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IN THE HIGH COURT OF JUSTICE Nos. HQ17M01967, HQ18M02612, QB-2019-001263
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 August 2019

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Queen's Bench Division)

B E T W E E N :

JOHN CAINE

Claimant

- and -

(1) ADVERTISER AND TIMES LIMITED
(2) EDWARD CURRY
(3) CAROLINE WOODFORD

Defendants

The Claimant in person

Clara Hamer (instructed by Reynolds Porter Chamberlain LLP) for the Defendants.

Hearing date: 25 July 2019

J U D G M E N T

RICHARD SPEARMAN Q.C.:

Introduction

1. There are three applications before the Court, each made by an application notice dated 10 May 2019, and each made in a different Claim. John Caine is the Claimant in each of those Claims. In Claim No HQ17M01967 ("Claim 1") the Defendants are (1) Advertiser & Times Limited ("ATL") and (2) Edward Curry. In both Claim No HQ18M02612 ("Claim 2") and Claim No QB-2019-001263 ("Claim 3") the Defendants are (1) Edward Curry and (2) Caroline Woodford. The applications are supported by a 5th witness statement, dated 10 May 2019, of Rupert Cowper-Coles, a solicitor at Reynolds Porter Chamberlain LLP ("RPC"), with a 139 page exhibit. Mr Caine served a witness statement in response dated 21 May 2019, with a 263 page exhibit.

2. In Claim 1, the application notice of ATL and Mr Curry seeks the following relief: (i) an Order varying paragraph 4 of the Order of Master Yoxall dated 10 August 2018 to allow the application to be made, (ii) an Extended Civil Restraint Order ("ECRO") pursuant to CPR 3.11 and Practice Direction 3C, paragraph 3.1(1), and (iii) costs. Paragraph 4 of that Order of Master Yoxall provides: "No further applications are to be made in these proceedings save in respect of the detailed assessment of costs and to a Judge [for permission to appeal, and to appeal, this Order]".

3. In Claim 2, the application notice of Mr Curry and Ms Woodford seeks the same relief as is sought by ATL and Mr Curry in Claim 1, save that there is no Order restraining the making of further applications in Claim 2, and accordingly there is no occasion to seek the variation of any such Order to allow the application to be made. The application notice also seeks the costs of the case as well as the costs of the application.

4. In Claim 3, the application notice of Mr Curry and Ms Woodford seeks: (i) an order under CPR 11 that the Court does not have jurisdiction to try Claim 3 or should not exercise its jurisdiction to try Claim 3, (ii) alternatively, an order under CPR 3.4(2)(b) striking out Claim 3, (iii) a finding that Claim 3 "is totally or wholly without merit", (iv) an ECRO on the same grounds as are relied on in Claims 1 and 2, and (v) costs.

5. Ms Hamer, who appeared for the Defendants in all three Claims, invited me to determine the application in Claim 3 first. In this way, if Mr Curry and Ms Woodford succeed in that application, they will be able to rely on the ruling that Claim 3 is "totally without merit" in support of the ECRO applications in all three Claims. Mr Caine, who appeared in person, did not object to that proposal. I therefore intend to adopt it.

6. ATL publishes local newspapers in Hampshire called *The New Milton Advertiser & Lymington Times* (for short "*The Advertiser and Times"*). The directors of ATL are Mr Curry and Ms Woodford, who are siblings. Mr Caine is a local businessman, living in New Milton, who knew their late father, Charles Curry, Mr Caine would say as a friend, but they would say as someone who began unjustifiably meddling in his affairs by advising him (when he was suffering from dementia) to revoke a Lasting Power of Attorney given in Mr Curry's favour. Among other things, Mr Caine's intervention resulted in the involvement of the Office of the Public Guardian. However, the Lasting Power of Attorney was not revoked, and Mr Curry was exonerated of wrongdoing. Mr Caine has subsequently brought Claims 1, 2 and 3, and indeed a fourth Claim which

was issued on 19 June 2019 against ATL and Mr Curry ("Claim 4"), alleging (in the main) libel and malicious falsehood in respect of articles published in *The Advertiser and Times* or on a Facebook page called *"New Milton Watch – the Truth"* ("the NMWT Page"). The NMWT Page contains content which is critical of another Facebook page which is operated by Mr Caine called *"New Milton Watch"* ("the NMW Page"), further or alternatively of Mr Caine himself. The NMWT Page is not operated by any of the Defendants in Claims 1-4, but Mr Caine contends that Mr Curry and Ms Woodford were or became liable for content published on the NMWT Page due to their operation of their own Facebook pages, in particular because they "Liked" the NMWT Page.

The procedural history of the Claims

Claim 1

7. With regard to Claim 1, I am fortunate in being able to rely on the judgment of Dingemans J in *Caine v Advertiser and Times Ltd & Curry* [2019] EWHC 39 (QB).

8. Dealing with the factual background, Dingemans J said at [3]-[4]:

> "3. On 27 January 2015 Mr Caine took his motor car to the New Milton Tyre Company. Work on two tyres and a spare tyre was carried out. The spare tyre was put in the boot. Mr Caine drove his car home but later telephoned to complain that items valued by Mr Caine at £200 had been taken from his boot, which was denied by the person who had carried out the fitting. Mr Caine confronted Mr Williamson, who ran the tyre company, about the missing items and words were exchanged. Mr Caine reported the tyre company for theft but was himself prosecuted for public order offences arising out of what he had said to Mr Williamson and garage workers. On 9 May 2016 Mr Caine was convicted at West Hampshire Magistrates' Court in Southampton of using threatening or abusive words or behaviour, or disorderly behaviour, contrary to section 5 of the Public Order Act 1986.
>
> 4. On Saturday 14 May 2016 there was a report in *The Advertiser and Times* about the trial. The report also reported that Mr Williamson complained that Mr Caine had conducted a 14 month online campaign against the tyre company. On 22 May 2016 Mr Caine wrote a letter of claim in relation to the article. On 10 June 2016 there was a response to the letter of claim."

9. Dealing with the relevant procedural history, Dingemans J said at [5]-[12]:

> "5. Mr Caine attempted to commence proceedings by sending a claim form to the court. On 4 May 2017 the Court returned the draft claim form to him because the incorrect fee had been paid and insufficient copies of the draft claim form had been provided. On 8 May 2017 Mr Caine returned the claim form to the court and it was endorsed as having been issued on 23 May 2017 (over a year after the date of publication which was on 14 May 2016). In fact, as Master Yoxall discovered when he called for the court file and recorded in his judgment, the claim form on the court file

shows that the issue date of 23 May 2017 had been struck through and the date of 9 May 2017 substituted. This meant that the claim had been issued in time …

6. However Mr Caine did not immediately serve the claim form or attach any particulars of claim. On 1 September 2017 the court wrote to Mr Caine recording that the claim had been referred to Master Davison, who had noted the absence of particulars of claim, the need for a prompt application to extend time to serve the claim form and particulars of claim, and the need for service of the claim form as soon as possible.

7. It appears that Mr Caine was away from the jurisdiction and did not return until 7 September 2017. In any event the claim form was delivered by hand on 5 October 2017, when it should have been served on 9 September 2017. Further when serving the documents Mr Caine failed to serve a response pack. It is common ground that this was in breach of the provisions of CPR Part 7.8 which provides that a form for defending, a form for admitting and a form for acknowledging service should have been filed. However it also seems clear that the failure to serve a response pack did not have a material effect on subsequent developments.

8. On 19 October 2017 [ATL] and Mr Curry, both then unrepresented, emailed an acknowledgment of service to the court having ticked the box that they intended to defend all of the claim. The box "I intend to contest jurisdiction" was not ticked. The notes say "If you do not file an application to dispute the jurisdiction of the court within 14 days of the date of filing this acknowledgment service, it will be assumed that you accept the court's jurisdiction ….". [ATL] also sent a covering email dated 19 October 2017 and an accompanying letter dated 19 October 2017 recording in both that the defendants were seeking legal advice "as it is not clear that the claim form has been correctly serviced with respect to content and dates". It seems plain that "serviced" was a typographical error for "served".

9. By letter dated 26 October 2017 [RPC], by then instructed on behalf of [ATL] and Mr Curry, wrote to Master Yoxall as the assigned Master noting that the claim was statute barred (having been misled by the stamp on the claim form showing 23 May 2017). The letter also stated "whilst it is not necessary due to the complete defence provided by limitation, it is appropriate for the Defendants to raise the following failures by the Claimant to comply with the CPR …". It was then noted that the claim form and particulars of claim had not been served within 4 months of issue, and there had been a failure to serve a response pack. The letter invited Master Yoxall to strike out the claim on his own initiative. A further email was sent by RPC to Master Yoxall dated 1 November 2017 reattaching the letter of 26 October 2017 and repeating the invitation for the court to strike out or enter summary judgment against Mr Caine. Master Yoxall did not make any order of his own motion.

10. 3 November 2017 was 14 days after the date of the filing of the acknowledgment of service. This is a relevant date for the provisions of CPR Part 11(4), as appears below.

11. On 7 November 2017 an application to strike out was made on behalf of [ATL] and Mr Curry. So far as is material the order sought was "the claimant's claim be struck out pursuant to CPR 3.4(2); or the court enters summary judgment against the claimant pursuant to CPR 24.2; and the claimant pays the defendants' costs of the application". It was stated "this application is made on the basis that the claimant has no reasonable grounds for bringing this claim (CPR 3.4(2)(a)) which has no real prospect of success (CPR 24.2(a)(i)) and/or that the claimant has failed to comply with various rules within the CPR (CPR 3.4(2)(c))". One of the failures to comply with the rules identified by the Defendants was the failure to serve the claim form and particulars of claim within time. By the time that the hearing commenced before Master Yoxall points about *Jameel* abuse, absence of serious harm, and complaints about the way in which the claim had been pleaded, were being relied on by the Defendants in relation to whether it would be equitable to extend the limitation period, and as distinct grounds to dismiss the claim.

12. Statements in support of the application were made by Mr Alex Wilson and Mr Rupert Cowper-Coles."

10. Dealing with the proceedings before Master Yoxall, and the judgment of Master Yoxall, Dingemans J said at [13]-[21]:

"13. It appears that the first hearing listed at 3 pm on 11 May 2018 overran and Master Yoxall invited written submissions on whether time for service of the claim form and particulars of claim should be extended. In submissions served on Monday 14 May 2018 Mr Caine took the point that even if the claim form and particulars of claim had not been served in time [ATL] and Mr Curry had submitted to the jurisdiction of the court because they had not disputed jurisdiction pursuant to CPR Part 11 within 14 days as required by the CPR Part 11, and because they had waived their right to challenge the jurisdiction of the court.

14. In response [ATL] and Mr Curry made an application dated 18 May 2018 as follows: "1. for a four day retrospective extension of time, including by way of the court's case management power under CPR 3.1(2)(a), for the period for filing an application under CPR 11(4) from 3 November to 7 November 2017; and/or 2. Under CPR 3.9 for relief from the sanctions in CPR 11(4) and 11(5) such that the Defendants are not treated as having accepted that Court has or should exercise its jurisdiction in these proceedings and the Defendants' challenge to service contained in its application of 7 November 2017 may be considered by the Court (which is pending following a part heard hearing on 11 May 2017 before Master Yoxall)". Reference was made in the application notice to an attached witness statement which was the third witness statement of Mr Cowper-Coles. He set out the procedural background and noted that the point about CPR Part 11 had just been taken by Mr Caine. In that witness statement Mr Cowper-Coles applied if necessary, for relief from the implicit sanction in CPR Part 11(4) and 11(5). Mr Cowper-Coles concluded by asking, to the extent necessary "the Court either retrospectively extend the period under CPR 11(4) by four days from Friday 3 November to Tuesday 7 November 2017 to

allow the service aspect of [the Defendants'] application to be heard on its merits or alternatively grant the Defendants relief from sanction pursuant to CPR 3.9 so as to achieve the same effect".

15. Written submissions were made by the parties which Master Yoxall then considered.

16. Master Yoxall distributed a draft judgment which he sent to the parties by email on 29 June 2018 and formally handed down on 10 August 2018. Master Yoxall set out the relevant background and in paragraphs 7 to 9 of the judgment he set out the way in which the application for an extension of time for filing an application under CPR Part 11(4) had arisen. Master Yoxall then set out the procedural history from paragraph 12 onwards, noting that the claim was issued in time after his examination of the court file in paragraph 17 of the judgment. He identified the late service of the claim form and particulars of claim which should have been served before midnight on 9 September 2017. The claim form was delivered by hand on 5 October 2017 and the particulars of claim was sent by post on 11 October 2017.

17. Master Yoxall addressed the issue of late service setting out the relevant provisions of CPR Part 7.6(3). He noted the strict regime set out for service of the claim form and particulars of claim stating that Mr Caine's apparent ignorance of the rules requiring service was no excuse in paragraph 26 of the judgment.

18. Master Yoxall then addressed Mr Caine's arguments that the challenge to service could only be made under CPR Part 11. He referred to the judgment in *Hoddinott v Persimmon* [2007] EWCA Civ 1203; [2008] 1 WLR 806, together with the subsequent judgment of the Court of in Appeal in *Aktas v Adepta* [2010] EWCA Civ 1170; [2011] QB 894 and the judgment in *Burns-Anderson Independent Network plc v Wheeler* [2005] EWHC 575; [2005] IL Pr 38. Master Yoxall noted that in *Aktas v Adepta* Rix LJ had said that CPR Part 3.4 applied "in terms to a statement of case rather than to a claim form" and recorded that as a difficulty with the proposition that CPR 3.4 was the correct route for striking out a claim form. Master Yoxall then set out part of the judgment in *Aktas v Adepta* which referred to *Hoddinott v Persimmon.* Master Yoxall went on to hold that "a defendant is entitled to strike out a claim form served out of time under CPR 3.4(2)(c)" in paragraph 30 of the judgment, having held that the judgment in *Aktas v Adepta* was obiter on this point, and wrong because it had overlooked CPR Part 2.3(1) which defines a statement of case to include, among others, a claim form and particulars of claim.

19. Master Yoxall considered *Burns-Anderson* and held that the conclusions about CPR Part 11 applying to proceedings served within the jurisdiction were wrong. Master Yoxall concluded in paragraph 33 of the judgment that a defendant could use either CPR Part 3.4 or CPR Part 11.

20. Master Yoxall then considered, if he was wrong in that conclusion and CPR Part 11 was the mandatory route, whether [ATL] and Mr Curry were out of time, noting that the defendants had applied for a

retrospective extension of time, as appears from paragraph 34 of the judgment. Master Yoxall noted that the Court had jurisdiction to extend time for making the application and he referred to CPR Part 3.9 and *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] 1 WLR 3926. Master Yoxall noted that the extension of time was for 4 or 5 days, and that adopting the wrong application route was not a serious breach. If he was wrong to consider it not serious there was no good reason for the breach but "turning to all the circumstances of the case, I am completely satisfied that the relief from sanctions should be granted".

21. Master Yoxall also recorded that after distributing the draft judgment Mr Caine had asked if the Court would accept a retrospective application for an extension of time to serve the claim form, which Master Yoxall did not because it would have been hopeless. Finally, in paragraph 45 of the judgment, Master Yoxall noted that by an application notice dated 4 July 2018 issued on 13 July 2018 Mr Caine sought an order that the defendants disclose information and an order setting aside Master Davison's order sent by letter dated 1 September 2017. Master Yoxall refused the applications because disclosure would serve no purpose in a case about to be permanently stayed, and Master Davison had not made an order. Master Yoxall certified these applications as totally without merit."

11. At [22], Dingemans J identified the issues before him in the following terms:

> "Permission to appeal was granted by Butcher J on 11 October 2018. I am grateful to Mr Caine and Ms Hamer for their helpful written and oral submissions. It was apparent from the written submissions before me that there were 5 issues to be addressed on the appeal. In the course of oral submissions the issues were refined. I will identify all 5 issues, but some can be dealt with very briefly. The issues were:
>
> (1) whether the regime for an extension of time for service of the Claim Form was contained in CPR Part 7.6(3);
>
> (2) whether Master Yoxall was wrong to refuse an extension of time to Mr Caine to serve the Claim Form and Particulars of Claim;
>
> (3) whether [ATL] and Mr Curry chose the wrong procedural route by applying to strike out the Claim Form and Particulars of Claim pursuant to CPR Part 3.4(2)(c) rather than disputing the Court's jurisdiction pursuant to CPR Part 11(1)(b);
>
> (4) if so, whether Master Yoxall was wrong both to treat the application to strike out as an application under CPR Part 11 and to extend time to [ATL] and Mr Curry to make an application under CPR Part 11(1)(b);
>
> (5) whether Master Yoxall was wrong to record that Mr Caine's applications dated 4 July 2018 were totally without merit."

12. Dingemans J then considered each of those issues, stating his conclusions at [41]:

> "For the detailed reasons given above (1) it is common ground that the relevant regime to govern an extension of time for service of the claim form was CPR Part 7.6(3); (2) Master Yoxall was right to refuse an extension of time for serving the claim form and particulars of claim; (3) the application to challenge late service of the claim form and particulars of claim should have been made pursuant to CPR Part 11; (4) the effect of the applications made on 18 May 2018 when read with the application of 7 November 2017 was to make an application to challenge jurisdiction pursuant to CPR Part 11 and to apply for an extension of time to do so, and Master Yoxall was entitled to find that the application had been made and to grant an extension of time and order a permanent stay of proceedings; (5) the applications dated 4 July 2018 were totally without merit. I therefore dismiss the appeal."

13. Prior to stating those conclusions, Dingemans J explained at [40]:

> "In submissions made after the hearing [ATL] and Mr Curry asked me to certify various grounds of appeal as totally without merit. I have not done so. Although permission to appeal was refused on paper, there was an oral renewal and it appears that Mr Caine was granted permission to appeal on all grounds. It would be wrong now to certify grounds for which permission was given as totally without merit even though, as appears above, they have not succeeded. Both sides have relied on grounds and submissions (in the Appellant's Notice and Respondents' Notice) which I have not upheld, but in my judgment none of them merit the certification of being totally without merit."

14. Further, with regard to issue (5), Dingemans J said at [36]:

> "Mr Caine disputes the certification by Master Yoxall that his applications of 4 July 2018 for disclosure and to set aside the order of Master Davison, were totally without merit. Certification of the application as being totally without merit was for the Court to consider. The certification was right because the application for disclosure related to an action which was going to be the subject of a permanent stay. Mr Caine has pointed to further proceedings in relation to a subsequent article. It matters not that there might be fresh proceedings in relation to different publications because if disclosure is necessary in those proceedings it can be obtained in those proceedings, and it does not justify making orders in proceedings which have been stayed. Further Master Davison did not make any order which could be set aside. He had simply caused a letter to be sent to Mr Caine. An application to set aside his order was therefore bound to fail."

15. On 14 January 2019, Dingemans J made an Order which reflected these rulings. Paragraph 1 of that Order states "The appeal [i.e. Mr Caine's appeal from the Order of Master Yoxall dated 10 August 2018] is dismissed". The effect of that Order was to leave undisturbed Master Yoxall's Order dated 10 August 2018. That, in turn, as reflected in the judgment of Dingemans J at [21], disposed of the application notice which Mr Caine had issued on 13 July 2018 seeking (i) an order that ATL and Mr Curry disclose information and (ii) an order setting aside what Mr Caine described as an "order" of Master Davison by (in the words of Dingemans J) (a) "refus[ing] the applications because disclosure would serve no purpose in a case about to be permanently stayed, and Master Davison had not made an order" and (b) "certif[ying]

these applications as totally without merit". It is apparent from his judgment that Dingemans J considered that Mr Caine had made two applications which Master Yoxall had certified as being "totally without merit", and that Dingemans J upheld that ruling.

16. Mr Caine did not accept the decision of Dingemans J, and sought permission to appeal to the Court of Appeal. That application was determined on the papers by Sharp LJ, and was refused by Order dated 17 May 2019. Sharp LJ's reasons for refusing permission to appeal included: "Dingemans J was also entitled to uphold Master Yoxall's finding that the applications dated 4 July 2018 were totally without merit for the reasons he gave at para 36". It therefore appears that Sharp LJ, also, considered that Mr Caine had made two applications which Master Yoxall had certified as being "totally without merit". It is also clear that Sharp LJ endorsed the upholding of that certification of Master Yoxall.

Claim 2

17. The claim form in Claim 2 was issued on 20 July 2018. This was shortly after Mr Caine would have learned from Master Yoxall's email dated 29 June 2018, attaching his draft judgment, that Claim 1 was going to be stayed permanently.

18. In substance, Claim 2 was based on the contention that Mr Curry and Ms Woodford were liable in defamation and malicious falsehood for material published on the NMWT Page because they had each provided a "Like" hyperlink to the NMWT Page on their own Facebook pages. In this way, they were said to be liable for "knowingly and deliberately promoting and circulating" alleged "abusive and libellous content appearing and published on [the NMWT Page]". The claim form further states that both Mr Curry and Ms Woodford "have failed to desist and continue to share and distribute this libellous and untrue material in total disregard for the truth of the material they are circulating and promoting and the personal and reputational damage it causes and continues to cause". The claim form sought "A court order instructing [Mr Curry and Ms Woodford to] desist from their continued promotion of this libellous content" and "Compensation [of] £50,000 for reputational damage and distress".

19. The Particulars of Claim and the attachments to it fleshed out these matters. Attached at page 18 was an extract from Mr Curry's Facebook page, from which it appears that he had "Liked" not only the NMWT Page but also (for example) the Pages of "Christians against Poverty UK" and "Mosaic Church Coventry". Attached at page 17 was an extract from Ms Woodford's Facebook page, from which it appears that she had "Liked" not only the NMWT Page but also (for example) the Pages of "John Edgar Trust" and "Will Stone Gas, Plumbing and Heating". The posts on the NMWT Page which were complained of were all, on the face of it, posts made by third parties:

    (1) A post by Cath Crowther as follows: "This horrible waste of human air is all over Google, just type in his name John Caine. Gives address too. And he has a nerve to call us stupid." This post is dated 28 July, apparently in the year 2016.

(2) A post by Sam Ube Millward as follows: "Haha about time! He's a stupid pathetic waste of a human who doesn't like the fact that he can't get his own way!" The post is dated 26 July, and immediately precedes post (1) above.

(3) A post by James Corbin as follows: "He's a no body with no life other than causing misery to others. He's properly [sic] another Benifit [sic] frauding scumbag." This post is undated in the version attached to the Particulars of Claim (save for the words "1y" underneath the post which suggest that it was posted at least one year before the date on which that image of the page was captured).

(4) A post by Paul Dore as follows: "I queried his intentions on his page and hot [sic] immediately blocked. No free speech there. The guy is deranged." This post is undated in the version attached to the Particulars of Claim but appears immediately before post (3) above (and has the same "1y" words underneath).

(5) There is also an "About" section on the NMWT Page, which reads as follows: "This is a page set up for residents and anybody related to New Milton is able to see both side [sic] of the story, instead of being fed lies by the other nmw."

20. It appears from page 41 of the exhibit to Mr Cowper-Coles' 5th witness statement that the "Like" entries on the Facebook pages of Mr Curry and Ms Woodford relating to the NMWT Page are dated 12 May 2015. According to [13] of that witness statement:

> "The Defendants had not personally authored any content on the Facebook group at all, nor liked or otherwise endorsed any of the posts containing the words complained of. They only 'liked' the group as a whole nearly four years ago, which is well in excess of the one year limitation period applicable in defamation and malicious falsehood."

21. On 20 August 2018, Master Yoxall made an Order "Upon reading the court file including the claim form and Particulars of Claim", staying Claim 2 until further order. The Order further directed that any application to lift the stay had to be supported by Particulars of Claim which complied with CPR 16.4 and the Practice Direction to CPR 53, extracts of which were attached to the Order. The Order itself added that the Particulars of Claim would need to plead that the publications complained of "are likely to cause serious harm to the reputation of [Mr Caine]" and "the relief claimed". Finally, it stated that any application to lift the stay had to be made by 28 September 2018.

22. Mr Caine filed Amended Particulars of Claim dated 22 September 2018 and applied to set aside the stay. By Order dated 15 October 2018 Master Yoxall ordered that the claim be struck out, and certified that it was "totally without merit". He also ordered that Mr Caine could apply to set aside or vary the Order within 7 days of service. The Order records that Master Yoxall found that the Amended Particulars of Claim did not make it clear what publication or words it is alleged Mr Curry and Ms Woodford were responsible for on the NMWT Page and (by footnote 1) that "Indeed, it appears that the words complained of "deranged", "a benefit frauding scumbag", "being fed lies", and "waste of human life" were published by other individuals". It further records that

Master Yoxall found that Mr Caine had no real prospect of succeeding on the claim against Mr Curry and Ms Woodford and (by footnote 2) that "It is not sufficient that [they] "liked" the said Facebook page or any entry". The Order recites that it was made:

> "… UPON the Master finding that the Amended Particulars of Claim do not make it clear what publication or words it is alleged that the Defendants are responsible for on the [NMWT Page]".

23. By Order dated 11 December 2018, Master Yoxall extended Mr Caine's time for applying to set aside his Order of 15 October 2018 to 26 November 2018, but dismissed Mr Caine's application to set aside his Order of 15 October 2018 and refused Mr Caine permission to appeal, stating that any further application for permission to appeal, and any appeal, should be to a Judge. The Order recites that it was made:

> "… UPON the Master remaining of the view that the claim is totally without merit".

24. Mr Caine applied for permission to appeal the Order of Master Yoxall dated 11 December 2018, and to bring that appeal out of time. That application was refused by Order of Sir Alastair MacDuff sitting as a Judge of the High Court dated 28 January 2019, for the following reason: "The Master was right to strike out the claim for the reasons stated in his Order of 15th October 2018". Accordingly, Sir Alastair MacDuff upheld Master Yoxall's certification that Claim 2 was totally without merit.

25. Mr Caine renewed those applications, and they came before Dove J at a hearing on 19 February 2019. It appears from the judgment of Dove J and his Order sealed on 26 February 2019 that Dove J (a) granted Mr Caine an extension of time for applying for permission to appeal, and (b) refused Mr Caine permission to appeal, but also (c) refused to certify that the application for permission to appeal was totally without merit.

26. The effect of the Order of Dove J (which was sealed on 26 February 2019) was to leave undisturbed Master Yoxall's Order dated 11 December 2018 (including Master Yoxall's dismissal of Mr Caine's application to set aside the Order of Master Yoxall dated 15 October 2018, which itself recorded that "[Claim 2] is totally without merit").

27. The judgment of Dove J includes the following description of the contents of Mr Caine's Amended Particulars of Claim in Claim 2 ("APC2"), at [3]-[6]:

> "3. In those Particulars of Claim, he explains that he is a resident of New Milton in Hampshire and that the defendants, who are brother and sister, were engaged as company directors in a local newspaper. He goes on to describe the nature of the complaint in the following terms:
>
> "Defamatory Online Publication of Abuse by 'Hyperlinking'.
>
> The defendants have been and still are actively engaged in promoting and circulating defamatory content via website 'hyperlinking' to libellous and grossly abusive and offensive online content on a website

page created by an untraceable and unknown third party. This creator of the defamatory content on Facebook has apparent connections to an advertising customer of the newspaper where both of the defendants are engaged as company directors."

4. The Particulars of Claim go on to point out that harm and serious harm has arisen from the publication of abusive and offensive and libellous material about the claimant on the Facebook page entitled "New Milton Watch - The truth". In particular, the Particulars of Claim rely upon pp.7 to 12 of the Particulars of Claim to which I shall turn in a moment. The document goes on to describe the words complained of as being published as follows:

> "The words complained of
> 'Deranged'
> 'A benefit frauding scumbag'
> The statement the community is 'being fed lies' by me which is the mantra of the page being promoted by the defendants and what the page, it is all about.
> 'Waste of human life'."

5. The Particulars of Claim then go on to discuss the particulars of malice involved and also explain the mechanism which is involved in Facebook "liking" by participants in that particular form of social media. It explains that "liking" - to which again I shall return in due course - is a process whereby material can be linked or redistributed.

6. Following a discussion of various legal propositions, there is then attached to the Particulars of Claim the pages of the New Milton Watch - The truth. At p.7 of the Particulars of Claim, there is the "About" page, which is the broad framework for the Facebook page itself. There is then a page containing a number of comments, together with other postings on the Facebook page, some of which are the particular points raised in the Particulars of Claim. Those observations are made by third parties, not identified in these proceedings. That is the basis of the Master's conclusion: that it appeared to him that the postings, which were referred to in the words complained of, were not postings that it had been demonstrated were the responsibility of these defendants."

28. Dove J next summarised the rival submissions before him at [7]-[10], as follows:

> "7. I am bound to say that, when I first approached the Particulars of Claim, I had difficulty, as the Master did, with following the basis upon which the Particulars of Claim gave rise to publication, which could properly be ascribed to the defendants so as to give rise to a cause of action. During the course of his submissions this morning, Mr Caine has amplified the position to make plain what his case amounts to. He, when describing the defamatory publication via hyperlinking, was referring to a page attached to the Particulars of Claim but not specifically referred to within it, in particular p.16, which is an extract of the second defendant's Facebook account on which there are a number of websites or Facebook pages together with the opportunity to follow or like those accounts or

pages. Page 17 is a similar part of the first defendant's Facebook account. Both of them contain the New Milton Watch - The truth and the opportunity to like or follow that particular Facebook account. It is, thus, submitted by the claimant that the Particulars of Claim provides the necessary material to justify the bringing of the claim, since he submits that pp.16 and 17 demonstrate and, effectively, adopt or signpost the defamatory material, which he complains of in the comments, by others on that account, that he is "deranged", "a benefit frauding scumbag", "a liar" and "a waste of human life".

8. The submission made in response to that by Miss Hamer, on behalf of the defendants, is, firstly, that the simple identification of the Facebook page or account on the defendants' Facebook accounts, without more, is insufficient to justify the conclusion that all of the material on the New Milton Watch - The truth Facebook account is at all material times being published by the defendants. She submits that that is, to quote her, "A click too far". What, in truth, that provides is the opportunity for somebody to look at that material, but it does not engage the adoption by the person whose Facebook account it is on of all of the material contained on that site, whether at the time when that opportunity is created by placing it on their Facebook account or thereafter on the basis that material may change on the Facebook account over the course of time.

9. Mr Caine submits that there is recent European Court authority which supports his contention that hyperlinking of that kind is capable of amounting to publication. He drew attention, in particular, to the recent decision of the European Court of Human Rights in the case of *Magyar Jeti Zrt v. Hungary*. That case addressed the issue of hyperlinks and provided at para.77 particular aspects of the phenomenon of hyperlinks which could justify the conclusion that a person had published linked content. Para.77 provides as follows [this text has been corrected by me]:

> "The Court identifies in particular the following aspects as relevant for its analysis of the liability of the applicant company as publisher of a hyperlink: (i) did the journalist endorse the impugned content; (ii) did the journalist repeat the impugned content (without endorsing it); (iii) did the journalist merely include a hyperlink to the impugned content (without endorsing or repeating it); (iv) did the journalist know or could he or she reasonably have known that the impugned content was defamatory or otherwise unlawful; (v) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?"

10. Mr Caine prays this material in aid in supporting his conclusion that the identification of the defendants' Facebook accounts with the New Milton Watch - The truth Facebook account was sufficient to justify the conclusion that they were publishing, by way of hyperlink to that material, the material that was then to be found on the website and complained of by him."

29. Finally, Dove J stated his conclusions at [13]-[14], in the following terms:

> "13. In my view, the Master was correct to conclude on the basis of the Particulars of Claim with which he was presented that there was no particularity provided in relation to how publication had occurred or how it could have been a publication which was the responsibility of the defendants. The Particulars of Claim themselves contain pp.16 and 17, but make no attempt to explain to the reader how they have any direct bearing on the case which the claimant wishes to advance. I, therefore, have formed the conclusion that, on the basis of the material that was before the Master, his conclusion was undoubtedly correct.
>
> 14. I do not cease my consideration of the matters raised by the claimant at that point. He has sought, albeit outside the terms of the Particulars of Claim, to explain why pp.16 and 17 are of relevance to this case. Having understood that point, which is not fully articulated, if at all, in the Particulars of Claim, I am not satisfied that it provides any basis for this claim proceeding and gives any cause to conclude that this case would have any realistic prospect of success. The difficulty which, in my view, faces this claim is the fact that all that he has done on pp.16 and 17 is identify the New Milton Watch - The truth Facebook account. That cannot in and of itself amount properly to any publication of any of the material that might be on it at any particular point of time by the person who places that on their Facebook account. Nor does it amount, as Mr Caine contends, to actually "liking" the material that is on that Facebook page. It provides the opportunity for somebody to look at it and, if they wish, like it, but it does not involve any specific endorsement or publication of the material on it by the person who places it on their Facebook page. The principles, therefore, that the European Court of Human Rights articulated in the case of *Magyar Jeti Zrt* do not support the claimant's contention that what occurred on pp.16 and 17 amounts to the publication of the material contained on New Milton Watch - The truth. Thus, even if those matters had been specifically alluded to, rather than inferentially to be deduced from the material in the Particulars of Claim, it would still not lead me to the conclusion that this appeal has any prospect of success."

30. The documents which were attached at pages 16-17 to APC2 are the same as those which were attached at pages 17-18 to Mr Caine's Particulars of Claim in Claim 2. Accordingly, the decision of Dove J is directly in line with the decisions of Master Yoxall reflected in the latter's Orders dated 15 October 2018 and 11 December 2018. However, as the decision of the European Court of Human Rights in *Magyar Jeti Zrt v Hungary* (Application No 11257/16) (*"Magyar Jeti Zrt"*) is dated 4 December 2018, it cannot have been considered by Master Yoxall before he made his Order dated 15 October 2018. Further, there is no evidence that it was considered by Master Yoxall before he made his Order dated 11 December 2018. Nevertheless, *Magyar Jeti Zrt* was plainly considered in detail by Dove J. Indeed, Mr Caine's reliance on *Magyar Jeti Zrt*, and Dove J's rejection of that reliance, lie at the heart of Dove J's judgment.

31. Moreover, Dove J rejected Mr Caine's contentions before him on two bases, which are dealt with in [13] and [14] of his judgment respectively: first, Claim 2 was not properly pleaded; second, even if it had been pleaded more clearly, it would be bound to fail.

32. Mr Caine then applied under CPR 50.3 (which was probably intended as CPR 52.3) to re-open his appeal. That application was refused by Order of Sir Alistair MacDuff sitting as a Judge of the High Court dated 4 March 2019, for the following reasons:

> "The learned Master dismissed your case and you appealed. Your application for permission to appeal was heard before a High Court Judge who refused permission. Thus your case was at an end. I have read your application, your grounds, and your supporting evidence and you do not begin to satisfy me that it is necessary to re-open the appeal to avoid an injustice or that the circumstances are exceptional. The Respondent was not in default as you claim; there was no requirement to follow the so called *Denton* test and there is absolutely no new material, which was not before Mr Justice Dove. Your Human Rights point is bordering on the fatuous. Your application is wholly without merit."

Claim 3

33. Claim 3 was begun by a claim form dated 3 April 2019 indorsed with "Brief details of claim" in materially identical terms to the "Brief details of claim" set out on the claim form in Claim 2.

34. The Particulars of Claim in Claim 3 ("PC3") are dated 14 March 2019. They begin with a section entitled "(1) Background", which reads as follows:

> "This claim has been reformulated after the particulars of claim where [sic] struck out by Master Yoxal [sic] on 15/10/2019 for not being sufficiently particularised in accordance with Practice Direction to CPR Part 53. The matter of the strike out then eventually went on to appeal and was unsuccessful. In the light of these events the particulars have now been re-constructed and re-drafted based on the omissions and lack of clarity in the POC as identified by Mr Justice Dove. Hence the re-filing of this new claim in which the libel is now unequivocally and succinctly laid out. Furthermore unlike before the central plank of this claim relates to the current ongoing and continuing republication of the libel by the Defendant's [sic] with absolute knowledge they are circulating libellous material. Please see pages 23 and 24 of this document. Notwithstanding the fore mentioned in the interim since the Master's strike out there has also been an important new development in the law by way of *Magyar Jeti Zrt v Hungary* (ECHR 4/12/2018). Importantly this case law was not available to the Court at the time the claim was struck out. It introduced case law whereas previously it was virtually non existent in relation to defamation/libel via "hyper-linking". Given this new development in law in conjunction with the corrected particulars of claim this claim now meets all the provisions of Practice Direction to CPR Part 53 and should therefore be permitted to proceed."

35. Mr Curry and Ms Woodford contend that this wording makes clear that Claim 3 comprises an attempt to re-litigate the matters which formed the subject of Claim 2.

They also contend that this wording is inaccurate, or at least misleadingly incomplete, in a number of respects: first, Dove J refused permission to appeal in Claim 2 not only because APC2 was insufficiently pleaded but also because, even if APC2 had been more clearly pleaded, the claim had no prospect of success; second, although the decision in *Magyar Jeti Zrt* post-dated the original Order of Master Yoxall in October 2018 whereby Claim 2 was initially struck out, that decision was not only available to the Court in Claim 2, but was also expressly relied on by Mr Caine before Dove J and moreover was carefully considered by Dove J when refusing Mr Caine's application for permission to appeal against the Order of Master Yoxall of December 2018 refusing to set aside the Order of Master Yoxall of October 2018; third, Mr Caine's attempt to re-open his application for permission to appeal in Claim 2 had been dismissed by Sir Alastair MacDuff, and had been found to be "wholly without merit".

36. I agree with those submissions, subject to one potential qualification. This relates to the words: "Furthermore unlike before the central plank of this claim relates to the ongoing and continuing republication of the libel by the Defendant's [sic] with absolute knowledge they are circulating libellous material. Please see pages 23 and 24 of this document." On the face of it, these words suggest a distinction between Claim 2 and Claim 3. It is therefore necessary to consider whether such a distinction truly exists.

37. In fact, the reference to "pages 23 and 24 of this document" is a reference to emails from Mr Caine to RPC dated 6 March 2018 and 9 March 2018 and an email in reply dated 12 March 2018, all of which make reference to Claim 1. Mr Caine's emails complain that Mr Curry's link on his own Facebook page to "the targeted abuse and malice as directed at [Mr Caine] as published on [the NMWT Page]" has rendered Mr Curry "fully liable under law for the defamatory and abusive content [of this material]", and that the same applies to Ms Woodford "also of [ATL]", and demand the immediate cessation of such "promotion and circulation". The email from RPC disputes that their clients (i.e. in context, Mr Curry and ATL) are responsible for content published on the NMWT Page and further states that, in any event, the matters complained of in Mr Caine's emails are not part of the subject matter of Claim 1. The "ongoing and continuing republication" referred to in the "Background" paragraph in PC3 thus extends back months before the claim form in Claim 2 was issued on 20 July 2018. It was therefore available to be complained of in Claim 2. Further, as appears from the detailed analysis set out below, it was in fact clearly complained of in Claim 2.

38. In addition, it is the evidence of Mr Cowper-Coles at [22.3] of his 5th witness statement that:

> "… since receiving the Third Claim, my firm has checked the '*New Milton Watch – the truth*' Facebook group on behalf of the Defendants and discovered that the group is no longer being published online on Facebook as the Claimant asserts … Consequently, neither Mr Curry nor Ms Woodford's Facebook profiles show them as 'liking' that group anymore, given it does not exist. As of 27 April 2019 at the latest, it was wrong to state either that the Facebook group '*New Milton Watch – the truth*' continues to be published or that the Defendants are 'liking' that group".

39. In these circumstances, it would appear that, contrary to the implication of the words "Furthermore unlike before ...", in truth and in fact "pages 23 and 24 of this document" do not reflect or support any distinction of substance between Claim 2 and Claim 3.

40. Moreover, any claim available in Claim 3 would appear to be confined to such part of the period between (i) the date 12 months preceding the issue of the claim form in Claim 3 on 3 April 2019 and (ii) 27 April 2019 during which there were in existence both (a) the complained of links on the Facebook pages of Mr Curry and Ms Woodford and (b) the complained of materials on the NMWT Page, as to which Mr Caine has not disputed the evidence of Mr Cowper-Coles and has adduced no evidence of his own.

41. My use of the expression "confined" is intended to mark the parameters of what is available to be complained of in Claim 3. It is not intended to suggest that any valid basis of claim exists, and indeed the contrary is the case for the reasons set out below.

42. The remainder of PC3 is set out in sections bearing different headings numbered (2) to (20), with regard to which the following points arise by way of comparison with APC2:

(2) Supporting facts

There is no material difference between this and the like section in APC2.

(3) Defamatory online re-publication via "hyper-linking"

This text is materially the same as the text of the like section in APC2, entitled "Defamatory online publication and abuse via "hyper-linking"", save that it contains the following additional wording:

> "The Defendants are using their own personal Facebook pages to promote and circulate the complained of defamatory content via website hyper-linking known as "liking" in the context of Facebook information propagation and circulation".

As appears below, this additional wording is essentially repetitious of allegations made elsewhere in PC3 and, also, in APC2.

(4) The publication context

This text is new, but is repetitious of other allegations pleaded both in PC3 and in APC2. The reference to pages 21 and 22 are to the same pages as were attached at pages 16-17 to APC2 and at pages 17-18 to the original Particulars of Claim in Claim 2. The text reads as follows:

> "Facebook, the well known online social media website. Here the Defendant's [sic] are engaged in on-going re-publication (via hyper-linking) from their personal Facebook pages to the impugned defamatory content. Refer to page

> 21 for the hyper-link on Ms Caroline Woodford's page directing people to the libellous "New Milton Watch – the Truth" publication, and page 22 for Mr Edward Curry's hyper-link used for the same purpose for maximum effect."

(5) The published words complained of

This text is materially the same as the text in the sections entitled "The complained of publication (incorporated herein by reference)" and "The words complained of" in APC2. It contains additional text beginning "The Claimant invites the Defendants to prove the truth of these statements", but this does not materially affect the basis of the causes of action pleaded against Mr Curry and Ms Woodford.

(6) Identification

This text is new. It pleads: "As the Defendant's [sic] are well aware the Facebook page containing the libellous statements they are promoting from their Facebook pages clearly identifies the Claimant to the community in two ways". Those two ways are then set out. This does not appear to me to add anything of significance to what is pleaded elsewhere in PC3 and, also, in APC2.

(7) Serious Harm

There is no material difference between the first part of this text and the text of the section bearing the same title in APC2. The second part of this text contains the following additional words, which add nothing of significance to the pleaded case:

> "… the Defendant's [sic] are even now still actively sharing and promoting. Clearly knowingly sharing accusations calling the Claimant a liar and a fraud who is neither have serious consequences both personally and professionally for any individual targeted in this way."

(8) Libel and Malicious Falsehood

Save for the omission of the word "grossly" before "defamatory", which appears in APC2, and the addition of the word "direct" before "meaning", which does not appear in APC2, this text is identical to the section bearing the same title in APC2.

(9) Ongoing continuing republication of the defamatory statements by the Defendants

This text is new. In substance, it pleads that Mr Curry and Ms Woodford knew that the NMWT Page "was defamatory of [Mr Caine] and specifically set up to target [Mr Caine]" at the time that they "Liked" the NMWT Page, and certainly by the time of Mr Caine's cease and desist demands dated 6 March 2018 and 9 March 2018 and RPC's response dated 12 March 2018. It then pleads as follows:

> "Yet both Defendants nevertheless intentionally continue to recklessly promote and circulate the libellous statements to the detriment of the Claimant.
>
> This qualifies as continuing and unequivocally republication under the principles very recently established in Magyar Jeti Zrt v Hungary (ECHR 4/12/18)."

However, there is a significant overlap between at least the middle part of this text and the last two lines of the second paragraph under the heading "Not "innocent dissemination"" in APC2, which pleads as follows:

> "Furthermore they blatantly and maliciously refuse to desist:
> See pages 18 and 19 for the Defendants' refusal to desist dated 12 March 2018."

Pages 18 and 19 attached to APC2 are the same as pages 23 and 24 attached to PC3. The emails dated 6, 9 and 12 March 2018 were therefore expressly pleaded and relied upon in APC2, and are not new to Claim 3.

(10) Particulars of malice

This text is divided into three sub-paragraphs. There is no material difference between sub-paragraph (a) of this text and the section entitled "Particulars of malice" in APC2. The text of sub-paragraph (b) is materially identical to the first paragraph under the heading "Not "innocent dissemination"" in APC2. The text of sub-paragraph (c) is materially identical to all but the last two lines of the second paragraph under the heading "Not "innocent dissemination"" in APC2. Those last two lines are additional in APC2, but overlap with what is pleaded in section (9) of PC3 (as set out above).

(11) The legal basis for this claim

There is no material difference between this text and the text of the section bearing the same title in APC2. It should be noted that both texts contain allegations which are said by the "Background" paragraph in PC3 to be new, as follows:

> "Even after demanding they desist they have still not taken any remedial action. They have simply and recklessly just carried on with this form of republication regardless of the damage it causes and has caused."

(12) The recent ECHR ruling clarifying the law not previously available

This text is new. It pleads what is said to be the basis of the decision in *Magyar Jeti Zrt*, comprising, in essence (a) the proposition that "liability requires an individual assessment in each case, regard being had to a number of elements",

and (b) the statement of particular relevant factors contained in [77] of that judgment (which was cited and considered by Dove J in Claim 2). The text also quotes what is, in fact, [20] not of that judgment but of the concurring opinion of judge Pinto de Albuquerque. In my judgment, this text adds nothing to the pleaded causes of action against Mr Curry and Ms Woodford. Moreover, if and in so far as it is intended to suggest that there has been any material development in the law since the final decision to strike out Claim 2 and leave undisturbed Master Yoxall's certification that it was totally without merit, further or alternatively that relevant legal principles were not considered in Claim 2, I consider that it is demonstrably unsustainable in light of the judgment of Dove J.

(13) The current UK law on website "hyper-linking"

This text is the same as the text of the section bearing the same title in APC2. It comprises what Dove J succinctly termed "a discussion of various legal propositions".

(14) The Twitter case

The same comments apply as apply in respect of section (13) above.

(15) Facebook case – fined for "liking" defamatory content

This text is the same as part of the text in the section entitled "How the mechanism of a Facebook page "likes" works" in APC2.

(16) Telephone Link Pty Ltd v IDG Communications Ltd

This text is new. It summarises what are said to be the facts, the legal arguments before the court, and the reasoning of Master Kennedy Grant in that case. It does not suggest that any ruling which determines the merits of Claim 3 was made in that case. However, it alleges (among other things) that it is arguable that references in an article to a third party's website containing defamatory allegations constitute publication of those allegations, and that whether there has been adoption or approval or repetition of the material referred to is a question of fact which requires to be determined at trial. None of those matters add anything to the causes of action that are pleaded in Claim 3. Moreover, Mr Caine relied on this case, and other cases referred to in PC3 as well as in APC2, before Dove J.

(17) Remedies sought

This text is the same as the text of sub-paragraphs (1) and (2) of the section bearing the same title in APC2. It omits sub-paragraph (3) of the relevant section of APC2, in which a claim for exemplary or punitive damages was made on the basis of "the Defendants' refusal to desist from sharing the defamatory and highly

abusive and offensive material via their personal Facebook pages". Accordingly, sub-paragraph (3) of the relevant section of APC2 (omitted from PC3) represents another instance in which (contrary to the impression given by the "Background" paragraph in PC3) the allegation that Mr Curry and Ms Woodford had refused to desist from continuing to republish the material complained of was plainly made as part of the claim in APC2.

(18) How the mechanism of a Facebook page "likes" works

This text is the same as the part of the text in the section entitled "How the mechanism of a Facebook page "likes" works" in APC2 which does not replicate section (15) in PC3.

(19) Facebook took no action despite repeated passed [sic] requests

This text is new in comparison to APC2, although very similar documents were attached to the original Particulars of Claim in Claim 2. It comprises the words "See pages 25 to 29". These pages relate to a report described by Facebook as "You anonymously reported New Milton Watch – The truth's photo for harassment". In my judgment, it is impossible to see how these matters can add anything to the claims pleaded against Mr Curry and Ms Woodford.

(20) In closing

This text is the same as the text of the section bearing the same title in APC2. It also further illustrates that the complaint about "ongoing and continuing republication of the libel by [the Defendants] with absolute knowledge they are circulating libellous material" is not new, but instead formed part of the claim in APC2. It reads as follows:

> "Here both Defendants absolutely knew the nature of the Facebook page, and there [sic] actions in "liking" it and its posts were a deliberate act to share it with their "friends" and the wider Facebook community. Hence promoting and making the abusive and defamatory content more widely available, and encouraging their friends and other users on the Facebook platform to participate and do likewise. It is indefensible."

The applications to stay or strike out Claim 3

43. The heart of the application under CPR 11.1 is that Claim 3 is an attempt to re-litigate Claim 2, which has been struck out and found to be totally without merit by Order of Master Yoxall dated 15 October 2018. The heart of the application under CPR 3.4(2)(b) is that Claim 3 is an abuse of the process of the Court because it is an attempt to re-litigate Claim 2, after permission to appeal and permission to re-open an appeal were refused in Claim 2. Accordingly, these applications require consideration of: (1) the history of proceedings in Claim 2 and (2) to what extent Claim 3 and Claim 2 overlap.

44. With regard to (1), as set out above, it is apparent from the history of the proceedings in Claim 2 that it was indeed struck out and certified to be totally without merit by Master Yoxall, and that Mr Caine failed in his attempts to appeal Master Yoxall's adherence to that decision both at a hearing before Dove J and on two separate applications which were disposed of on consideration of the papers by Sir Alastair MacDuff. It is also apparent that the decisions in Claim 2 were based on consideration of the merits of Claim 2, and not merely on the sufficiency of Mr Caine's pleaded case in Claim 2. That is clear, in particular, from the terms of the Order of Master Yoxall dated 15 October 2018 (see [22] above) and from [14] of the judgment of Dove J dated 19 February 2019.

45. This last point also follows from the fact that a finding that a claim or application is "totally without merit" can only be made "if it is bound to fail in the sense that there is no rational basis on which it could succeed" (see *Sartipy (aka Hamila Sartipy) v Tigris Industries Inc* [2019] EWCA Civ 225, Males LJ at [27], citing *R (Grace) v SSHD* [2014] EWCA Civ 1091, [2014] 1 WLR 3432 and *R (Wasif) v SSHD* [2016] EWCA Civ 82, [2016] 1 WLR 2793). Ms Hamer submits, and I agree, that the correct application of this test requires consideration of the merits, and that it is not appropriate to make such a finding on (for example) the basis that a claim is inadequately pleaded. Further, save perhaps in an exceptional case, which the present case is not, "where an order of the court records that a claim or application was totally without merit, it is not necessary or appropriate for a judge who is subsequently considering whether to make a civil restraint order to re-examine that question … It is difficult to think of a clearer example of an activity contrary to the public interest in the finality of litigation and the efficient administration of justice." (see *Nowak v The Nursing and Midwifery Council and Anr* [2013] EWHC 1932 (QB), Leggatt J (as he then was) at [67]).

46. Accordingly, the repeated findings of "totally without merit" that were made or upheld in Claim 2 indicate without more that the material decisions were made on the merits.

47. With regard to (2), and as emerges from the detailed comparison conducted above, it is clear that there is no material difference between Claim 3 and Claim 2. In large part, the same text is repeated in the two Claims. Such differences as exist do not materially affect the causes of action relied on, whether in respect of the factual or the legal basis of the claims. In particular, and contrary to what is stated in the "Background" section in PC3, "the current ongoing and continuing republication of the libel by [Mr Curry and Ms Woodford] with absolute knowledge they are circulating libellous material" is not new in Claim 3 but was an important part of Claim 2 and is a repeated theme in APC2.

48. In these circumstances, Ms Hamer submitted that all the elements of cause of action estoppel were made out in the present case. Those elements were identified by Sir Terence Etherton MR in *R (Gray) v Police Appeals Tribunal* [2018] 1 WLR 1690 at [43], as follows:

> "… the constituent elements of cause of action estoppel [are] the following six matters specified by Lord Clarke JSC in [*R (Coke-Wallis) v Institute of*

> *Chartered Accountants in England and Wales* [2011] 2 AC 146] para 34, endorsing para 1.02 of *Spencer Bower & Handley, Res Judicata* , 4th ed (2009): (1) the decision, whether domestic or foreign, was judicial in the relevant sense; (2) it was in fact pronounced; (3) the tribunal had jurisdiction over the parties and the subject matter; (4) the decision was (a) final and (b) on the merits; (5) it determined a question raised in the later litigation; and (6) the parties are the same or their privies, or the earlier decision was in rem."

49. Sir Terence Etherton MR further stated at [44]:

> "Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action: *Arnold v National Westminster Bank plc* [1991] 2 AC 93; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160, para 22."

50. As to element (4), Sir Terence Etherton MR stated at [47]: "It is difficult to identify, in the context of res judicata in general and cause of action estoppel in particular, an authoritative meaning of the expression "on the merits" applicable to all circumstances." At [50], he referred to the proposition that "a cause of action estoppel will only arise if, among other things, the first determination involved a judicial assessment or evaluation of the facts constituting the cause of action in the light of the applicable legal principles". At [51], he expressed the view that "In principle, but without the benefit of legal argument, that would seem to me to be correct."

51. Ms Hamer also placed reliance on *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160, Lord Sumption JSC at [26] (emphasis added):

> "Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, <u>even in changed circumstances and with material not available before,</u> offends the core policy against the re-litigation of identical claims."

52. Viewing matters more broadly, Ms Hamer took as her starting point the notes in the Supreme Court Practice 2019, Vol 1, at 3.4.3.2 (p84):

> "The court's power to strike out abusive proceedings is often employed to give effect to principles relating to *res judicata*, a portmanteau term which is used to describe a number of different legal principles including cause of action estoppel (the prohibition on the relitigating of a cause of action held to exist (or not exist) in earlier proceedings); issue estoppel (the prohibition on relitigating an issue decided in earlier proceedings even though in respect of a different cause of action); and the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones."

53. Building on this foundation, Ms Hamer submitted as follows:

(1) A claim may be struck out as an abuse of process if the new proceedings are an attack on a final decision by a court of competent jurisdiction: *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, cited in the notes in the Supreme Court Practice 2019, Vol 1, at 3.4.3.3 (p88). The principles relevant to this head of abuse were reviewed by Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321 at [38], including: "If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings."

(2) A claim may also be struck out if it is vexatious, "i.e. two or more sets of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make them fight the same battle more than once with the attendant multiplication of costs, time and stress": see the notes in the Supreme Court Practice 2019, Vol 1, at 3.4.3.1, p83.

54. Mr Caine's main submissions in answer to the above were as follows. First, Claim 3 is "fundamentally different" from Claim 2. Second, Claim 3 is "supported" and "validated" by evidence which is "key" in accordance with the decision in *Magyar Jeti Zrt*. Specifically, the emails dated 6, 9 and 12 March 2018 establish that Mr Curry and Ms Woodford "[knew] the nature of the material they are circulating, yet nevertheless continue to circulate it anyway". In accordance with one or other or both of those points: "the new claim is substantively different from the previous claim under new Human Rights Law to which we are inevitably bound". Third, Mr Curry and Ms Woodford are still publishing the article in *The Advertiser and Times* dated 14 May 2016 (which was the subject of Claim 1), which gives rise to "another valid libel complaint in its own right" and "This additional point of law is fatal to [their] request for strike out based on "abuse of process", given that they are also committing libel under the provisions of the Rehabilitation [of Offenders] Act 1974". Fourth: "Not only that but it also shows [they] have unclean hands". Fifth, as the material on the NMWT Page plainly libelled Mr Caine, Dove J's ruling can only sensibly have been "about the correctness of the Master's strike out based on the inadequacies of [APC2] rather than the overall merits of [Claim 2]". Sixth, Mr Curry and Ms Woodford have not been prejudiced, and the Court's resources have not been wasted, by being required to deal with Claim 2. Seventh, it would be a breach of Mr Caine's rights guaranteed by Article 8 of the European Convention on Human Rights to prevent him from bringing Claim 3. Finally, Mr Caine placed reliance on the following authorities: *Aktas v Adepta* [2010] EWCA Civ 1170; *Wahab v Khan* [2011] EWHC 908 (Ch); *Hall v Ministry of Defence* [2013] EWHC 4092 (QB); *Davies v Carillion Energy Services Ltd* [2017] EWHC 3206 (QB); *Johnson v Gore Wood & Co* [2002] 2 AC 1.

55. Ms Hamer's answer to those authorities is that none of them concern issues of *res judicata* or cause of action estoppel. She submitted that the first four of those authorities relate to the bringing of a second claim in respect of matters which were raised in a first claim which has been struck out on purely procedural grounds and without any

consideration of the merits, and that this is borne out by the fact that *Aktas*, *Wahab*, and *Davies* are discussed in the notes in the Supreme Court Practice 2019, Vol 1 at 3.4.3.2 (p88) under the sub-heading "Previous litigation terminated without any substantive adjudication or settlement" (emphasis added) and that *Hall* is mentioned in the notes at 3.4.3.6 (p93) under the sub-heading "Delay". She submitted that the fifth of those authorities relates to circumstances where a party seeks to raise in a second claim issues or facts which could and should have been, but were not, raised in a first claim, where the first claim had resulted in a substantive adjudication or settlement. Accordingly, Ms Hamer submitted that none of those cases provides an answer to her clients' application.

56. I have little hesitation in preferring the submissions of Ms Hamer, for reasons which I have substantially foreshadowed above. Far from being "fundamentally different" to Claim 2, in my judgment Claim 3 is in all material respects the same as Claim 2. Neither the emails dated 6, 9 and 12 March 2018 nor the decision in *Magyar Jeti Zrt* are new to Claim 3. On the contrary, the same emails were relied on in Claim 2, and *Magyar Jeti Zrt* was relied on by Mr Caine before Dove J (and in his application to re-open the appeal in Claim 2). *Magyar Jeti Zrt* was carefully considered by Dove J, who reached a decision on the merits (and not merely on the adequacy of the pleaded case contained in APC2) having full regard to it. Any continuing publication of the article in *The Advertiser and Times* dated 14 May 2016, far from being fatal to those applications, is irrelevant to the applications of Mr Curry and Ms Woodford under CPR 11.1 and CPR 3.4(2)(b). Nor has Mr Caine made out the allegation that they have "unclean hands", or that, even if they did, this would be a bar to them making and succeeding on those applications. The suggestion that Mr Curry and Ms Woodford have not been prejudiced, and the Court's resources have not been wasted, by being required to deal with Claim 2 was rightly described by Ms Hamer as "risible". The argument that depriving Mr Caine of the opportunity to bring the claims that were the subject of Claim 2 and which have now been re-iterated in Claim 3 would breach his Human Rights appears to repeat or be similar to contentions which Sir Alastair MacDuff described as "bordering on the fatuous". Finally, I accept Ms Hamer's submissions that the relevant principles are set out in the cases and materials upon which she relies, and that none of the authorities relied upon by Mr Caine are in point on these applications.

57. In my judgment, all the elements of cause of action estoppel are made out in this case. In any event, Claim 3 falls to be struck as an abuse of process because it amounts to an attack on a final decision by a court of competent jurisdiction in Claim 2, further or alternatively because it is vexatious in light of the history and outcome of Claim 2.

58. For these reasons, Mr Curry and Ms Woodford are entitled to the relief that they seek.

Is Claim 3 "totally without merit"?

59. As there is no material difference between Claim 3 and Claim 2, and as Claim 2 was held (after repeated review) to be totally without merit both as formulated in Mr Caine's original Particulars of Claim and as re-formulated in APC2, logic and consistency point inexorably to the conclusion that Claim 3, also, is totally without merit.

60. Disregarding those considerations, and considering the matter afresh, I would arrive to the same result. The essential premise of PC3 is that Mr Curry and Ms Woodford are liable as publishers of defamatory content on the NMWT Page because they provided hyperlinks to the NMWT Page on their own Facebook pages, and continued to do so after Mr Caine sent "cease and desist" emails in March 2018. Not only is that the essential premise of PC3, but also it contains no further material factual allegations in support of the alleged liability for publication. For example, it does not allege (a) that persons visited the Facebook page of Mr Curry or the Facebook page of Ms Woodford (b) that anyone clicked on the link to the NMWT Page on either of those Facebook pages (c) that anyone who clicked on either of those links read on the NMWT Page all or any of the defamatory content complained of, or indeed (d) that anyone read that content. (There are other deficiencies in PC3, for example as to pleading the meaning of the words complained of, and, with regard to the claim for malicious falsehood, the particulars of falsity and whether special damage was caused (because the claim does not appear to fall within the ambit of section 3(1) of the Defamation Act 1952). However, as PC3 shares those features with APC2, and as Claim 2 has suffered the fate that it has, I have thought it right to focus on what Mr Caine contends to be his new and improved case in PC3 when considering whether Claim 3 is totally without merit.)

61. In my judgment, a claim advanced on this basis is inconsistent with the decision in *Magyar Jeti Zrt*, in which, at [76], the Strasbourg Court expressly disagreed with "the domestic courts' approach equating the mere posting of a hyperlink with the dissemination of defamatory information, automatically entailing liability for the content itself" (emphasis added) and stated instead "that the issue of whether the posting of a hyperlink may justifiably … give rise to such liability requires an individual assessment in each case, regard being had to a number of elements".

62. The factors which the Court identified as being of particular relevance to whether the publisher of a hyperlink is liable for dissemination of defamatory third-party material were set out at [77], which was cited and considered by Dove J in Claim 2:

> "(i) did the journalist endorse the impugned content; (ii) did the journalist repeat the impugned content (without endorsing it); (iii) did the journalist merely include a hyperlink to the impugned content (without endorsing or repeating it); (iv) did the journalist know or could he or she reasonably have known that the impugned content was defamatory or otherwise unlawful; (v) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?"

63. Those factors focus on "the impugned content" (i.e. in the present case the particular items on the NMWT Page that contain the allegations complained of by Mr Caine).

64. Factors (i)-(iii) distinguish between three different approaches on the part of the publisher of the hyperlink, namely (i) endorsing the impugned content, (ii) repeating the impugned content (without endorsing it), and (iii) merely providing a hyperlink to the impugned content (without endorsing or repeating it). Dove J held that the Facebook

pages of Mr Curry and Ms Woodford (which were attached as pages 17 and 16 respectively to APC2) placed Mr Curry and Ms Woodford in category (iii). That is the meaning and effect of [14] of the judgment of Dove J, in which he said:

> "That [i.e. the Facebook pages of Mr Curry and Ms Woodford relied on by Mr Caine] cannot in and of itself amount properly to any publication of any of the material that might be on [the NMWT Page] at any particular point of time by the person who places that on their Facebook account. Nor does it amount, as Mr Caine contends, to actually "liking" the material that is on [the NMWT Page]. It provides the opportunity for somebody to look at it and, if they wish, like it, but it does not involve any specific endorsement or publication of the material on it by the person who places it on their Facebook page."

65. I do not consider that it is open to me to revisit that finding or to go behind it, but in any event I agree with it. Mr Curry and Ms Woodford plainly did not repeat the impugned content on their own Facebook pages. Applying the approach of the Strasbourg Court, the choice is therefore between saying (a) that they endorsed the impugned content and (b) that they merely provided a hyperlink to it (without endorsing or repeating it). Even assuming that they were aware that the impugned content existed (as Mr Caine alleges that they were, at least after RPC's receipt of his emails dated 6 and 9 March 2018), I do not consider that the posting of a "Like" hyperlink to the NMWT Page constitutes an "endorsement" of the impugned content within the meaning of [77] of the judgment.

66. In this regard, guidance as to what amounts to endorsement is provided by [78]-[79] (emphasis added):

> "78. In the present case the Court notes that the article in question simply mentioned that an interview conducted with J.Gy. was to be found on YouTube and <u>provided a means to access it through a hyperlink, without further comments on, or repetition even of parts of, the linked interview itself</u>. No mention was made of the political party at all.
>
> 79. The Court observes that <u>nowhere in the article did the author imply in any way that the statements accessible through the hyperlink were true or that he approved of the hyperlinked material or accepted responsibility for it. Neither did he use the hyperlink in a context that, in itself, conveyed a defamatory meaning.</u> It can thus be concluded that the impugned article did not amount to an endorsement of the impugned content."

67. As appears from these passages, *Magyar Jeti Zrt* concerned a hyperlink to a single interview. It would be stretching matters a great deal further to suggest that provision of a "Like" hyperlink to the NMWT Page, which contained many other items and which changed over time, constituted an "endorsement" of the matters now complained of.

68. Turning to factor (iv) identified by the Strasbourg Court, Mr Caine's pleaded case that Mr Curry and Ms Woodford knew or could reasonably have known that the impugned content was defamatory is based on his emails dated 6 and 9 March 2018 and RPC's response dated 12 March 2018 which are attached as pages 23 and 24 to PC3. However,

those emails do not identify the contents of the NMWT Page which (piecing together the words complained of with the extracts from the NMWT Page which are attached to PC3) now appear to be complained of. On the contrary, those emails refer in entirely unspecific terms to "promoting and sharing the link to the targeted abuse and malice … as published on [the NMWT Page] … [which] is clearly malicious, derogatory, defamatory and abusive". Mr Caine's own pleaded case is that, in addition to the matters about which he complains, "There are many more abusive and offensive references on the [NMWT Page] but these do not constitute libel and hence have not been provided". In these circumstances, it is untenable to suggest that these emails fixed Mr Curry and Ms Woodford with knowledge of the defamatory nature of the matters complained of. It is possible to work out what is being complained about when a few extracts from the NMWT Page are attached to a Particulars of Claim in which specific words or phrases are singled out for complaint, but not possible to do so in response to general allegations which relate to the entirety of the NMWT Page - especially when it is not obvious that any content is either defamatory of Mr Caine or libellous even if it is defamatory having regard to the elements of the English law of libel discussed below.

69. The facts of *Magyar Jeti Zrt* were very different from the present case, and involved freedom of political speech. Accordingly, the guidance provided by the Strasbourg Court with regard to factor (iv) identified in [77] of the judgment is of limited assistance. However, it includes the following at [81]-[82] (emphasis added): " … the Court reiterates that an attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life … the journalist in the present case could reasonably have assumed that the content to which he provided access, although perhaps controversial, would remain within the realm of permissible criticism … and, as such, would not be unlawful. Although the statements … were ultimately found to be defamatory … the Court is satisfied that such utterances could not be seen as clearly unlawful from the outset …" These passages suggest that it is important to avoid an over-restrictive approach to the freedom of expression of the provider of a hyperlink. They also echo many cases in which recognition has been accorded to the difficulties of persons involved in disseminating content in the Internet age of which they are not the authors who are confronted by claims that the content is defamatory.

70. Under English law, whether words are libellous depends not only on whether they are defamatory but also on whether there is any defence to a claim for libel (e.g. truth, or honest opinion). Further, as set out in *Gatley on Libel and Slander*, 12th edn, para.3.37 (omitting citations):

> "Even if the words, taken literally and out of context, might be defamatory, the circumstances in which they are uttered may make it plain to the hearers that they cannot regard it as reflecting on the claimant's character so as to affect his reputation because they are spoken in the "heat of passion, or accompanied by a number of non-actionable, but scurrilous epithets, e.g. a blackguard, rascal, scoundrel, villain, etc." for the "manner in which the words were pronounced may explain the meaning of the words." … [And] it has been held that bulletin board exchanges on the internet (which are almost certainly technically libel)

> are more susceptible of being equated for this purpose with slander because "it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment"."

71. See, further, *Stocker v Stocker* [2019] 2 WLR 1033, in which the Supreme Court gave guidance as to the correct approach towards ascertaining the meaning of posts and Tweets on social media. The analysis of Lord Kerr JSC at [41]-[45] includes:

> "The imperative is to ascertain how a typical (ie an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on."

72. Applying these considerations to the items which appear to be complained of in PC3: (a) expressions such as "horrible waste of human air" and "stupid pathetic waste of a human", if defamatory at all, probably represent the honest opinion of the authors, (b) the expression "benefit frauding scumbag" may also not be defamatory, especially as it is written in the context of the words "He's a no body with no life other than causing misery to others", (c) the allegation "The guy is deranged", if defamatory at all, written in the context of the words "I queried his intentions on his page and [got] immediately blocked. No free speech there", is probably not a statement of fact but instead an expression of opinion, which is probably honestly held by the author; and (d) if and in so far as the statement about the purpose of the NMWT Page defames Mr Caine for "feeding lies" on the NMW Page it is unclear whether it would be defensible as true.

73. For all these reasons, even if Mr Curry and Ms Woodford were alert to the particular content about which Mr Caine now complains, whether by Mr Caine's emails dated 6 and 9 March 2018 or in any event, they would not have known that it was libellous.

74. Factor (v) identified in *Magyar Jeti Zrt* seems to me primarily applicable to journalists. The standards and responsibilities there mentioned may extend to "citizen journalists" (see *Doyle v Smith* [2018] EWHC 2935 (QB), Warby J at [95]-[96]), but it forms no part of Mr Caine's pleaded case that Mr Curry and Ms Woodford operated their Facebook pages in anything other than their purely personal capacities. I am therefore doubtful that this factor has much of a role to play in the present case. Having said that, the requirement of "good faith" may be of general application, and is firmly put in issue by Mr Caine's pleaded case of malice, and to this extent this factor may be relevant.

75. Quite apart from these considerations, publication is a requirement of the English law of libel. A hyperlink on a Facebook page can only be published to persons who access that page. Moreover, as is plain from a perusal of pages 16 and 17 attached to PC3, the hyperlinks in the present case are not themselves defamatory. Accordingly, under English law, the links posted by Mr Curry and Ms Woodford (which need to be considered separately, as on the face of it each of them is only liable for their own personal publication) can only give rise to liability for libel if and to the extent that (a) they were accessed by people and (b) as a result of that accessing those people went on to access and read the impugned content on the NMWT Page (probably by clicking

through to the NMWT Page, although it may be arguable that liability would extend also to those who saw the "Like" posts and in consequence, but independently, accessed the impugned content on the NMWT Page). As set out above, no facts relating to any of these matters are pleaded in the Particulars of Claim, which instead relies on the mere fact of posting of the material hyperlinks (as Mr Caine has pleaded, persistently).

76. The extent to which and the circumstances in which online content is accessed are also central to whether the claimant can satisfy the threshold requirement of serious harm contained in section 1(1) of the Defamation Act 2013 ("A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant"). In light of the decision of the Supreme Court in *Lachaux v Independent Print Ltd* [2019] 3 WLR 18, Lord Sumption JSC at [14], [16]:

> "This is a proposition of fact which can be established only by reference to the impact which the statement is shown actually to have had. It depends on a combination of the inherent tendency of the words and their actual impact on those to whom they were communicated …
> … Suppose that the words amount to a grave allegation against the claimant, but they are published to a small number of people, or to people none of whom believe it, or possibly to people among whom the claimant had no reputation to be harmed … it is plain that section 1 was intended to make [these matters] part of the test of the defamatory character of the statement."

77. PC3 contains no allegations of fact which are sufficient to amount to an arguable case that this requirement is met (whether directly or by way of inference) in the present case in respect of all or any of the defamatory imputations complained of. This would be a matter of real significance in any case, but is especially material in the present case, because, as set out above: (a) the hyperlinks in question were posted on 12 May 2015 and (b) Claim 3 can only extend back to publications occurring in the 12 months before 3 April 2019. Whether and to what extent anyone was referring to those 2015 hyperlinks in those 12 months, let alone in a way that caused them to view impugned content that appears to have been posted on the NMWT Page in 2016, represent factual hurdles for Mr Caine. He has pleaded nothing which even begins to surmount them.

78. Accordingly, as held by Dove J, the principles articulated in *Magyar Jeti Zrt* do not support Mr Caine's case against Mr Curry and Ms Woodford. Moreover, PC3 contains nothing which addresses the above major hurdles that Claim 3 faces under English law.

79. For all these reasons, Claim 3 is totally without merit, and my Order will record that.

Should an ECRO be made?

Legal principles

80. The relevant principles were set out in *Sartipy (aka Hamila Sartipy) v Tigris Industries Inc* [2019] EWCA Civ 225, Males LJ at [25]-[37]:

"25. The power to make an ECRO is contained in CPR 3.11:

> "A practice direction may set out—
>
> a) the circumstances in which the court has the power to make a civil restraint order against a party to proceedings;
> b) the procedure where a party applies for a civil restraint order against another party; and
> c) the consequences of the court making a civil restraint order."

26. The relevant practice direction is Practice Direction 3C, which provides for three kinds of civil restraint order, a limited civil restraint order, an extended civil restraint order, and a general civil restraint order. A limited order may be made "where a party has made 2 or more applications which are totally without merit". An extended order may be made "where a party has persistently issued claims or made applications which are totally without merit". A general order may be made "where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate". A limited order may be made by a judge of any court, but an extended or general order may be made only by specified judges. The consequences of the three kinds of order differ, but the differences do not need to be considered on this appeal.

…

28. In *CFC 26 Ltd v Brown Shipley & Co Ltd* [2017] EWHC 1594 (Ch), [2017] 1 WLR 4589, Newey J considered what was meant by "persistently" in the phrase "a party has persistently issued claims or made applications which are totally without merit" in CPR PD3PC para 3.1. He held, in agreement with previous first instance authority, that "persistence" in this context requires at least three such claims or applications. I respectfully agree. I would add some further points by way of clarification.

29. First, "claim" refers to the proceedings begun by the issue of a claim form. In the course of those proceedings one or more applications may be issued. If the claim itself is totally without merit and if individual applications are also totally without merit, there is no reason why both the claim and individual applications should not be counted for the purpose of considering whether to make an ECRO.

30. Second, although at least three claims or applications are the minimum required for the making of an ECRO, the question remains whether the party concerned is acting "persistently". That will require an evaluation of the party's overall conduct. It may be easier to conclude that a party is persistently issuing claims or applications which are totally without merit if it seeks repeatedly to re-litigate issues which have been decided than if there are three or more unrelated applications many years apart. The latter situation would not necessarily constitute persistence.

31. Third, only claims or applications where the party in question is the claimant (or counterclaimant) or applicant can be counted (although this includes a totally without merit application by the defendant in the proceedings). A defendant or respondent may behave badly, for example by telling lies in his or her evidence, producing fraudulent documents or putting forward defences in bad faith. However, that does not constitute issuing claims or making applications for the purpose of considering whether to make an ECRO. Nevertheless such conduct is not irrelevant as it is likely to cast light on the party's overall conduct and to demonstrate, provided that the necessary persistence can be demonstrated by reference to other claims or applications, that an ECRO or even a general civil restraint order, is necessary.

…

37. Seventh, when considering whether to make a restraint order, the court is entitled to take into account any previous claims or applications which it concludes were totally without merit, and is not limited to claims or applications so certified at the time, albeit that in such cases the court will need to ensure that it knows sufficient about the previous claim or application in question: *R (Kumar) v Secretary of State for Constitutional Affairs (Practice Note)* [2006] EWCA Civ 990, [2007] 1 WLR 536 at [67] and [68]."

81. Further helpful guidance is provided by the judgment of Leggatt J (as he then was) in *Nowak v The Nursing and Midwifery Council and Anr* [2013] EWHC 1932 (QB), at [58]-59] and [63]-[70]:

"58. As explained by the Court of Appeal in the leading case of *Bhamjee v Forsdick* [2004] 1 WLR 88, the rationale for the regime of civil restraint orders is that a litigant who makes claims or applications which have absolutely no merit harms the administration of justice by wasting the limited time and resources of the courts. Such claims and applications consume public funds and divert the courts from dealing with cases which have real merit. Litigants who repeatedly make hopeless claims or applications impose costs on others for no good purpose and usually at little or no cost to themselves. Typically such litigants have time on their hands and no means of paying any costs of litigation – so they are entitled to remission of court fees and the prospect of an order for costs against them is no deterrent. In these circumstances there is a strong public interest in protecting the court system from abuse by imposing an additional restraint on their use of the court's resources.

59. It is important to note that a civil restraint order does not prohibit access to the courts. It merely requires a person who has repeatedly made wholly unmeritorious claims or applications to have any new claim or application which falls within the scope of the order reviewed by a judge at the outset to determine whether it should be permitted to proceed. The purpose of a civil restraint order is simply to protect the court's process from abuse, and not to shut out claims or applications which are properly arguable.

…

63. In considering whether to make a civil restraint order and, if so, what form of order to make, it seems to me that there are three questions which the court needs to ask.

64. The first question is whether the relevant condition specified in the practice direction is satisfied. In the case of an extended civil restraint order, this condition is that the litigant has "persistently issued claims or made applications which are totally without merit" (see para 3.1 of the practice direction). Unless this condition is satisfied, the court does not have the power to make an extended order.

65. As for what is meant by persistence in this context, in *Bhamjee v Forsdick* [2004] 1 WLR 88, para 42, the Court of Appeal explained that:

> "We do not include the word "habitual" among the necessary criteria for an extended civil restraint order, but there has to be an element of persistence in the irrational refusal to take "no" for an answer before an order of this type can be made."

See also *R (Kumar) v Secretary of State for Constitutional Affairs* [2006] EWCA Civ 990, [2007] 1 WLR 536, paras 68-69.

66. In *Kumar* the Court of Appeal said, at para 79, that:

> "court staff and judges must be careful to ensure that if an application or statement of case is regarded as being totally without merit, the order of the court must record that fact, as is required by paragraph 1 of Practice Direction C to CPR Pt 3. If this is not done, wholly avoidable expense may have to be incurred in disinterring and examining the evidence of past litigation …"

…

68. If the pre-condition for making a civil restraint order of one of the three specified types is satisfied, the court may make such an order but is not obliged to do so. In each case the practice direction sets out the scope of the restraint which, as I have indicated, is intended to operate as a default rule where the relevant condition is met. However, in deciding whether to make an order and, if so, whether to depart from the default rule, the court must in principle be guided by the rationale for making civil restraint orders: namely, that such an order is justified if but only if and to the extent that it is necessary to protect the court's process from abuse. This requires an assessment of the risk which the litigant poses. The second question is therefore to ask what risk the litigant has objectively demonstrated that he will, if unrestrained, issue further claims or make further applications which are an abuse of the court's process.

69. The fact that the litigant has repeatedly issued claims or made applications which are totally without merit will itself almost inevitably demonstrate the existence of such a risk. But in considering the extent of the risk it may also be relevant to consider other factors, such as any statements of the litigant's future

intentions, other aspects of the litigant's conduct and whether the circumstances which have generated the hopeless claims or applications are continuing or likely to continue.

70. The third question which the court needs to ask is what order, if any, it is just to make to address the risk identified. As I have indicated, because a civil restraint order represents a restriction on the right of access to the courts, any such order should be no wider than is necessary and proportionate to the aim of protecting the court's process from abuse. In accordance with this principle, the court should therefore approach this question by asking "what is the least restrictive form of order shown to be required"."

82. In *Karim v Charkham & Ors* [2014] EWHC 497 (Admin), Griffith Williams J said at [36]:

> "While there is no longer a requirement of "a vexatious proceeding", the observations of Lord Bingham CJ (as he then was) in *Attorney General v Barker* [2000] FLR 759 at 764 are pertinent:
>
> > "The hallmark usually is the claimant sues the same party repeatedly in reliance upon essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon… that the claimant automatically challenges every adverse decision on appeal; and that the clamant refuses to take any notice of or give effect to orders of the court. The essential vice for habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop"."

The issue of jurisdiction

83. Males LJ's statement that "an extended or general order may be made only by specified judges" gives rise to the first point made by Mr Caine with regard to the application for an ECRO. Practice Direction 3C deals with ECROs at paragraph 3 as follows:

> "3.1 An extended civil restraint order may be made by—
> (1) a judge of the Court of Appeal;
> (2) a judge of the High Court; or
> (3) a Designated Civil Judge or their appointed deputy in the County Court, where a party has persistently issued claims or made applications which are totally without merit.
> 3.2 Unless the court otherwise orders, where the court makes an extended civil restraint order, the party against whom the order is made—
> (1) will be restrained from issuing claims or making applications in—
> (a) any court if the order has been made by a judge of the Court of Appeal
> (b) the High Court or the County Court if the order has been made by a judge of the High Court; or
> (c) the County Court if the order has been made by a Designated Civil Judge or their appointed deputy,

concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order;
(2) may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order; and
(3) may apply for permission to appeal the order and if permission is granted, may appeal the order.
3.3 Where a party who is subject to an extended civil restraint order—
(1) issues a claim or makes an application in a court identified in the order concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order, the claim or application will automatically be struck out or dismissed—
(a) without the judge having to make any further order; and
(b) without need for the other party to respond to it;
(2) repeatedly makes applications for permission pursuant to that order which are totally without merit, the court may direct that if the party makes any further application for permission which is totally without merit, the decision to dismiss the application will be final and there will be no right of appeal, unless the judge who refused permission grants permission to appeal.
…
3.7 An order under paragraph 3.3(2) may only be made by—
(1) a Court of Appeal judge;
(2) a High Court judge; or
(3) a Designated Civil Judge or their appointed deputy."

84. In *Middlesbrough Football & Athletic Company (1986) Ltd v Earth Energy Investments LLP & Anor* [2019] 1 WLR 3709, [2019] EWHC 226 (Ch) an issue arose as to whether HHJ Pelling QC, a senior circuit judge and deputy judge of the High Court authorised under section 9(1) of the Senior Courts Act 1981, had jurisdiction to make an ECRO. Sir Geoffrey Vos, Chancellor said at [80]-[81]:

> "80. It is necessary to consider the meaning of the term "High Court Judge" as it is used in CPR Part 3.3 and Practice Direction 3C of the CPR. A person authorised to act as a deputy High Court Judge under section 9(1) has almost all the powers of a salaried High Court Judge, including the power to grant an ECRO. The ambit and limitations of such a judge's jurisdiction are explained in section 9(5)-(6A) of the Senior Courts Act 1981 as follows:-
>
> "(5) Every person while acting under this section shall, subject to subsections (6) and (6A), be treated for all purposes as, and accordingly may perform any of the functions of, a judge of the court in which he is acting.
> (6) A person shall not by virtue of subsection (5)—
> (a) be treated as a judge of the court in which he is acting for the purposes of section 98(2) or of any statutory provision relating to—
> (i) the appointment, retirement, removal or disqualification of judges of that court;
> (ii) the tenure of office and oaths to be taken by such judges; or
> (iii) the remuneration, allowances or pensions of such judges; or

(b) subject to section 27 of the Judicial Pensions and Retirement Act 1993, be treated as having been a judge of a court in which he has acted only under this section.
(6A) A Circuit judge, Recorder or person within subsection (1ZB) shall not by virtue of subsection (5) exercise any of the powers conferred on a single judge by sections 31, 31B, 31C and 44 of the Criminal Appeal Act 1968 (powers of single judge in connection with appeals to the Court of Appeal and appeals from the Court of Appeal to the Supreme Court)."

81. Section 9(5) makes it clear that a judge authorised to sit in the High Court (like HHJ Pelling) is to be treated, subject to some irrelevant exceptions, for all purposes as a judge of the High Court. Accordingly, the term "High Court Judge" in CPR Part 3.3 and Practice Direction 3C is to be construed as including judges authorised under section 9(1) to sit in the High Court. For that reason, HHJ Pelling did indeed have the jurisdiction to the make the ECRO …"

85. Mr Caine submitted that this decision is authority for the proposition that a judge who already has authority to make an ECRO can also make an ECRO when authorised to act as a deputy judge of the High Court pursuant to section 9(1) of the Senior Courts Act 1981, but that an individual who does not already have that authority does not gain it when thus authorised to act as a deputy judge of the High Court. In my judgment, that submission is wrong. On the contrary, the decision is clear authority for the following propositions: first, that "a person authorised to act as a deputy High Court Judge under section 9(1) has almost all the powers of a salaried High Court Judge, including the power to grant an ECRO"; and, second, that "the term "High Court Judge" in CPR Part 3.3 and Practice Direction 3C is to be construed as including judges authorised under section 9(1) to sit in the High Court". Those propositions draw no distinction between the capacity in which the person authorised under section 9(1) has been authorised (in the case of HHJ Pelling as a Circuit Judge, and my case as a Recorder). Further, it would make no sense, and would be contrary to the provisions of sections 9(5)-(6A), for any such distinction to be drawn. I am satisfied I have jurisdiction to make an ECRO.

86. Mr Caine further submitted that I have no jurisdiction pursuant to Practice Direction 2b, on the grounds that this precludes a deputy High Court Judge from trying a claim for a declaration of incompatibility in accordance with section 4 of the Human Rights 1998, and that the present case involves trial of such a claim. In my judgment, that submission is also plainly wrong. No one is seeking a declaration of incompatibility in this case. The fact that Mr Caine's arguments involve contentions that the grant of the applications which are being made against him will involve a transgression of his Article 8 rights (to which, in emails sent after the conclusion of the hearing, he added reference to transgression of his Article 6 rights as well) does not give rise to the trial of a claim for any such declaration. Moreover, those arguments are baseless in any event.

The parties' submissions

87. Turning to the substance of the application for an ECRO, Ms Hamer submitted that the following claims or applications had been held to be totally without merit in Claims 1-3 alone: (a) the applications made by application notice dated 4 July 2018 and issued on 13 July 2018 in Claim 1 for (i) an order that ATL and Mr Curry disclose information and (ii) an order setting aside an "order" of Master Davison; (b) Claim 2, which by Order dated 15 October 2018 Master Yoxall struck out and certified to be "totally without merit"; (c) the application under CPR 50.3 to re-open Mr Caine's appeal in Claim 2 which was the subject of the Order of Sir Alistair MacDuff dated 4 March 2019, which stated that "[the] application is wholly without merit"; and (d) Claim 3, which I have found to be totally without merit for the detailed reasons given above.

88. Mr Caine submitted that the application notice dated 4 July 2018 and issued on 13 July 2018 in Claim 1 comprised only one application (which he accepts was certified as being totally without merit), and that certification in the Order of Master Yoxall dated 15 October 2018 that Claim 2 was totally without merit can and should be ignored on the grounds that this Order was made in ignorance of *Magyar Jeti Zrt* and is vitiated by the decision in *Magyar Jeti Zrt*. Accordingly, Mr Caine contends that he has made only two claims or applications which have been certified as totally without merit (the application made by notice dated 4 July 2018 and issued on 13 July 2018 in Claim 1, and the application under CPR 50.3 to re-open his appeal in Claim 2). Therefore, he argues, the requirement of "persistence" in para 3.1 of Practice Direction 3C, which has been held to require at least three such claims or applications, is not made out.

89. In fact, even if Mr Caine's arguments were right, my finding that Claim 3 is totally without merit means that he has made no fewer than three such claims or applications. Moreover, I consider that his arguments are wrong. Master Yoxall's certification cannot be ignored as he suggests. Indeed, it could not be ignored even if consideration of *Magyar Jeti Zrt* pointed to a different outcome, which it does not, as shown by my analysis of Claim 3. In addition, it is clear that Claim 1 was dealt with at every level on the basis that two applications had been certified as being totally without merit in Claim 1. Accordingly, I consider that Ms Hamer is right in saying that a total of five claims or applications have been certified as being totally without merit in Claims 1-3 alone.

90. However, matters do not stop there, because Mr Caine has been a frequent visitor to the Courts, and there are other cases in which claims or applications made by him have been certified as being totally without merit, or otherwise attracted judicial criticism. Those cases are numerous, and were the subject of amplification as a result of information that emerged both during the course of the hearing and subsequently.

91. The Defendants' legal advisers have prepared a Chronology relating to these others cases, which identifies no fewer than 15 occasions between 22 November 2009 and 9 December 2016 on which judges were strongly critical of claims or applications made by Mr Caine. Among other things, it asserts that a number of "totally without merit" findings were made in various proceedings brought by Mr Caine in the Administrative Court in 2009, 2010 and 2013. For example, in *R (1) John C (2) Patricia v OFSTED* [2013] EWHC 3594 (Admin), in which Mr Caine was one applicant, an application for

permission to apply for judicial review was dismissed by Walker J and described as "totally without merit" at [31]-[32]. Further, at [40] Walker J stated "I will make the order that the claim is without merit". However, it is unclear to me whether similar observations were translated into formal Orders in every instance. In any event, Mr Caine contends that these matters duplicate the matters which are referred to in the Order of Mostyn J which I discuss below, and I have no immediate means of ascertaining whether or not that is right. In other instances, I consider that the Chronology overstates matters. For example, the Schedule states that in *R (Caine) v Chief Constable of Dorset* [2009] EWHC 3725 (Admin) Mr Caine's application for permission to apply for judicial review was "refused by Dyson LJ (as he then was) and Tugendhat J on limitation grounds [8] and because it was "misconceived", "abusive" [9]-[10] and "unarguable" [9], [12]". However, I consider that what Dyson LJ said at [10] (for example) puts a slightly different complexion on these matters:

> "… I should explain that what Hickinbottom J meant when he used the word "abusive" was that it was in the technical sense an abuse of the process of the court. It is an abuse of the process of the court to seek to invoke the criminal law solely for the purposes of advancing a civil claim. I would not rest my decision on that point. I would rest my decision on the narrower point that the police were fully entitled to take the view that Mr Caine's real complaint here is of a civil nature against Mr Norcliffe …"

92. For these reasons, I confine myself to the following matters:

(1) In *R (Jonathan Caine and John Caine) v Parliamentary Commissioner for Administration* (case number CO/5588/2014) by Order dated 28 January 2015 Mostyn J refused an application for judicial review in which Mr Caine was one applicant and certified "the application is considered to be totally without merit". It appears from [2] of Mostyn J's reasons for refusing permission state that Mr Caine had made three previous applications which were totally with merit:

> "This is the ninth application for judicial review made by the claimant John Caine since 2012. Four have related to [educational matters]. Three of those have been found to be totally without merit. This is the fourth. On the last occasion the deputy High Court Judge specifically required that any further claim by either claimant should be referred to a High Court Judge to consider if a Civil Restraint Order should be made. In the circumstances I direct that the claimant John Caine should attend before a High Court Judge sitting in the Administrative Court on a date to be fixed before 2 April 2015 to show cause why an extended Civil Restraint order should not be made against him …"

(2) Thereafter, Holroyde J made an Order on paper granting Mr Caine's application to adjourn the hearing envisaged by Mostyn J, pending determination of Mr Caine's application for permission to appeal the Order of Mostyn J. By Order dated 2 February 2016, McCombe LJ refused permission to appeal, stating that the reasons of Mostyn J "were entirely correct". These matters are referred to in the Order of Holman J dated 15 March 2016. For the reasons given in that Order,

Holman J decided that it was no longer necessary for Mr Caine to show cause whether or not an ECRO should be made. Those reasons state at [1] and [8]:

> "… this claim was another in the long line of unsuccessful and usually hopeless (being certified as totally without merit) applications made to the Administrative Court by John Caine…
>
> Mr John Caine must clearly understand, however, that if he were later to issue further unmeritorious applications to the court, on whatever topic, there may be future consideration of whether or not an ECRO should be made against him, at which reliance could also be placed upon the history of the previous proceedings, including these proceedings."

93. Ms Hamer submitted that Mr Caine is on any view a litigant who refuses to take "no" for an answer. Undeterred by, in particular, the fate of Claim 1 and Claim 2, and the impending and now actual fate of Claim 3, he continues to threaten or advance litigation - most obviously in the form of Claim 4 and in his assertions that even Claim 1 can be "resurrected" at any time in the future (on the basis that a photograph of the hard-copy article that was complained of in Claim 1 was posted by a certain Richard Millhouse Milford on 14 May 2016 on the NMWT Page - the very Facebook page that judges have repeatedly found that the Defendants are not liable for publishing).

94. Ms Hamer further made the point that Mr Caine has been granted remission of court fees, so that there is no immediate financial deterrent to issuing further claims or applications. Also, the £34,000 that Mr Caine has so far been ordered to pay on account of costs (£25,000 by Master Yoxall and £9,000 by Dingemans J) has not been paid.

95. Finally, Ms Hamer submitted that although it is a matter of record that Mr Caine was successful on one argument in his appeal in Claim 1 (on the legal question of whether a challenge to late service of a claim form should be brought under CPR 11 or CPR 3.4 – a point which did not affect the outcome of the appeal, which was nevertheless dismissed) and, further, that, while upholding findings of "totally without merit" below, various judges have declined to certify that Mr Caine's applications for permission to appeal or his appeals are themselves totally without merit, the decision whether to grant an ECRO "is not a question of a batting average" (see *Attorney General v Vaidya* [2017] EWHC 2152 (Admin), per Bean LJ). Ms Hamer submitted: "The vice in this case is the indiscriminate issuing of claims and applications, the vast majority of which are hopeless and/or abusive, leaving the Court and the Defendants to try to sort the wheat from the chaff at great cost, time and expense. An ECRO will not preclude Mr Caine from having access to the courts. It simply imposes a filter. If the claim or application has reasonable grounds, he will be given permission to bring it …."

96. Mr Caine's main answers to these submissions were to say, first, that other litigation in which claims or applications made by him have been certified as "totally without merit" were historic, and that he had not been the subject of any such finding (outside the scope of Claims 1-3) since January 2015.

97. Further, Mr Caine relied on the fact that he had enjoyed some successes, and that even where he had not been successful he had received sympathetic or appreciative or encouraging remarks from judges. For example, in *R (Caine) v The Independent Office for Police Conduct & Ors* (Claim No CO/2550/2018), on 19 November 2018 Garnham J granted Mr Caine permission to apply for judicial review in respect of decisions dated 12 April 2018 and 17 April 2018; and in *R (Caine) v The Independent Office for Police Conduct & Anr* (Claim No CO/80/2019), on 24 April 2019 Upper Tribunal Judge Grubb sitting as a Deputy High Court Judge granted him permission to apply for judicial review in respect of a decision dated 19 October 2018.

98. When I asked Mr Caine for what he regarded as a good illustration of approving remarks from judges, he referred me to what was said in *R (Caine and Anor) v SoS for Children, Schools and Families and Arnewood School* [2012] EWCA Civ 484. In that case, when dismissing an application for permission to appeal on the grounds that the appeal would have no real prospect of success, Arden LJ (as she then was) said at [8]: "I have fully accepted that Mr and Mrs Caine feel very strongly about the serious failings of the school and I have already described what those failings were".

99. With regard to Claims 1-3, Mr Caine did not accept these claims were "totally without merit": as set out above, he considered (a) that the rulings in Claim 2 were wrong in light of what he believed could be extracted from *Magyar Jeti Zrt;* (b) that he had properly brought Claim 3 on the same basis; and (c) as reflected in Ms Hamer's submissions, that the substance of his grievance about the article which formed the subject of Claim 1 remained valid.

Discussion

100. I do not consider that Mr Caine's reliance on the words of Arden LJ lends support to his case. On the contrary, I consider that it undermines it. The renewed application for permission to appeal which was before Arden LJ concerned an order that Mr Caine and his wife should pay costs of £900; this order was made against a background that proceedings had been started in February 2010 and in July 2010 HH Judge Mackie QC had refused permission for judicial review on the grounds that the claim was hopeless; and Arden LJ upheld the order below on the basis that "the proceedings could not be proceeded with" and "[t]here had been a sensible offer … which could have resolved the proceedings with no order as to costs, but no step was taken in relation to that until … [a] stage [where the offering party] said that it had incurred further costs, as was inevitable": see [1], [2], [3] and [6] of the reasons of Arden LJ. It seems to me that this reveals another instance of Mr Caine commencing litigation that is hopeless, pursuing it in an unreasonable way, and refusing to take "no" for an answer, resulting in costs and inconvenience to others, and a waste of the resources of the court. Even if Mr Caine has enjoyed a measure of success in some cases, this is a pattern repeated in many others.

101. As to Mr Caine's other points, until 2 February 2016 Mr Caine was seeking to appeal the Order of Mostyn J dated 28 January 2015, and until Holman J made his Order dated

15 March 2016 Mr Caine was in jeopardy of having an ECRO made against him for the reasons which appear from the Order of Mostyn J. Mr Caine wrote a letter of claim in respect of the article complained of in Claim 1 on 22 May 2016. The claim form in Claim 1 was issued on 9 May 2017. There is not a long interval between those events. Moreover, it would be unsurprising if Mr Caine was reticent about commencing further litigation for a while in light of the cautionary words in [8] of the Order of Holman J. In any case, even if Mr Caine was quiet for a time, he soon made up for that in Claims 1-3. The history of those Claims speaks for itself. The manner in which Mr Caine has pursued them is almost a textbook example of the hallmarks stated by Lord Bingham.

102. In my judgment, Mr Caine has persistently issued claims or made applications which are totally without merit. This is so by reference to Claims 1-3 alone, but is exacerbated or underscored by the antecedent proceedings which were considered by Mostyn J and Holman J. In Mr Caine's case, there is more than an element of persistence in the irrational refusal to take "no" for an answer. Further, I consider that an ECRO is necessary to protect the court's process from further abuse. The existence of such a risk is amply demonstrated by Mr Caine's past conduct, and is in no way diminished by his response to the applications that are before me (which, in my judgment, has demonstrated a blinkered and self-righteous determination to press on with his chosen course of litigation and a lack of insight as to its objective merits, its effect on others, and its demands on the resources of the court), and by the commencement of Claim 4.

103. For these reasons, I am satisfied that it is appropriate to make an ECRO in this case. I consider that this should be for a period of 2 years. That is the least restrictive form of order which is just, necessary, and proportionate to address the risk posed by Mr Caine.

Conclusion

104. I propose to grant the Defendants all the relief that they seek. Ms Hamer should draw up draft Orders for consideration when this judgment is handed down. I will deal at that time with the precise terms of the Orders, costs, and any other consequential matters.