmacal* principles, then there is no residual "inherent" jurisdiction that can be called upon. If there were such a jurisdiction under the "inherent jurisdiction", then applicants for

such orders for disclosure, would hardly need to trouble themselves with meeting the requirements under CPR 5.4B(2) and/or the *Norwich Pharmacal* jurisdiction and would instead simply invite the Court to utilise its "inherent" jurisdiction. There is no inherent jurisdiction to make the order sought by the Claimant.

88. For all these reasons, the Claimant's application is dismissed.