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Claim No. QB-2019-003176

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2020

Before:

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

Between:

(1) DAVID NEIL GERRARD
(2) ELIZABETH ANN GERRARD

Claimants

- and -

(1) EURASIAN NATURAL RESOURCES
CORPORATION LIMITED
(2) DILIGENCE INTERNATIONAL LLC

Defendants

Thomas de la Mare QC and Daniel Burgess (instructed by **Jones Day**) for the **First Defendant**

Anya Proops QC (instructed by **RIAA Barker Gillette (UK) LLP**) for the **Second Defendant**

Adam Wolanski QC, Lorna Skinner and Sandy Phipps (instructed by **Enyo Law LLP**)
for the **Claimants**

Hearing dates: 3-4 November 2020

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JUDGMENT

RICHARD SPEARMAN QC:

INTRODUCTION AND NATURE OF THE HEARING

1. In these proceedings, the Claimants (“Mr and Mrs Gerrard”) bring claims for breaches of data protection law, misuse of private information, harassment, and trespass arising from surveillance activities carried out on behalf of the First Defendant (“ENRC”) by various persons, including, since February 2017, the Second Defendant (“Diligence”). The proceedings form part of high profile litigation between Mr Gerrard, ENRC and others.
2. Until April 2011, Mr Gerrard was a partner at DLA Piper UK LLP. He is now a partner at Dechert LLP. In those capacities, between December 2010 and March 2013, he acted as a solicitor for ENRC, which is a holding company in a diversified natural resources group with extensive mining operations. In sum, he was instructed to conduct an investigation into a number of ENRC’s subsidiaries. Diligence provides intelligence and surveillance services. So far as material to this claim, it has provided services to ENRC since 2017.
3. On 25 September 2017, ENRC issued proceedings in the Commercial Court (the “Commercial Court Proceedings”) claiming damages for breach of fiduciary duty and negligence. It is alleged in those proceedings that (1) during the course of the retainer Mr Gerrard sought to encourage (and thereafter increase) the intervention of the SFO in the investigation being conducted by Dechert LLP, in order to expand the scope of that firm’s retainer and thus his own ability to generate fees; (2) Mr Gerrard said on one occasion with regard to ENRC that he was planning to “screw these fuckers”; (3) Mr Gerrard was aiming to generate millions of pounds in fees from ENRC, and the fees in fact amounted to over £16m; and (4) the wrongdoing included secretly, and without authorisation, leaking ENRC’s confidential and privileged material to both the media and the SFO.
4. On 25 March 2019, ENRC brought further proceedings in the Chancery Division (the “Chancery Proceedings”) against the Director of the SFO, for inducing Dechert LLP to breach its contract with ENRC, inducing Dechert LLP and/or Mr Gerrard to breach their fiduciary duties to ENRC, and misfeasance in public office. The factual allegations relating to Mr Gerrard’s unlawful conduct were repeated by ENRC in those proceedings.
5. On 6 September 2019, Mr and Mrs Gerrard brought the present claim against Diligence. By a consent order made by me dated 17 October 2019, ENRC was added as a defendant. The substance of their claim is that ENRC has been seeking to obtain

personal information relating to Mr Gerrard since at least December 2013, and has been conducting surveillance in relation to him from at least 2014. Further, Diligence has since February 2017 been instructed by ENRC to provide intelligence and surveillance services in respect of Mr Gerrard, and, starting on a date no later than 1 January 2019, has been undertaking surveillance activities in relation to both Mr and Mrs Gerrard. All the actions complained of are said to be unlawful, and, among other things, the surveillance is said to have extended to protracted surveillance of their home at Hunters Farm in East Sussex.

6. By application dated 14 October 2019, Mr and Mrs Gerrard sought an injunction to restrain ENRC from making any use of the information obtained via the surveillance and from carrying out any further “monitoring” of Mr and Mrs Gerrard. ENRC and Diligence provided undertakings in lieu of the injunction that was sought, pursuant to another Consent Order that I made on 17 October 2019 (the “Undertakings Consent Order”).
7. On 20 January 2020, ENRC and Diligence filed separate Defences. Their case, in substance, is that: (1) the surveillance carried out by Diligence on behalf of ENRC was part of an investigation into Mr Gerrard’s wrongdoing for the purposes of (i) the ongoing Commercial Court Proceedings and (ii) the then potential Chancery Proceedings (together “the Litigation”); (2) the instructions provided to Diligence and the documents produced in respect of the investigation were for the dominant purpose of the Litigation and thus subject to litigation privilege; (3) the surveillance was reasonable and necessary in pursuit of the legitimate aim of investigating (and preventing) the wrongdoing (together the “Legitimate Aim”); and (4) the surveillance was not calculated to be, and was not, harassing of Mr or Mrs Gerrard, and was reasonable in light of the Legitimate Aim.
8. Initially, Mr and Mrs Gerrard chose not to file a Reply, and a deadline of 3 February 2020 for them to do so expired. Instead, they applied to stay the present proceedings. That application was dismissed, following a contested hearing, by Master Sullivan on 22 April 2020. Thereafter, Mr and Mrs Gerrard filed a Reply dated 12 May 2020.
9. There then followed the various applications which are now before me. They comprise: (1) the applications of ENRC and Diligence dated 16 June 2020 to strike out parts of the pleaded case of Mr and Mrs Gerrard (“the Strike Out Applications”), (2) the application of Mr and Mrs Gerrard dated 18 September 2020 for permission to amend their pleaded case (“the Amendment Application”), now to take the form of a draft Re-Amended Particulars of Claim dated 13 October 2020 (“the RAPOC”), and (3) cross-applications relating to costs arising from a Consent Order of Master Eastman dated 9 June 2020, whereby it was ordered that a CCMC listed for 11 June 2020 should be adjourned and that the “costs of the adjourned CCMC” were reserved to the Judge hearing the strike out applications of ENRC and Diligence (“the Costs Applications”). During the course of the hearing, the parties agreed that determination of the Costs

Applications should be deferred until after I had given judgment in relation to the other three Applications.

10. The applications were very ably argued by Mr de la Mare QC for ENRC, Ms Proops QC for Diligence, and Mr Wolanski QC for Mr and Mrs Gerrard. I am grateful to all of them.

OVERVIEW OF THE APPLICATIONS

11. The Strike Out Applications are not in the same terms. ENRC's application relates to paragraphs 30-33 of the RAPOC and paragraphs 8(a)(ii), 8(a)(iii), 8(b), 8(d)(ii)(2), 8(e)(i), and 8(e)(ii) of the Reply, and is made under CPR 3.4(2)(a) ("the statement of case discloses no reasonable grounds for bringing or defending the claim") and/or CPR 3.4(2)(b) ("the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings"). Diligence's application relates to paragraphs 8 (a)(ii), 8 (a)(iii), 8(b), 8(d) and 8(e) of the Reply, and is made under CPR 3.4 2(a) alone. So far as concerns the Amendment Application, at the start of the hearing it became clear that the only contested aspects related to paragraphs 30-33 of the RAPOC.
12. The substance of the applications is that ENRC and Diligence seek summarily to dispose of: (1) the entirety of Mr and Mrs Gerrard's claim for harassment pursuant to section 3 of the Protection from Harassment Act 1997 ("PHA"), and (2) various aspects of Mr and Mrs Gerrard's case that ENRC and Diligence are not entitled to rely on litigation privilege in respect of the surveillance and other activities about which they complain.
13. The applications overlap, not least because one significant feature of the claim under the PHA is that harassment, if made out, gives rise to criminal as well as civil liability. This, in turn, is relevant to the merits of the argument of Mr and Mrs Gerrard that ENRC and Diligence are unable to rely upon litigation privilege because they are guilty of iniquity. It emerged during the hearing that the prize, or at least a prize, which the parties are fighting over concerns the extent of the obligations of ENRC and Diligence at the disclosure stage of the litigation, which has not yet been reached. It was suggested on behalf of ENRC and Diligence that Mr and Mrs Gerrard may be using the present proceedings as a means of gaining access to documents which may assist them in the Litigation but which (presumably) they would be unable to obtain on disclosure in the Litigation. Mr and Mrs Gerrard deny this, and contend that disclosure is going to be important because (as they say, understandably) they want to know what information has been obtained about them.
14. Mr de la Mare addressed me first, and concentrated on the pleaded claim under the PHA, although he also made some submissions concerning the pleaded Reply issues.

Ms Proops addressed me second, and concentrated on the Reply issues, although she also made some submissions concerning the claim under the PHA. Mr Wolanski then addressed me on all issues on behalf of Mr and Mrs Gerrard. Both Mr de la Mare and Ms Proops then replied, in part by reference to a joint written Reply Note. As this referred to new authorities, Mr Wolanski asked for permission to provide a written response, which was not resisted. In addition to a day for pre-reading, these submissions occupied two full hearing days. They were preceded by written Skeleton Arguments which ran to more than 100 pages in total.

15. That volume of reading material and argument does not, of course, mean that the issues which I am now asked to decide are not suitable for summary determination. It did, however, bring to mind at quite an early stage in my deliberations some words of caution from well-known cases: (1) in *Tilling v Whiteman* [1980] AC 1, Lord Scarman observed at p25 that “Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety, and expense”; (2) in *John v Rees* [1970] Ch 345, Megarry J said at p402: “... the path of the law is strewn with examples of open and shut cases which, somehow, were not ...”; and (3) in *Re S-W (Children)* [2015] 1 WLR 4099, Sir James Munby P said at [54] “We are all familiar with the aphorism that ‘justice delayed is justice denied’. But justice can equally be denied if inappropriately accelerated ...”

THE RELEVANT LEGAL PRINCIPLES

16. There was no dispute between the parties as to the legal principles applicable to the Strike Out Applications and the Amendment Application, and I can take them substantially from the Skeleton Argument of Mr de la Mare, as follows.
17. A court may strike out a statement of case if it “discloses no reasonable grounds for bringing or defending the claim” (CPR 3.4(2)(a)). An example of such a statement of case is one “which contain[s] a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant” (CPR PD 3A, para 1.4(3)).
18. There is an overlap between the summary judgment and strike out jurisdictions to the extent that the court may treat an application under CPR 3.4(2)(a) as if it was an application for summary judgment: *Moroney v Anglo-European College of Chiropractic* [2009] EWCA Civ 1560 (at [24]).
19. In *Easyair v Opal* [2009] EWHC 339 (Ch) at [15], Lewison J set out the principles applicable to the equivalent test in summary judgment, as follows:

“i) *The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success ...*

- ii) *A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ...*
- iii) *In reaching its conclusion the court must not conduct a “mini-trial”.*
- iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.*
- v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.*
- vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.*
- vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction”.*

20. The test to be applied on an opposed application to amend is the same as the test to be applied to an application for summary judgment (i.e. whether the proposed new claim has a real prospect of success): *SPR North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch) at [5].

21. Further, given that the purpose of the statement of truth is to verify an amendment, a party will not be permitted to raise by amendment an allegation which is unsupported by any evidence and is therefore pure speculation or invention: *Clarke v Marlborough Fine Art (London) Ltd* [2002] EWHC 11.

22. In addition to citing *Easyair*, Mr Wolanski relied upon the following summary by Warby J of the principles to be applied on an application to strike out, in *Duchess of Sussex v Associated Newspapers Ltd* [2020] EMLR 21 at [33]:

“(1) *Particulars of Claim must include “a concise statement of the facts on which the claimant relies”, and “such other matters as may be set out in a Practice Direction”*: CPR r.16.4(1)(a) and (e). *The facts alleged must be sufficient, in the sense that, if proved, they would establish a recognised cause of action, and relevant.*

(2) *An application under CPR r.3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The Court should not be deterred from deciding a point of law; if it has all the necessary materials it should “grasp the nettle”*: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725, *but it should not strike out under this sub-rule unless it is “certain” that the statement of case, or the part under attack discloses no reasonable grounds of claim*: *Richards (t/a Colin Richards & Co) v Hughes* [2004] EWCA Civ 266; [2004] P.N.L.R. 35 [22]. *Even then, the Court has a discretion; it should consider whether the defect might be cured by amendment; if so, it may refrain from striking out and give an opportunity to make such an amendment.*

(3) *Rule 3.4(2)(b) is broad in scope, and evidence is in principle admissible. The wording of the rule makes clear that the governing principle is that a statement of case must not be “likely to obstruct the just disposal of the proceedings”*. *Like all parts of the rules, that phrase must be interpreted and applied in the light of the overriding objective of dealing with a case “justly and at proportionate cost”*. *The previous rules, the Rules of the Supreme Court, allowed the court to strike out all or part of a statement of case if it was “scandalous”, a term which covered allegations of dishonesty or other wrongdoing that were irrelevant to the claim. The language is outmoded, but ... the power to exclude such material remains. Allegations of that kind can easily be regarded as “likely to obstruct the just disposal” of proceedings.”*

23. Mr Wolanski also drew my attention to [34] in the same judgment:

“In the context of r 3.4(2)(b), and more generally, it is necessary to bear in mind the Court’s duty actively to manage cases to achieve the overriding objective of deciding them justly and at proportionate cost; as the Court of Appeal recognised over 30 years ago, “public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for the fair determination of the dispute between the parties”: *Polly Peck v Trelford* [1986] Q.B. 1000, 1021 (O’Connor LJ). *An aspect of the public*

policy referred to here is reflected in CPR r.1.1(2)(e): the overriding objective includes allotting a case “an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases”.”

24. Mr Wolanski also pointed out that “it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact” (*Benyatov v Credit Suisse Securities (Europe)* [2020] EWHC 85 at [60(6)]).
25. A number of submissions were addressed to me concerning the procedural history and background to the present applications. For ENRC and Diligence, it was said, in substance, that Mr and Mrs Gerrard’s pleaded case had gone through a number of iterations, that they had been compelled to abandon aspects of it in response to manifest deficiencies being pointed out to them, and that those aspects of the RAPOC which remained in issue represented an attempt to improve the harassment claim (i.e. to save it from the consequences which would otherwise flow from the Strike Out Applications) by adding a number of additional pages, which nevertheless failed because that claim had no real prospect of success. For Mr and Mrs Gerrard, it was said that the Strike Out Applications had been made late, and that this reflected ENRC and Diligence’s lack of confidence in the same, and also, it was suggested, the lack of merit in the same.
26. I bear all these points in mind. As I indicated during the hearing, however, it seems to me that what matters is principally the state of affairs which has now been reached, as opposed to the history of how it has been reached. In a nutshell, the aspects of the RAPOC and the Reply which are now in issue either do or do not disclose a case which has a real prospect of success (or, so far as concerns the Reply, a case which is “otherwise likely to obstruct the just disposal of the proceedings”). If they disclose a case with a realistic prospect of success, that case should be permitted to go forward; if not (or, in the case of the Reply it is likely to obstruct the just disposal of the proceedings), it should not.

THE PLEADED CASE OF HARASSMENT

27. I consider that the detail of this case is important. In the interests of keeping this judgment within manageable bounds, however, I set out the material paragraphs in an Appendix.

THE MATERIAL PARTS OF THE REPLY

28. The like points apply to the case of harassment that is pleaded in the RAPOC.

THE CLAIM FOR HARASSMENT

(i) *The submissions of ENRC and Diligence*

29. Mr de la Mare contended that the harassment claim has no real prospect of success for the following principal reasons:

- (1) To succeed in their claim pursuant to section 3 of PHA, it is necessary for Mr and Mrs Gerrard to establish that the Surveillance Activities (in 2019) and the Other Surveillance Activities (in 2013/14) were “calculated to” cause distress to them. Even accepting their factual case in its entirety, they cannot do so. As is apparent from close consideration of the RAPOC, it is their own pleaded case that all of the Surveillance Activities and the Other Surveillance Activities were covert and intended to be so. Surveillance which is intended to be “covert” and thus not discovered by the target plainly cannot be said to be “calculated to cause distress” to that target.
- (2) Mr and Mrs Gerrard’s attempts to respond to this flaw in their claim by paragraph 31 of the RAPOC essentially boil down to three propositions. None of these propositions (even if established factually) remedy the flaw:
 - (a) First, they allege that while ENRC intended the surveillance to be covert, ENRC nevertheless knew that it was possible that, despite those intentions, the surveillance might be discovered by them such that the activity “carrie[d] an inherent and ongoing risk of exposure”. This is no answer. Such conduct cannot be conduct which is objectively “calculated to” cause distress. It is conduct calculated to not be discovered and thus to not cause distress.
 - (b) Second, they allege that ENRC knew or suspected that one or more acts of covert surveillance had been discovered by them such that any subsequent acts of covert surveillance must have been objectively calculated to cause distress. Again, whilst any distress is denied, this proposition is no answer. The initial acts of covert surveillance were covert, and thus cannot have been objectively calculated to cause distress. The fact that those acts had been discovered does not render later acts of surveillance acts calculated to cause distress if, again, those acts were also covert. For example, even if it were established that ENRC did instruct the attempted surveillance in the Caribbean and knew or suspected that Mr and Mrs Gerrard had been made aware of the attempt, that would not mean that any subsequent surveillance of their property was “calculated to” cause distress, given the substantial efforts to ensure that surveillance was covert and not discovered.

- (c) Third, they allege that ENRC knew that it was possible that the surveillance would be discovered later as a result of documents generated by the surveillance being disclosed in the Chancery or Commercial Court Proceedings. As to this: (i) Such a possibility (again) can have no bearing on whether the surveillance was calculated to cause distress; (ii) The proposition proceeds on the basis that the tort would only be complete on some future occasion (which may never arise); (iii) Further, and in any event, a party deploying documents in the course of litigation would be subject to immunity from civil suit, with the result that such conduct may not form the basis of a claim in harassment (as held by the Court of Appeal in *Crawford v Jenkins* [2014] EWCA Civ 1035 per Sir Timothy Lloyd at [69] to [70], applying (at [43]) the judgment of Lewison LJ in *Singh v Reading Borough Council* [2013] 1 WLR 3052 in which it was held that the relevant immunity applied to “statements of case and other documents placed before the court”).
- (3) The surveillance activities alleged by Mr and Mrs Gerrard could not, taken at their highest, be sufficiently grave to attract criminal liability: “On [their] approach, any private investigation firm would be engaged in a course of criminal harassment if there were any risk of its covert surveillance being detected or if it attempted to resume covert [surveillance] after an earlier episode had been detected, or because there may be some chance that the surveillance activities would be revealed in the course of legal proceedings” and “It would be most surprising if, after 23 years of operation under the [PHA], and the grant of innumerable search and freezing orders based in part on evidence obtained by surveillance, if that were the law.”
- (4) The above points concern the Surveillance Activities and the Other Surveillance Activities. By the RAPOC, Mr and Mrs Gerrard seek to bring a further claim of harassment which is said to arise from two letters sent by ENRC’s solicitors, Jones Day. Such letters constitute action in the litigation, pursuant to which ENRC is seeking to defend its rights and interests, both in this litigation and in the Commercial Court Proceedings. It is conduct squarely in connection with extant civil legal proceedings, for the purposes of Article 6 ECHR. The letters are written communications alone (benefiting in their own right from Article 10 ECHR) in a context that, were this a claim for defamation, would plainly benefit from at least qualified privilege. In substance, the letter dated 8 June 2020 was written in accordance with the provisions of the Undertakings Consent Order, and comprised notice by ENRC of ENRC’s intention to limit the ambit of the undertakings given by ENRC to “physical surveillance” and thus remove references to surveillance by “digital” means including “observing, tracking, monitoring or recording their online activities”. Further, the letter explained the rationale for ENRC exercising its right under the Undertakings Consent Order. By the letter dated 12 June 2020, ENRC clarified its position further by

confirming that the withdrawal of the undertaking related to Mr Gerrard only (i.e. the full undertaking for Mrs Gerrard would remain) and also confirming that ENRC had no intention of carrying out investigations of Mr Gerrard outside the Legitimate Aim. Even putting aside the fundamental legal problems of extending the tort of harassment to the conduct of litigation (see below), the allegation that the letters from Jones Day on 8 June and 12 June 2020 in fact constituted actionable harassment pursuant to section 3 of the PHA is fanciful:

- (a) The letters did no more than exercise a right that Mr and Mrs Gerrard agreed that ENRC should have to withdraw the Undertakings on notice. The exercise of such a right cannot on any view amount to conduct calculated to cause distress. Indeed, given that the right being exercised was specifically negotiated between solicitors acting for the respective parties, the exercise of the right is self-evidently “reasonable” (for the purposes of section 1(3)(c) of the PHA).
- (b) Even if exercise of such a right could, in principle, amount to harassing conduct (i.e. actus reus), there is no evidence that the letters were in fact calculated to cause distress. The letters set out entirely proper justifications for the exercise of the right to withdraw.
- (c) There is no evidence that Mr and Mrs Gerrard have in fact been caused distress.
- (d) Most notably, and notwithstanding the assertions that the justifications provided by ENRC for withdrawing the undertakings were insufficient, Mr and Mrs Gerrard have not since sought an injunction to replace the undertakings that have been withdrawn (despite having threatened to do so by letter dated 11 March 2020). If they are correct that the conduct of ENRC (through Jones Day) amounted to criminal harassment, then that would be the obvious course. No explanation has been provided as to why that course has not been adopted.
- (e) Letters sent on instruction during the course of litigation cannot be the subject of a claim for harassment (applying the principles established by Sir Timothy Lloyd in *Crawford* at [69] to [70]).
- (f) More broadly (and in any event) the Court should be extremely chary in finding that any action taken in the course of the conduct of litigation, particularly defensive litigation, by reputable solicitors in correspondence to another party’s solicitors could amount to the crime and tort of harassment, given the implications such analysis may have for: (i) the common law fundamental right to access the Court/Article 6 ECHR; and/or (ii) the

common law fundamental right to legal professional privilege/Article 8 ECHR; and/or (iii) the common law fundamental right of free speech/Article 10 ECHR.

- (g) Sections 1(3)(a) to (c) of the PHA must be purposively construed when applied to extant litigation. The only sensible approach is to construe those provisions as preventing any claim of harassment (not least since the intrusion of a criminal liability into the conduct of litigation has an intolerable chilling effect) arising out of the conduct of litigation. At the very least, once it is shown the context of the purported harassment complained of is solicitor to solicitor correspondence, section 1(3)(b) and (c) purposively construed, requires the claimant then to show that the correspondence is actuated by malice (by analogy to the approach to qualified privilege: see *Clerk & Lindsell*, §§22-96-97) something Mr and Mrs Gerrard's pleaded case does not begin to do. Alternatively, if there is any residual role for the PHA in relation to the conduct of litigation it cannot sensibly extend beyond the very narrow ambit of the tort of malicious (civil) proceedings, following the *Willers v Joyce* line of authority (see [2016] UKSC 43, [2018] EWHC Ch 3424 (trial)), and that pleaded case comes nowhere near that.
 - (h) In particular, it should not be necessary to enquire whether any particular action is enabled or required by a particular section or provision, although that conclusively answers some of Mr and Mrs Gerrard's wider complaints. For instance, complaint is also made by Mr and Mrs Gerrard of the potential use of surveillance material in Court in the Commercial Court Proceedings. But: (i) if such material is disclosed and used in the Commercial Court Proceedings, it will be disclosed and used pursuant to legal obligations to disclose under the CPR and Orders made under it, and will thus fall within section 1(3)(b) of the PHA; and (ii) if used in Court, it will be used in circumstances both attracting absolute privilege for anything said or done in relation to such material, and under the full control of the Court (which will have powers to control the deployment of the material under CPR 39), and such use will fall under either section 1(3)(b) or (c). The dangers of rejecting this analysis include that, taken to its logical extreme, not only would solicitors have to fear criminal liability as a result of their conduct of litigation, but also it would mean that a variation/withdrawal mechanism in a Court Order such as the Undertakings Consent Order could never in fact be lawfully operated.
- (5) For all these reasons, “these fresh complaints are hopeless in fact and in law”, and: (a) paragraphs 30-33 of the RAPOC should be struck out; (b) the proposed amendments alleging the above claim for harassment (paragraph 31(i)) and the consequent amendments to the claim for damages (paragraph 44(i)) and

injunctive relief (at paragraph 46), should be disallowed on the basis that they are unarguable; and (c) paragraph 8(a)(ii) of the Reply should be struck out for the same reason.

30. Ms Proops adopted Mr de la Mare's submissions, and supplemented them by a number of points which concentrated on the requisite mental element of harassment under the PHA. Her submissions included the following:

- (1) *"It is incoherent to the point of being misconceived to allege that conduct that is covert (i.e. designed to be concealed from an individual) can at one and the same time amount to conduct which was 'calculated' by the putative tortfeasor to have harassing effects on that individual: logically such conduct must be taken to have been 'calculated to' have no effects on the target of the conduct, still less effects which are harassing in nature."*
- (2) *"... to hold that covert surveillance activities will amount to unlawful harassment merely because of the possibility that the surveillance may be discovered or because the fruits of the surveillance may at some point in the future be deployed in court would be to create a situation in which all covert surveillance activities were immediately at risk of being classified as criminal conduct for the purposes of [section 2(1) of the PHA], which outcome would plainly be absurd in all the circumstances."*
- (3) *"... often covert surveillance is the only means by which those activities can be brought to light and subject to adjudication by the courts. It is both conceptually illogical and contrary to public policy to proceed on the basis that such surveillance is by its very nature susceptible to being characterised as criminally harassing in nature, and yet that is the upshot of the Claimants' case ... The suggestion that a specialist investigations company conducting covert surveillance, on behalf of a third party client, for the purposes of substantial litigation that is either in train or in prospect, is automatically and without more (criminally) engaging in conduct calculated to harass the subjects of that surveillance is simply not tenable."*
- (4) *"... the question of whether the Claimants have an arguable case as to the effects of the alleged surveillance on them this is not the issue which falls to be considered in the context of the Strike Out Applications; rather the issue is whether the Claimants' allegations that the Defendants had the requisite guilty mind in respect of the alleged surveillance activities have reasonable prospects of success. For the reasons set out in ENRC's skeleton and above, they do not."*

(ii) *The submissions of Mr and Mrs Gerrard*

31. Mr Wolanski submitted as follows:

- (1) The central contention of ENRC and Diligence (i.e. that because the conduct consisted of covert surveillance, Mr and Mrs Gerrard's case that ENRC and Diligence knew or ought to have known that their conduct amounted to harassment of Mr and Mrs Gerrard should be struck out) is unsupported by authority and is misconceived.
- (2) In any event, Mr and Mrs Gerrard propose to amend their case in harassment to set out further particulars as to why they contend that ENRC and Diligence knew or ought to have known that the conduct amounted to harassment: see RAPOC, [31].
- (3) As the PHA does not define "harassment", it is necessary to have recourse to the authorities to discern the meaning of that concept. The following points emerge:
 - (a) To amount to harassment, the course of conduct must cross the boundary between that which is unattractive and even unreasonable, and that which is oppressive and unacceptable.
 - (b) The concept of harassment is wide and open ended.
 - (c) Because the PHA is concerned with courses of conduct amounting to harassment rather than with individual acts, it is not necessary for the claimant to establish that each act making up the course of conduct amounts to harassment; instead, the focus is on the course of conduct taken as a whole (see *Iqbal v Dean Manson Solicitors* [2011] IRLR 428, Rix LJ at [45]: "[t]he course of conduct cannot be reduced to or deconstructed into the individual acts, taken solely one by one.")
 - (d) The context in which the course of conduct occurs is relevant.
 - (e) It is the substance of the course of conduct that matters, not its form. Harassment can occur even if the conduct in question is, at first sight, commonplace or unremarkable (see *Roberts v Bank of Scotland* [2013] EWCA Civ 882, concerning the volume and nature of telephone calls made by a bank to a defaulting debtor).
 - (f) Complaints between lawyers as to the conduct of litigation can amount to harassment (see *Iqbal*, Rix LJ at [41]-[42]: "In sum, in my judgment, each of these letters does, when considered side by side, arguably evidence a campaign of harassment against [the claimant]. They are arguably capable of causing alarm or distress. They are arguably unreasonable, or oppressive

and unreasonable, or oppressive and unacceptable, or genuinely offensive and unacceptable. Arguably, they go beyond annoyances or irritations, and beyond the ordinary banter and badinage of life. Arguably, the conduct alleged is of a gravity which could be characterised as criminal ...”)

- (g) A person may claim for harassment even if he or she was not a person targeted by the course of conduct, but merely a person foreseeably and directly harmed by the course of conduct.
 - (h) A course of conduct can amount to harassment even if it involves no communications with the claimant, but instead involves actions and allegations which the defendant knows or ought to know will get back to the claimant and cause alarm, distress and anxiety.
 - (i) Acts of surveillance, or the prospect of future acts of surveillance, can comprise a course of conduct amounting to harassment; and this is so even if the subject of the surveillance only later discovers the surveillance.
 - (j) In particular, it is apparent from *Howlett v Holding* [2006] EWHC 41 and *Kellett v DPP* [2001] EWHC Admin 107 that a claim in harassment lies when: (1) a person is subject to surveillance which is unknown at the time, but which is subsequently discovered; and/or (2) a person is subject to a continuing threat of surveillance, even if no such surveillance actually takes place.
- (4) In light of these considerations, Mr and Mrs Gerrard have at least a real prospect of establishing that their case on harassment is sound in law. In particular, the question of whether conduct amounts to harassment is a question of substance, rather than of form. Accordingly, whether or not the conduct amounted to harassment can only be determined by reference to the findings of fact as to what did or did not occur. Much of the challenge of ENRC and Diligence to the pleaded case on harassment is centred around the contention that Mr and Mrs Gerrard (and Mr Gerrard in particular), were not, in reality, alarmed or distressed at all. However, that is a matter which cannot be resolved summarily, and can only be resolved through cross-examination at trial.
- (5) Accordingly, the applications to strike out the harassment claims should be dismissed, and Mr and Mrs Gerrard should be permitted to amend their pleaded case in the form of the revised draft RAPOC (save only that in the following sentence in the current draft [4] the word “investigation” should be used in place of the word “surveillance”: “Accordingly, starting on a date no later than 1 January 2019, the Second Defendant has been undertaking surveillance activities in relation to the Claimants”).

(iii) *The case law concerning the PHA*

32. The question which arose for determination in *Majrowski v Guy's and St. Thomas' NHS Trust* [2007] AC 224 is whether an employer is vicariously liable for harassment committed by an employee in the course of his employment. The claimant alleged that his departmental manager, fuelled by homophobia, had bullied and intimidated him, subjected him to abuse and excess criticism, threatened him with disciplinary action for failing to meet unrealistic performance targets, and isolated him by refusing to talk to him. The Trust investigated these allegations internally and found that harassment had occurred, but later dismissed the claimant for reasons unrelated to those circumstances. The claim was struck out summarily in the county court. On the claimant's appeal, the Court of Appeal, by a majority, allowed the appeal, and held that the case should be permitted to go to trial. The Trust's appeal to the House of Lords was dismissed.
33. The leading speech was given by Lord Nicholls. Lord Hope delivered a speech concurring in the result, but focussing on the provisions of the PHA which apply to Scotland. Lady Hale delivered a speech agreeing with Lord Nicholls and Lord Hope. Lord Carswell delivered a speech expressing agreement with aspects of the speeches of Lord Nicholls and Lord Hope and "agree[d] with your Lordships that the appeal should be dismissed". Lord Brown agreed with Lord Nicholls, Lord Hope and Lady Hale.
34. The material provisions of the PHA were described by Lord Nicholls at [18]-[22] as follows:

"18. I turn to the material provisions of the 1997 Act. The purpose of this statute is to protect victims of harassment, whatever form the harassment takes, wherever it occurs and whatever its motivation. The Act seeks to provide protection against stalkers, racial abusers, disruptive neighbours, bullying at work and so forth. Section 1 prohibits harassment in these terms:

'(1) A person must not pursue a course of conduct -

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.'

Certain courses of conduct are excepted: where the course was pursued for the purpose of preventing or detecting crime, or was pursued under any enactment or rule of law, or where in the circumstances it was reasonable to pursue the course of conduct: section 1(3). Harassment is

not defined in the Act, but it includes causing anxiety or distress. A course of conduct means conduct on at least two occasions: section 7(2), (3). Harassment may be of more than one person.

19. *This statutory prohibition applies as much between an employer and an employee as it does between any other two persons. Further, it is now tolerably clear that, although the victim must be an individual, the perpetrator may be a corporate body.*
20. *Section 2 creates the criminal offence of harassment. The offence comprises pursuit of a course of conduct in breach of section 1. Criminal proceedings can deal only with offences which have been committed. Section 3 goes further. Section 3 affords victims a civil remedy in respect both of actual breaches of section 1 and also threatened breaches. For instance, a single act of harassment may have occurred, not in itself a course of conduct, and the victim may fear repetition. Section 3 provides:

(1) *An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.*

(2) *On such a claim damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.'**

Subsequent provisions in the section make plain that the court may grant an injunction for the purpose of restraining a defendant from pursuing any conduct which amounts to harassment. Breach, without reasonable excuse, of such an injunction is itself a criminal offence: subsection (6).

21. *The Trust, relying on the permissive 'may' in section 3(2), submitted that an award of damages under this section is discretionary. A claimant is not entitled to damages as of right. Hence, it was said, harassment cannot be equated with a common law tort.*
22. *I do not agree. The effect of section 3(1) is to render a breach of section 1 a wrong giving rise to the ordinary remedies the law provides for civil wrongs. This includes an entitlement to damages for any loss or damage sustained by a victim by reason of the wrong. Ordinary principles of causation and mitigation and the like apply. Subsection (2) is consistent with this understanding of the section. The phrase 'among other things' assumes that damages are recoverable. The enabling language ('may be awarded') is apt simply to extend or clarify the heads of damage or loss for which damages are recoverable."*

35. At [30], Lord Nicholls said:

"Where ... the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other

people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2.”

36. At [64], Lady Hale posed the question of what the promoters of the PHA might have thought about the issue of vicarious liability. Lady Hale continued as follows at [65]-[67]:

“65. They might have considered that the principal purpose of the Act was prevention and protection rather than compensation. It begins with the prohibition of harassment in section 1. This is then made a criminal offence by section 2. Civil remedies, including damages and injunctions are provided for in section 3. The aim, it might be thought, was to deter, to punish or to encourage the perpetrator to mend his ways by the wide range of criminal disposals available on summary conviction, including the restraining orders provided for in section 5, or by the sort of specific prohibitions which may be helpfully contained in an injunction.

66. If this was the aim, it is easy to see why the definition of harassment was left deliberately wide and open-ended. It does require a course of conduct, but this can be shown by conduct on at least two occasions (or since 2005 by conduct on one occasion to each of two or more people): section 7(3). All sorts of conduct may amount to harassment. It includes alarming a person or causing her distress: section 7(2). But conduct might be harassment even if no alarm or distress were in fact caused. A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour.

67. If prevention and protection were the aim, it is also easy to see why the mental element was framed as it was. A person is guilty of harassment if he knows or ought to know that his course conduct amounts to harassment: section 1(1)(b). He ought to know this if a reasonable person in possession of the same information would think that it amounted to harassment: section 1(2). There is no requirement that harm, or even alarm or distress, be actually foreseeable, although in most cases it would be. This broad formulation helps the courts to intervene to warn the perpetrator and encourage him to mend his ways.”

37. It seems to me that these passages make clear a number of points which, in my opinion, are apparent from the wording of the PHA in any event. They include: (1) that the purpose of the PHA is to provide protection to victims of harassment in a broad range of circumstances (Lord Nicholls at [18]), including protection by way of prevention and deterrence (Lady Hale at [65]); (2) allied to point (1), that harassment is not defined in the PHA, but, in principle, extends to “[a]ll sorts of conduct” which constitutes “genuinely offensive and unacceptable behaviour” (Lady Hale at [66]); (3) allied to points (1) and (2), that harassment includes, but is not limited to, alarming or causing

distress to the victim; and (4) that the mental element of the offence is made out if the perpetrator knows that the perpetrator's course of conduct amounts to harassment or if a reasonable person in possession of the same information as the perpetrator would think that it amounted to harassment, and, in particular, that "There is no requirement that harm, or even alarm or distress, be actually foreseeable, although in most cases it would be" (Lady Hale at [67]).

38. Although Lord Nicholls referred to the PHA seeking to provide protection against stalkers, it would appear that Parliament considered that this protection was inadequate, because a new section 2A was inserted into the PHA with effect from 25 November 2012 by the Protection of Freedoms Act 2012, sections 111(1) and 120, and S.I. 2012/2075, Art. 5(a). Section 2A creates an offence of stalking, and provides as follows:

- "(1) A person is guilty of an offence if—*
- (a) the person pursues a course of conduct in breach of section 1(1), and*
 - (b) the course of conduct amounts to stalking.*
- (2) For the purposes of subsection (1)(b) ... a person's course of conduct amounts to stalking of another person if—*
- (a) it amounts to harassment of that person,*
 - (b) the acts or omissions involved are ones associated with stalking, and*
 - (c) the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.*
- (3) The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking—*
- (a) following a person,*
 - (b) contacting, or attempting to contact, a person by any means,*
 - (c) publishing any statement or other material— (i) relating or purporting to relate to a person, or (ii) purporting to originate from a person,*
 - (d) monitoring the use by a person of the internet, email or any other form of electronic communication,*
 - (e) loitering in any place (whether public or private),*
 - (f) interfering with any property in the possession of a person,*

(g) *watching or spying on a person.*

...

(6) *This section is without prejudice to the generality of section 2.”*

39. Accordingly, on the one hand, a person cannot be guilty of stalking unless they are also guilty of harassment; and, on the other hand, in order to be guilty of stalking their course of conduct must in addition involve “acts or omissions [which] are ones associated with stalking”. Further, the acts which are associated with stalking include (among other things): (1) following a person, (2) monitoring the use by a person of the internet, email or any other form of electronic communication, and (3) watching or spying on a person.
40. Although harassment is not defined in the PHA, and as stated by Lady Hale “it is easy to see why the definition of harassment was left deliberately wide and open-ended”, the courts have undertaken interpretation of the wording of the PHA in a number of cases.
41. In *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233; [2002] EMLR 4, the Court of Appeal considered the issue of harassment by publication of newspaper articles. Before that Court, the defendants conceded that the publication of newspaper articles is capable in law of amounting to harassment, and the live issue therefore became whether it was arguable that the publications in question constituted harassment. The Court of Appeal held that the claimant had pleaded an arguable case that the defendants had harassed her by publishing the articles in question, and that the claim should therefore be permitted to proceed. Complaints that the claimant’s pleaded case (a) relied on a single article, whereas the PHA prescribes a course of conduct involving at least two incidents, and (b) contained no plea that the defendants knew, or ought to have known, that their conduct amounted to harassment, were held to be capable of rectification by amendment, and incapable of affecting the outcome of the appeal (Lord Phillips MR at [39]).
42. The leading judgment was given by Lord Phillips MR, with whom Jonathan Parker LJ and Lord Mustill agreed. At [30] and [31], Lord Phillips MR said this:

“30 The Act does not attempt to define the type of conduct that is capable of constituting harassment. “Harassment” is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct.

31 The fact that conduct that is reasonable will not constitute harassment is clear from section 1(3)(c) of the Act. While that subsection places the

burden of proof on the defendant, that does not absolve the claimant from pleading facts which are capable of amounting to harassment. Unless the claimant's pleading alleges conduct by the defendant which is, at least, arguably unreasonable, it is unlikely to set out a viable plea of harassment."

43. In one respect at least, it appears that this exposition is wrong. Section 7(2) of the PHA provides that "References to harassing a person include alarming the person or causing the person distress". Accordingly, there is no requirement that the course of conduct should "produce the consequences described in section 7". On the contrary, as stated in *Majrowski*, conduct may constitute harassment even if no alarm or distress is caused. What constitutes harassment is a particular class of conduct, whereas section 7 is dealing (non-exhaustively) with a different matter, namely the consequences of harassing conduct. Indeed, Lord Phillips MR made the point himself in [29] in *Thomas*: "It seems to me that section 7 is dealing with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect". If it is not a requirement of harassment that it should *in fact* produce the consequences of alarm and distress, it is hard to see why, as stated in *Thomas* at [30], harassment should be confined to conduct which is "*calculated to*" produce only those particular consequences.
44. The statement in [30] might therefore be re-cast to say that the generally understood meaning of "harassment" is conduct which is (1) targeted at an individual, (2) calculated to produce harmful consequences such as but not limited to causing alarm and distress, and (3) oppressive and unreasonable. Even so, this is, in my view, a gloss on dictionary definitions, which seem to me to relate to actions such as tormenting, wearing out, exhausting, troubling, and causing vexation, worry and distress, without further requiring that such actions should be either "oppressive" or "unreasonable". The explanation for the addition by the Court of Appeal of these qualifications appears to me to relate to the requirements of the PHA, rather than the ordinary meaning of the word "harassment".
45. The word "oppressive" appears to have been used to summarise the requirement that "the gravity of the misconduct must be of an order which would sustain criminal liability under section 2" (see Lord Nicholls in *Majrowski* at [30]). Reading [30] and [31] in *Thomas* together, the explanation for the addition of the requirement "unreasonable" appears to lie in the need to take account of the provision in section 1(3) that "Subsection (1) does not apply to a course of conduct if the person who pursued it shows ... (c) that in the particular circumstances the pursuit of the course of conduct was reasonable".
46. In any event, an issue arises as to the meaning of the word "calculated" in this context. This word does not appear in the PHA. At [48], Lord Phillips MR referred to some letters which had been published by the defendants and said that they "add to the

[claimant's] case that the [defendants] were pursuing a course of conduct which they could foresee was likely to cause her distress, but do not, when taken in isolation, add to the [claimant's] case that this course of conduct was racist". At [49], Lord Phillips MR said that he was satisfied that the claimant had pleaded an arguable case that the defendants "harassed her by publishing racist criticism of her which was foreseeably likely to stimulate a racist reaction on the part of their readers and cause her distress". The words which I have underlined in [48] appear to me to suggest a subjective test of foreseeability (i.e. which links foreseeability with the defendant's state of mind), but those which I have underlined in [49] appear to me to suggest an objective test (i.e. which links foreseeability with the characteristics of the course of conduct complained of). In my view, the judgment in *Thomas* does not make clear what the Court meant by "calculated". I am fortified in that conclusion by the consideration that, as appears below, that decision appears to have been interpreted in different ways in subsequent cases. If it was open to me to decide the point, however, I would hold that the Court intended an objective test.

47. The Court of Appeal's formulation in *Thomas* has been referred to in other cases. In *Hayes v Willoughby* [2013] 1 WLR 935 the issue before the Supreme Court related to the circumstances in which a civil claim for damages for harassment and for an injunction to restrain its continuance could be defended on the ground that the alleged harasser could rely upon section 1(3)(a) of the PHA: "Subsection (1) . . . does not apply to a course of conduct if the person who pursued it shows (a) that it was pursued for the purpose of preventing or detecting crime". The Supreme Court held that "purpose" in section 1(3)(a) related to a subjective state of mind; that section 1(3)(a) was not subject to a wholly objective test of whether an alleged harasser's conduct was for the purpose of preventing or detecting crime, based on his reasonableness in supposing that there was a crime to be prevented or detected or that his conduct was calculated to achieve those ends, since the application of such a test was not consistent with either the language or the purpose of the PHA and, given the terms of section 1(3)(c), would render section 1(3)(a) otiose; but that this was subject to the control mechanism of rationality (per Lord Sumption JSC at [14]-[15]). The leading speech was given by Lord Sumption JSC, who said at [1]:

"... Harassment is both a criminal offence under section 2 and a civil wrong under section 3. Under section 7(2), references to harassing a person include alarming the person or causing the person distress, but the term is not otherwise defined. It is, however, an ordinary English word with a well understood meaning. Harassment is a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress: see Thomas v News Group Newspapers Ltd [2002] EMLR 78, para 30 (Lord Phillips of Worth Matravers MR) ..."

48. This definition, while similar to that of the Court of Appeal in *Thomas*, in fact differs from it in at least three ways: (1) it adds to the requirements that the conduct in question

should be “oppressive” and “unreasonable” the further requirement that it should be “persistent”; (2) it adds the consequence of “fear” to the consequences of “alarm” and “distress” to which the definition in *Thomas* was restricted; and (3) it limits the application of sections 2 and 3 of the PHA to circumstances where the person who is targeted by the conduct and the person who suffers the adverse consequences of being caused “alarm, fear or distress” are one and the same.

49. The reference to “persistent” may be no more than shorthand for the requirement of a course of conduct. The addition of “fear” to “alarm” and “distress” may be no more than shorthand for saying that section 7(2) is not definitive as to the necessary harmful consequences. However, the third point is inconsistent with the unanimous decision of the Court of Appeal in *Levi v Bates* [2016] QB 91. In that case, Briggs LJ (as he then was) explained at [27]-[31] his reasons why he considered that “it is not a requirement of the statutory tort of harassment that the claimant be the (or even a) target of the perpetrator’s conduct” and “provided that it is targeted at someone, the conduct complained of need not be targeted at the claimant, if he or she is foreseeably likely to be directly alarmed or distressed by it”. Ryder LJ said at [52]: “[The Judge] ought to have held that targeting is an objective concept that includes a situation where the conduct complained of is not only intended to harm a particular victim, but would also foreseeably harm another person, because of her proximity to the intended victim”. Longmore LJ said at [55]:

“It is right that, for the statutory tort of harassment to occur, there must be a course of conduct which is aimed (or targeted) at an individual since that is inherent in the term “harassment”. But I see no reason why it should be only that individual who can sue, if the defendant knows or ought to know that his conduct will amount to harassment of another individual. The tort (and crime) of harassment does not require an intent to harass any one individual; section 1 of the Act is clear that the question whether conduct is harassing conduct is an objective question for the fact-finder. If therefore a defendant knows or ought to know that his conduct amounts to harassment, he should be liable to the person harassed, even if the conduct is aimed at another person. A defendant is always entitled to show, pursuant to section 1(3) of the Act, that in the particular circumstances, his pursuit of the course of conduct was reasonable.”

50. The interpretation provided in *Thomas* was also considered by Simon J (as he then was) in *Dowson & Ors v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB).
51. At [128], Simon J referred to a passage from the judgment of May LJ in the Court of Appeal in *Majrowski v Guy’s and St. Thomas’s NHS Trust* [2005] EWCA Civ 251 at [82], which includes the words (emphasis added):

“... although section 7(2) provides that harassing a person includes causing the person distress, the fact that a person suffers distress is not by itself enough to show that the cause of the distress was harassment. The conduct has

also to be calculated, in an objective sense, to cause distress and has to be oppressive and unreasonable. It has to be conduct which the perpetrator knows or ought to know amounts to harassment, and conduct which a reasonable person would think amounted to harassment”.

52. At [129]-[131], Simon J referred to passages from the speeches of Lord Nicholls and Lady Hale in *Majrowski*.
53. At [132], Simon J referred to a passage from the judgment of Gage LJ in the Court of Appeal in *Conn v Sunderland City Council* [2007] EWCA Civ 1492 at [12], which includes the statement “the touchstone for recognizing what is not harassment for the purposes of sections 1 and 3 will be whether the conduct is of such gravity as to justify the sanctions of the criminal law”.
54. Simon J then referred to a number of other cases as follows:

“133. In R v. Curtis (James Daniel) [2010] EWCA Crim 123, the Court of Appeal (Criminal Division) considered what constituted harassment, in a judgment of the Court given by Pill LJ.

[29] To harass as defined in the Concise Oxford Dictionary, Tenth Edition, is to ‘torment by subjecting to constant interference or intimidation’. The conduct must be unacceptable to a degree which would sustain criminal liability and also must be oppressive. We respectfully agree with the analysis of Lord Phillips MR, with whom Jonathan Parker LJ and Lord Mustill agreed, in Thomas v News Group Newspapers Ltd [2001] EWCA Civ 1233.

134. This interaction of ss.2(1) and 3(1) of the Act and the fact that the same actions may give rise to both criminal and civil liability has been further considered in later cases in the Court of Appeal (Civil Division). These cases provide a warning against confining civil claims only to those cases where a criminal case would succeed.

135. In Ferguson v British Gas Trading Ltd [2009] EWCA Civ 46, Jacobs LJ said at [18]

... It has never been suggested generally that the scope of a civil wrong is restricted because it is also a crime. What makes the wrong of harassment different and special is because, as Lord Nicholls and Lady Hale recognised, in life one has to put up with a certain amount of annoyance: things have got to be fairly severe before the law, civil or criminal, will intervene.

136. In Veakins v Kier Islington Ltd [2009] EWCA Civ 1288 Maurice Kay LJ observed,

[11] ... The primary focus is whether the conduct is oppressive and unacceptable, albeit the court must keep in mind that it must be of an order which ‘would sustain criminal liability’.

...

[15] ... *It may be that, if asked, a prosecutor would be reluctant to prosecute but that is not the consideration, which is whether the conduct is of 'an order which would sustain criminal liability'. I consider that, in the event of a prosecution, the proven conduct would be sufficient to establish criminal liability. I do not accept that, in a criminal court, the proceedings would properly be stayed as an abuse of process."*

55. Simon J then considered issues relating to section 1(3)(a) of the PHA which are not relevant to the present case, before summarising what must be proved as a matter of law in order for a claim in harassment to succeed as follows at [142] (emphasis added):

- "(1) There must be conduct which occurs on at least two occasions,*
- (2) which is targeted at the claimant,*
- (3) which is calculated in an objective sense to cause alarm or distress, and*
- (4) which is objectively judged to be oppressive and unacceptable.*
- (5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.*
- (6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: 'torment' of the victim, 'of an order which would sustain criminal liability'."*

56. As set out above, the limitation in Simon J's proposition (2) that the conduct must be "targeted at the claimant" was overruled by the Court of Appeal in *Levi v Bates* [2016] QB 91. However, this summary appears otherwise to have been approved in that case.

57. Before me, Mr Wolanski relied on two further cases: *Howlett v Holding* [2006] EWHC 41 (QB), and *Kellett v Director of Public Prosecutions* [2001] EWHC Admin 107.

58. In *Howlett* the defendant had carried out a clear and persistent campaign of harassment of the claimant intermittently over a period of about four to five years, by flying banners from his aircraft which were addressed to her, or referred to her, in abusive and derogatory terms, and by dropping leaflets. Eady J said at [1]: "This has undoubtedly caused her anxiety and distress and, what is more, because she never knows when she is likely to see another aircraft going past, she is forced to live in a state of uncertainty and apprehension". At [16], Eady J turned to consider the additional question of surveillance, and recorded that the defendant "has revealed that he has had [the claimant] watched at various times and wishes to retain his right to do so, whatever anxiety and distress that may cause her. It is another means by which he can twist the knife".

59. In *Kellett*, the appellant appealed by way of case stated against the dismissal by the Crown Court of his appeal against his conviction by the magistrates' court of harassment contrary to section 2 of the PHA. The appellant and the victim were neighbours, and there was a history of civil litigation between them which included boundary disputes. The victim was an employee of the Department of Social Security ("DSS"). On two dates in the July 1997, the appellant telephoned the DSS and spoke to an employee of the DSS who was senior to the victim and alleged, in substance, that the victim had been moonlighting. Notes of the two telephone calls were passed on to the DSS Regional Manager, who subsequently informed the victim of the fact and nature of the telephone calls. It was accepted by the appellant that the fact that the victim was caused distress when told of these telephone calls constituted harassment in the light of section 7(2) of the PHA. The case stated included five questions (see [7]).
60. However, the principal argument advanced on behalf of the appellant was that the conviction was only possible because the victim was told about the telephone calls contrary to the appellant's expressed intention; and it was submitted that the appellant could not, in those circumstances, be held criminally liable for the consequences of another's act (see [11]). The respondent submitted, among other things, that there was clearly evidence on the basis of which the court could conclude that his was still a course of conduct which he knew or ought to have known amounted to harassment of the complainant, and relied on the finding below that: "It was a clearly foreseeable and inevitable result of passing the information to her employer that [the victim] would find out about the telephone calls made by the appellant, and any reasonable person in possession of the same information as the appellant would have been aware and expected that the matter would inevitably at some stage be raised with her" (see [13]).
61. The judgment of the Divisional Court was delivered by Penry-Davey J, with whom Rose LJ agreed. Penry-Davey J stated at [15] that "The court concluded in the words that I have already read that it was a foreseeable and inevitable result" and continued at [16]-[18]:
- "16. *In my judgment there is no error of law in the approach adopted by the Crown Court in this case and the questions posed are to be answered in the affirmative. The offence was only complete when the complainant was told of the telephone calls made by the appellant in that it was the knowledge of his conduct that caused her distress. But the fact that she had been informed of the course of conduct by a third party rather than by the appellant himself did not mean that there was no offence committed once she had been so informed, even in circumstances where the appellant had asked that she should not be so informed, so long as there was evidence on the basis of which the court could properly conclude, as it clearly did, that the appellant was pursuing a course of conduct which he knew or ought to have known amounted to harassment of the complainant.*

17. *The court could and did have regard also to section 1(2) providing that a person ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.*
18. *There was in my judgment evidence on the basis of which the court could properly conclude, and it did so conclude, that those allegations were made out. Equally, in my judgment, there was ample evidence in the circumstances of this case for the court to conclude that the appellant's pursuit of the course of conduct was not reasonable. He went considerably beyond the simple reporting of the fact that the complainant was at home when he contended that she should be working and alleged, for example, fraud and an extortionate salary."*

62. The word "calculated" has assumed significance in the present context not because it is contained in the PHA but instead due to the way in which the provisions of the PHA have been interpreted, starting with the judgment of the Court of Appeal in *Thomas*. This led me to ask whether assistance could be obtained from legislation in which it does appear.

63. In consequence, Mr Wolanski placed reliance on the way in which provisions of the Defamation Act 1952 had been interpreted by the courts and by commentators. Section 2 of the Defamation Act 1952 provides that it is not necessary to allege or prove special damage in an action for slander where the words are "calculated to disparage the plaintiff in any office, profession, calling, trade or business carried on by him at the time of the publication". *Gatley on Libel and Slander, 12th edn*, states in this connection at [4.16]:

"There appears to be no direct authority on the meaning of "calculated", though there is some on the similar phrase "calculated to cause pecuniary damage" in s3 of the 1952 Act (which deals with malicious falsehood). Though "calculated to" may have the subjective sense of "intended to bring about a certain result" it is often used in the law in the broader, objective sense of "likely to produce a result" and it has been interpreted in this way in cases under s.3 (Andre v Price [2010] EWHC 2572 (QB)). Tugendhat J noted that there can be degrees both of "likelihood" and "disparagement". However s.2 had to be interpreted in a way that required more than a minimal meaning to be attributed to each of the words to reflect the importance of art.10 rights: "It would be inconsistent with Article 10 to impose liability for slander when the effect upon a Claimant's reputation was below a certain threshold" (at [98]). Having said that, his lordship agreed with counsel that in this context "calculated" must mean something less than "more likely than not" (at [97])."

64. Further, *Gatley on Libel and Slander, 12th edn*, states at [21.14] (some citations omitted):

"Under the provisions of s.3(1) of the Defamation Act 1952, it is not necessary

to allege or prove special damage:

“(a)if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

(b)if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.”

... *“Calculated to” in this context has been accepted as meaning “more likely than not” (Tesla Motors Ltd v BBC [2013] EWCA Civ 152 at [27]. See also, IBM v Web-Sphere Limited [2004] EWHC 529 (Ch) at [74] (Lewison J). In Ferguson v Associated Newspapers Ltd [unreported, December 3, 2001] Gray J stated: “In my opinion, the word “calculated”, where it appears in the Defamation Act, should be given the meaning of “likely” or “probable” rather than such as might well happen, or something which is a possibility...”). The claimant must plead and prove with sufficient particularity that it was more likely than not that the damage referred to in s.3 was caused by “the words upon which the action is founded”. This requires him to give particulars of the nature of the allegedly probable damage and the grounds relied on for saying that it is more likely than not (Tesla Motors Ltd v BBC [2011] EWHC 2760 (QB) at [66]).”*

65. For their part, Mr de la Mare and Ms Proops submitted in their Reply Note that “calculated to” means “intended to” or “was reckless as to”. They relied on the decision of the Court of Appeal, Criminal Division, in *R v Haque* [2012] 1 Cr. App. R 5. That case concerned a prosecution for an offence contrary to section 4 of the PHA, which provides:

- “(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.*
- (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.*
- (3) It is a defence for a person charged with an offence under this section to show that—*
 - (a) his course of conduct was pursued for the purpose of preventing or detecting crime,*
 - (b) his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or*

(c) *the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.*”

66. There was no dispute in *Haque* that the prosecution had to prove (1) that there had been a course of conduct on the part of the appellant, (2) that the course of conduct had caused the complainant to fear on at least two occasions that violence would be used against him; and (3) that the appellant knew or ought to have known that his course of conduct would cause the complainant to fear violence on each of those occasions. The submission which led the Court of Appeal to grant permission to appeal was that, additionally, the prosecution had to prove that the course of conduct amounted to harassment (see [38]).
67. The substance of the appellant’s argument was as follows (see Hooper LJ, giving the judgment of the Court at [37]-[38]): (1) “Given the definition of harassment in section 1 and given that by virtue of section 7 “References to harassing a person include alarming the person or causing the person distress”, proof of the offence against section 4 would seem necessarily to involve proof of harassment within the meaning of section 1”; but (2) “the courts have added further ingredients to the definition of harassment in section 1, and the prosecution must therefore prove those additional ingredients”; and (3) this argument had been accepted by the Court of Appeal in *R v Curtis* [2010] Crim LR 638.
68. At [69], Hooper LJ said “Whilst accepting, as we must, that section 1 is so broadly defined that it may be necessary to import non-statutory requirements into the definition of the offence, we would, but for *Curtis* and *Widdows* [i.e. *R v Widdows* [2011] EWCA Crim 1500], have taken the view that the section 4(1) offence is a freestanding offence and does not require proof of harassment. It would then follow that the statement of offence should not refer to harassment”. At [70], Hooper LJ said that the Court had reached the conclusion “not without some reluctance” that it had to follow *Curtis* and *Widdows*, and accordingly “that a prosecution under section 4 requires proof of harassment and that the prosecution must prove, in addition to the statutory requirements, the requirements identified by Lord Phillips MR in *Thomas v News Group Newspapers Ltd ...*”. The Court held that those requirements were: (1) that the conduct must be targeted at an individual; (2) that the conduct must be calculated to produce the consequences described in section 7 (alarming the person or causing the person distress); and (3) that the conduct must have been oppressive and unreasonable. The Court held (at [71]-[75]) that the first and third of those requirements were made out, and that there was nothing in the point that the jury had not been properly directed in relation to the second of those requirements. The Court accordingly rejected the ground of appeal based on this alleged lack of proper direction.
69. Hooper LJ dealt with the second requirement identified by the Court of Appeal at [72]:

“The second of those requirements is that the conduct must be calculated to produce the consequences described in section 7 (alarming the person or

causing the person distress). Conduct would, it seems to us, to be calculated to produce the consequences described in section 7 if the defendant intended to alarm the complainant or cause him distress (or, perhaps, was reckless as to the consequences). Section 4 requires proof that the defendant knew or ought to have known that his course of conduct would cause the complainant to fear violence. The jury in the present case not having been directed, in accordance with Curtis, that they must be sure that the defendant intended to alarm the complainant or cause him distress, is the conviction safe? In our view it is. We take the view, contrary to the submissions of Miss Jung, that it is inconceivable that the jury (given their other conclusions) would not have been sure that the appellant intended to alarm or distress the complainant in order to achieve his stated objective of protecting Yahuffu. Unless he at least alarmed or distressed the complainant, the appellant would, on his account, have been unable to achieve his objective.” (emphasis added)

70. Further, in *Plavelil v Director of Public Prosecutions* [2014] EWHC 736 (Admin), Moses LJ, with whom Silber J agreed, said at [18]:

“The Crown Court was undoubtedly correct to follow the guidance of the Court of Appeal in R v Haque. The three requirements identified include as a second requirement the conduct must be calculated to produce the consequences described in section 7 and thus the defendant must have intended to alarm the complainant or cause him distress (see paragraph 72). The third requirement is that the conduct must have been oppressive and unreasonable (see paragraph 73).” (emphasis added)

71. Mr de la Mare and Ms Proops accordingly submitted that “... the harasser’s intention (subjectively and objectively assessed) is a necessary part of the meaning of “harassment” and thus is separate from and additional to the objective test of knowledge in section 1(b) ... The alarm or distress must be the natural or inevitable consequences of your actions. This analysis appears, tacitly but necessarily, to be the basis on which the Court of Appeal upheld the verdict in *Haque* ...”. It appears to me that this was a significant departure from their opening submissions, in which, as summarised above, they put at the heart of their arguments the proposition that covert surveillance could not be objectively calculated to cause distress. It is commonplace for arguments to evolve during the course of a hearing. However, changes of significance which occur in the context of contentions that the law is clear plainly, in my judgment, provide grounds for reflection by the Court.
72. In the alternative, while questioning whether it could be appropriate to seek guidance from provisions of the Defamation Act 1952 which are not replicated in the PHA, if (contrary to their interpretation of the decision of the Court of Appeal in *Haque*) the expression “calculated to” was used by Lord Phillips MR in *Thomas* in the same sense as in those provisions, Mr de la Mare and Ms Proops submitted that the expression meant “more likely than not” for the purposes of the PHA. They submitted that:

- (1) in *IBM v Web-Sphere Ltd* [2004] EWHC 529 (Ch); [2004] FSR 39 Lewison J noted that the phrase “calculated to cause pecuniary damage” should be interpreted as meaning likely or probable in an objective sense, rather than a possibility;
 - (2) in *Cruddas v Calvert* [2013] EWHC 2298 (QB) at [195] Tugendhat J adopted the meaning “more likely than not to cause pecuniary damage” (and that phrase was also used by the Court of Appeal in *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152 at [27]);
 - (3) in *Fage UK Ltd v Chobani UK Ltd* [2013] EWHC 630 (Ch); [2013] FSR 32 at [151] Briggs J found that the phrase means “damage is, in the ordinary course of events, viewed objectively, likely to be caused by the conduct of which complaint is made”; and
 - (4) for the same reasoning as informs the “more likely than not” test in those cases (which involved human rights and Article 10) that test is appropriate in the present case (which, they submitted, involves human rights, Article 6, and Article 8 privilege).
73. Finally, while I believe both sides were prepared to accept that, as stated by Lord Nicholls in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 at [12], the meaning of the word “likely” is one which “depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from ‘more likely than not’ to ‘may well’”, they differed as to the extent to which anything said in that case is of assistance in the present context.
74. Mr de la Mare and Ms Proops submitted that the concept of and the analysis of likelihood in that case (which concerned section 12(3) of the Human Rights Act 1998) and which permeates *Practice Guidance (HC: Interim Non-disclosure Orders)* and cases such as *H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (referred to by Lord Nicholls at [21]) arises in a protective, predictive or precautionary context, and cannot safely be transposed to the constituent elements of a substantive criminal offence and a tort.
75. Mr Wolanski did not press the point. He nevertheless suggested that it is at least arguable that to ask whether a result is “sufficiently likely in the light of all the other circumstances of the case” (see Lord Nicholls at [22]-[22]) is appropriate in the context of the PHA.
76. In his written submissions in response, Mr Wolanski submitted that the words “calculated to” were used in *Thomas* in the sense of “objectively likely”, and had been

so applied in numerous first instance decisions in civil harassment cases. In addition to *Dowson* at [142](4), Mr Wolanski made reference to: *Davies v Carter* [2020] EWHC 2674; *Sube v News Group Newspapers* [2020] EMLR 25 at [65]; *LJY v Persons Unknown* [2018] EMLR 19 at [33]; *BVC v EWF* [2019] EWHC 2506 at [169] and [176]; *Canada Goose v Persons Unknown* [2020] 1 WLR 417 at [51]; *Khan v Khan* [2018] EWHC 241 at [140], [141]; *Foskett v Ezeugo* [2017] EWHC 3749 at [33] and *Royal Institution of Chartered Surveyors v Rushton* at [33].

77. Mr Wolanski placed particular reliance on the decision of Warby J, who has great experience of the PHA, in *Hourani v Thomson and Ors* [2017] EWHC (QB) 432. At [129], Warby J identified the three issues on which the claimant bore the burden of proof in relation to each defendant as: (1) Did the defendant engage in a course of conduct? (2) Did any such course of conduct amount to harassment? and (3) Did the defendant know, or should the defendant have known, that the conduct amounted to harassment? In addition (see [5] and [6]), that case involved an assessment of the merits of the defences that any course of conduct did not amount to harassment because it was (i) pursued for the purpose of preventing or detecting crime and/or (ii) in the particular circumstances, reasonable. At [140]-[149], Warby J said the following (emphasis added by Mr Wolanski):

“140. *There must, therefore, be conduct on at least two occasions which is, from an objective standpoint, calculated to cause alarm or distress and oppressive, and unacceptable to such a degree that it would sustain criminal liability: see Dowson v Chief Constable of Northumbria Police [2010] EWHC 2612 (QB) [142] (Simon J).*”

141. *The reference to an “objective standpoint” is important, not least when it comes to cases such as the present, where the complaint is of harassment by publication. In any such case the Court must be alive to the fact that the claim engages Article 10 of the Convention and, as a result, the Court’s duties under ss 2, 3, 6 and 12 of the Human Rights Act 1998. The statute must be interpreted and applied compatibly with the right to freedom of expression, which must be given its due importance. As Tugendhat J observed in Trimingham v Associated Newspapers Ltd [2012] EWHC 1296 (QB) at [267] “[i]t would be a serious interference with freedom of expression if those wishing to express their own views could be silenced by, or threatened with, claims for harassment based on subjective claims by individuals that they feel offended or insulted”.*

...

148. *In general it may be better to evaluate a given factual scenario in its totality, before reaching a conclusion on whether it amounts to harassment. But in this case I have no difficulty dealing, in isolation, with the question of whether it has been proved that the defendants’ conduct actually caused alarm or distress, or other emotions or impacts consistent with it amounting to harassment. To do so involves picking*

out for separate consideration the question of whether the claimant has proved the harm which is plainly an element of the tort. As Lord Phillips said in Thomas at [29], “It seems to me that section 7 [(2)] is dealing with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect.” On the facts of this case at least I see no great difficulty, either, in dealing in isolation with the objective aspect of the same question, namely whether the defendants’ conduct was calculated or likely to produce alarm or distress. I can also reach a conclusion on whether the conduct reached the necessary level of gravity or, put another way, whether it was objectively oppressive, having regard to the subject-matter, the claimant’s status, personality, and the other objective circumstances relied on.

149. *But it seems to me that the question of subjective intention belongs in a different category, and is difficult to assess fairly other than in the context of the twin defences of legitimate purpose and reasonableness that are advanced in reliance on s 1(3). It seems reasonable to conclude that conduct which causes distress but might otherwise be fair and reasonable may in fact be unreasonable, if it is engaged in for an illegitimate purpose, or with malign intent. An example was given by Counsel in Thomas: “... the editor who uses his newspaper to conduct a campaign of vilification against a lover with whom he has broken off a relationship” (see [36]). This approach would seem consistent with the requirement of the Strasbourg jurisprudence that the right to freedom of expression should be exercised in good faith. Similar reasoning applies to the defendants’ further contention that I should find against Mr Hourani on this issue because “For many years he benefitted to an extraordinary degree from his close connections to [Aliyev] and the elite of the Kazakh State. As a result he was able to accumulate vast wealth.” These are disputed allegations, the truth or falsity of which cannot affect the question of whether the offending acts were likely to or did cause harm, or whether they were objectively oppressive.”*

(iv) *Discussion and conclusion*

78. Having carefully reflected on this substantial body of authority, my primary conclusions are that the points which ENRC and Diligence ask me to decide in their favour are not suitable for conclusive determination in the context of the present applications, and that there is at least a real prospect that the analysis discussed below is correct in law. Further, if there is room for discretion, as a matter of discretion I consider that, in accordance with the overriding objective, those points would be better decided, if indeed they ultimately need to be decided at all, on the concrete findings of fact which will be known at trial. However, if the foregoing approaches are not properly open to me, and this is a case where, contrary to my primary views, I am required to “grasp the nettle”, I would decide that the analysis which follows is correct. Accordingly, I propose to dismiss the applications to strike out the claims in harassment and allow the Amendment Application.

79. In my judgment, the cases to which I have been referred contain various inconsistencies.
80. First, in accordance with *Thomas*, as followed in *Haque* and *Plavelil*, it is a requirement of the tort (and crime) of harassment that the conduct must be calculated to produce the consequences described in section 7(2). However, in accordance with *Majrowski*, Lord Sumption in *Hayes*, and I should respectfully have thought the plain meaning of section 7(2), conduct may constitute harassment even if no alarm or distress is in fact caused. If that is right, it makes no obvious sense that it should be necessary for the conduct to be *calculated* to alarm the complainant or cause the complainant distress, when it is not a requirement of harassment that one of those two consequences should *in fact* be caused.
81. Second, the test propounded in *Haque* and *Plavelil* is that “Conduct would ... be calculated to produce the consequences described in section 7 if the defendant intended to alarm the complainant or cause him distress (or, perhaps, was reckless as to the consequences)” such that the jury “must be sure that the defendant *intended* to alarm the complainant or cause him distress”. That is a subjective test. However, the analysis in other cases articulates, or at least strongly points to, an objective test. Thus, Simon J’s analysis in *Dowson* refers to a passage from the judgment of May LJ in the Court of Appeal in *Majrowski* in which May LJ stated “conduct has also to be calculated, in an objective sense, to cause distress”; and Simon J’s summary of what must be proved as a matter of law in order for a claim in harassment to succeed includes conduct “which is calculated in an objective sense to cause alarm or distress”. With the exception of Simon J’s suggested requirement that the conduct must be “targeted at the claimant”, that summary appears to me to have been approved by the Court of Appeal in *Levi*. In any event, Longmore LJ stated in terms that section 1 of the PHA “is clear that the question whether conduct is harassing conduct is an objective question for the fact-finder”. The same approach is to be found in *Hourani* and the other cases relied on by Mr Wolanski.
82. Third, Lord Sumption in *Hayes* stated that harassment requires that the “conduct ... is targeted at another person, which is calculated to and does cause that person alarm, fear or distress”. However, in *Levi* it was held that “it is not a requirement of the statutory tort of harassment that the claimant be the (or even a) target of the perpetrator’s conduct”.
83. In addition, the analysis in *Haque* proceeded on the premise that (1) a prosecution under section 4 requires proof of harassment, and (2) the prosecution must prove, in addition to the statutory requirements, a number of non-statutory requirements which had been imported into the definition of the section 1 offence by cases following *Thomas*. However, unfettered by precedent, the Court of Appeal would have been of the view that the section 4 offence is a freestanding offence and does not require proof of harassment. That view seems to me, with respect, to be right, and to undermine the entire premise on which the decision in *Haque* is based. At the same time, *Haque* is not

only a decision of the Court of Appeal, but also one which applied earlier decisions of the Court of Appeal.

84. Turning from conflicts or possible conflicts in the authorities to questions of precedent, it seems to me that the passages which I have quoted from the speeches of Lord Nicholls and Lady Hale in *Majrowski* formed part of the basis of the reasoning in that case. The issue before the House of Lords was one of vicarious liability. However, in order to address that issue, it was necessary for the House of Lords to set out first the ingredients of the statutory tort for which it was sought to make the employer vicariously liable. This was done in the speeches of Lord Nicholls and Lady Hale, with which Lord Carswell and Lord Brown (at least) agreed. Those passages are thus part of a precedent binding on me.
85. In accordance with that analysis, harassment is a type of conduct. It is not defined in the PHA, but it constitutes genuinely offensive and unacceptable behaviour of an order of gravity which would sustain criminal liability, and it includes, but is not limited to, alarming or causing distress to another person. The action element of the crime (or tort) consists of carrying out that type of conduct. The mental element of the crime (or tort) is made out if the perpetrator knows that the perpetrator's course of conduct amounts to harassment, or if a reasonable person in possession of the same information as the perpetrator would think that it amounted to harassment. There is no requirement that harm, or even alarm or distress, be actually foreseeable, although in most cases it will be.
86. That seems to me in any event to be the correct analysis of section 1 of the PHA. I am unable to see how the requirements for there to be a course of conduct which (1) amounts to harassment of another, and (2) the defendant knows or ought to know amounts to harassment of the other can be given sensible effect if there is contained within the concept of "harassment" a further mental element. Giving the word "calculated" the primary meaning advocated on behalf of ENRC and Diligence (a) would involve requiring the defendant to know that the conduct in question is conduct which the defendant intends to alarm the complainant or cause the claimant distress (or, perhaps, in respect of which the defendant is reckless as to the consequences) and (b) even more problematically, in circumstances where the defendant for some reason lacked that knowledge, would involve requiring that a reasonable person in possession of the same information as the defendant would think that the conduct in question is conduct which the defendant (subjectively) intends to alarm the complainant or cause the claimant distress (or, perhaps, in respect of which the defendant is reckless as to the consequences). This seems to me infelicitous, convoluted and unworkable. It also seems to me unnecessary. In my view, section 1 works perfectly well as I consider it to have been explained by Lord Nicholls and Lady Hale, without adding to the statutory words.

87. If, as I consider right, “calculated” should be understood in the cases where it has been mentioned in the context of discussing harassment not in the subjective sense of “intended to bring about a certain result” but in the objective sense of “likely to produce a result”, that gives rise to an issue as to the meaning of the word “likely” in that context. That is an issue which I am reluctant to decide on the applications which are at present before me. However, I am not persuaded that the correct meaning is “more likely than not” as opposed to a lesser or more flexible meaning such as “sufficiently likely in all the circumstances”. I say this for the following principal reasons: (1) although in the defamation context it is always necessary to have regard to Article 10 considerations, much of the conduct with which section 1 is concerned will not engage ECHR rights either at all or to any serious extent; (2) accordingly, the same considerations as apply in cases such as *Cruddas* do not apply in the context of many and indeed in all probability the great majority of cases involving section 1; (3) my provisional view is not affected by the consideration that ENRC and Diligence may be able to argue that, in this particular case, the conduct complained of was carried out in pursuit of the Legitimate Aim and accordingly engages, as they say, Article 6 and/or Article 8(2) considerations; (4) nor is it affected by the consideration that section 1 creates a criminal offence; (5) on the contrary, the necessary protections are provided by section 1(3), which includes protection where the defendant can show that the defendant’s pursuit of the course of conduct was reasonable, and by the burden and standard of proof which apply in the criminal context.
88. In my view, the above analysis is supported by considering the problem of stalking. As set out above, stalking involves not only harassment but also and in addition “acts or omissions [which] are ones associated with stalking”. These include (among other things): (1) following a person, (2) monitoring the use by a person of the internet, email or any other form of electronic communication, and (3) watching or spying on a person.
89. By their very nature, those particular types of conduct may well be carried out in such a way that, and with the intention that, they will be neither discovered nor discoverable by the victim. This is because, while some perpetrators may want their victims to know that they are being stalked, or may be indifferent as to whether or not their victims realise that they are being stalked, other perpetrators may want to carry out their acts without risk of being detected. For one thing, the longer the acts remain concealed from the victim the longer the acts can be continued, and the more extensively they can be pursued, without the victim taking practical steps to avoid them, or legal steps to prevent them. For another, some perpetrators may derive satisfaction from knowing that, for example, their “watching and spying” is being carried out without the victim having any idea that they are being watched and spied upon. Further, a number of perpetrators will be concerned that they may be subject to criminal penalties or civil remedies if they are discovered.
90. Accordingly, if acts such as following, monitoring electronic communications, and watching and spying do not amount to the particular kind of harassment which

constitutes stalking in circumstances where the perpetrator (1) conceals those acts, (2) has no intention that they should be discovered by the victim, and (3) reasonably believes that they will not be discovered (for example, because they are carried out with skill and care), that would greatly cut down the protection for victims which the PHA provides.

91. This point is underlined by the consideration that, depending on all the circumstances, including the characteristics of the perpetrator and the victim, it may be equally or even more upsetting and alarming for the victim to be followed, monitored and spied upon in a manner that the victim is unable to detect than in a manner that the victim can ascertain.
92. It would also, it seems to me, limit the extent to which the civil courts could provide effective relief, including protection by means of an injunction. Section 3 of the PHA applies in circumstances where there is an “actual or apprehended breach of section 1”. For example, if following or spying on the target in a way which is designed to be, and which can in fact be expected to be, undetectable by the target, does not amount to harassment, it would be open to the defendant to say that the target is entitled to no remedy, and that the court has no jurisdiction to grant an injunction, no matter how extensive and lacking in justification the following or spying on may be and no matter how much distress the target may suffer as a result of the prospect of being undetectably followed or spied on. I consider it improbable that Parliament should have intended such consequences, especially when it was seeking to address the problem of stalking.
93. I agree with Mr de la Mare that, on the facts, *Howlett* is a very different case from the present case. Nevertheless, it includes the recognition by Eady J, who had great experience of cases involving the PHA, that anxiety and distress may be occasioned to a person by someone who has watched that person and who asserts the right to continue to do so. I am not persuaded that it would inescapably afford an answer to the contention that such an assertion of right may amount to harassment for the perpetrator to say that the victim will not know whether, to what extent, and in what way they are being watched because it will all be done covertly. Indeed, I consider that may make it more harassing. I consider that there is obvious force in what Eady J said in *Howlett* at [23]:

“I put to [Counsel for the defendant] in the course of argument the hypothesis that a victim of surveillance had been watched on six occasions but only realised what was happening on the seventh when he was caused alarm. On his case, there would be no “course of conduct” because there had been no alarm or distress on the previous occasions. Moreover, if the surveillance continued six more times, without the victim spotting it, those occasions would also have to be left out of account. I regard this as an artificial approach.”

94. I consider that *Kellett* is authority for the proposition that the offence (or tort) of harassment is only complete when the victim learns of the harassing conduct. Until then, they do not suffer any harmful effects. However, once the victim learns of conduct which, objectively, constitutes harassment, I consider that it is no answer for the perpetrator to say that the perpetrator hoped or intended or planned that the victim would not find it out. In *Kellett* itself, the perpetrator did not know or expect that the victim would be told by her employer that he had made allegations against the victim to the employer, although a reasonable person in possession of the same information as him would have been aware and expected that the matter would inevitably at some stage be raised with the victim by the employer. However, that was not, in my judgment, essential to the decision. I consider that the essential reasoning is set out in [16]-[18] of the judgment of Penry-Davey J.
95. For these reasons, I am not persuaded that Mr and Mrs Gerrard's case of harassment has no real prospect of success even if all the activities complained of were in fact "covert".
96. However, regardless of whether this was either (i) intended or (ii) likely, it is plain on the face of the RAPOC that the activities, were, in fact, discovered by Mr and/or Mrs Gerrard, in some instances at or very close to the time when they were taking place.
97. It is logical, in my view, to start by considering those incidents which are earliest in time. As to those:
- (1) The following by car from the Goring Hotel in January or February 2014 appears to have been detected by Mr Gerrard at the time.
 - (2) The placing of the tracking device on Mr Gerrard's car is said to have happened in 2013 or 2014. This is also, on the face of the pleaded case, when it was discovered (as, otherwise, how could it be known that this is when it happened?). It is unclear what, if any, interval passed between its placement and its detection. However, the inference is that it was still in place, and tracking his car, when it was discovered, and therefore he became aware of the conduct which he complains of while it was still taking place, even if it may also have taken place undetected by him prior to that.
 - (3) The interviews that are alleged to have been staged for purposes of obtaining information about Mr Gerrard took place in December 2013 and January 2014, and it is alleged in the RAPOC that their true purpose became apparent upon the attendance of the ex-Dechert LLP employees at the interviews (i.e. at the time of that conduct).
98. With regard to the later incidents:

- (1) The “Video Camera Surveillance of the Claimants’ Property” is alleged to have begun by 1 January 2019, to have been discovered and reported to Mr and Mrs Gerrard on 16 April 2019, and to have involved use of an SD data storage card containing video files dating from 26 March 2019 to 17 April 2019 inclusive. Even if (contrary to my analysis above) Mr and Mrs Gerrard have no basis in law for complaining about the surveillance prior to the date when they discovered that it was taking place, it is apparent on the face of the RAPOC that it continued on 17 April 2019, that is to say after the date when it had been discovered and reported to them, and there seems no reason at all why they cannot rely upon that continuance of surveillance at least.

- (2) The “Attempted Physical Surveillance of the Claimants on Holiday” has two main limbs: (i) that Diligence obtained advance information about Mr and Mrs Gerrard’s travel arrangements to a private Caribbean island in January 2019 and (ii) that Diligence attempted physical surveillance of them while they were on holiday there. It is unclear from the RAPOC when and how Mr and Mrs Gerrard learned some of the detail of what is pleaded, which, in sum, is that: (i) Diligence obtained advance information about their flight from London Gatwick to St Lucia, and details of the villa on the island at which they were staying; (ii) two of Diligence’s operatives travelled out on the same flight as Mr and Mrs Gerrard; (iii) three days later, two of Diligence’s Operatives attempted to gain access to the island by means of false claims to the St Lucia authorities that they were nephews of Mr and Mrs Gerrard, but the falsity of those claims was rapidly discovered by others who were staying with Mr and Mrs Gerrard, and was reported back to the St Lucia authorities, such that the operatives were denied entry; (iv) Mr and Mrs Gerrard were informed about this attempt “and of the presence of a third individual on St Lucia, during the course of that same day by the St Lucia authorities, who were alarmed by the attempts, and concerned for [Mr and Mrs Gerrard’s] safety”; and (v) two days after that, a fourth Diligence operative travelled out to St Lucia from London Gatwick, this time with an advance booking to stay at a hotel located on the island, but he was intercepted by the authorities at St Lucia airport and interviewed because the hotel had alerted them to his impending arrival, and he was denied entry to the island due to his suspicious behaviour, and Mr and Mrs Gerrard were informed of this individual’s attempt to gain access to the island on that same day. Even if (contrary to my analysis above) Mr and Mrs Gerrard have no basis in law for complaining about these activities prior to being given information about the conduct of the first three Diligence operatives, it is apparent from the RAPOC that the conduct of the fourth operative occurred after the activities of the first three had been discovered and reported to them by the St Lucia authorities (“who were alarmed by the attempts, and concerned for [their] safety”) and (subject to issues of territoriality, which are discussed below) there seems no reason why they cannot rely upon the conduct of the fourth operative at least.

- (3) The “Physical Surveillance of the First Claimant’s place of work” relates to an incident which took place on 18 January 2019 when an individual who, it is alleged in the RAPOC, was one of Diligence’s operatives attended at the offices of Dechert LLP, but left the building when approached by security personnel. While the date when Mr and/or Mrs Gerrard found out about this incident is not pleaded, the implication is that they found out about it at or around the time when it took place, and it not obvious why they cannot rely upon it as an incident of harassment.
- (4) The “Physical Surveillance of the First Claimant in a restaurant” relates to an incident which took place after Mr and Mrs Gerrard had returned from their holiday on the Caribbean island. It is pleaded that Mr Gerrard made a booking for lunch with a friend at a restaurant in a hotel in London on 4 February 2019. When he arrived at the hotel at around 1pm, two men followed him into the restaurant, which was not busy, walked past 10 to 15 empty tables, and sat at a table near to where he was seated. Throughout his meal, one of the men was using a laptop and the other a mobile phone. He became suspicious of these men for a number of reasons, including that they sat unusually close to him in an otherwise near-empty restaurant. He therefore asked the restaurant’s manager about the men, and was told that the manager had never seen them before, that they had arrived earlier that day, and that they were “very interested” in him. The RAPOC further pleads that the two men, who are said to be Diligence operatives, arrived at the lobby of the hotel at approximately 10.30am on 4 February 2019, and waited for Mr Gerrard to arrive. As Mr Gerrard did not arrive until about 1pm he cannot have seen this himself, and the obvious implication is that this is something that he learned from the hotel after he had spoken to the restaurant manager. The pleaded case is that the men must have learned about the booking by some means in advance of Mr Gerrard setting off for the venue (as they arrived long before he arrived), and that it is to be inferred that the two men sat near to his table and utilised the laptop and the mobile phone for the purpose of “observing [his] behaviour, demeanour and associations, and monitoring and recording the same”. On the face of it, Mr Gerrard learned of all these matters as and when it occurred, or else (so far as concerns the fact that they cannot have known that he was in the restaurant by following him having regard to the time when two men arrived in the lobby of the hotel) very shortly after this conduct occurred. Even if it is assumed that the men were attempting to act covertly, given that Mr Gerrard nevertheless plainly became aware of their conduct and its implications when or shortly after it occurred, there is no reason why these matters cannot be relied upon as an incident of harassment.

99. In sum, and reverting to stalking for the purposes of illustration, I consider that there is no material difference when evaluating whether the tort (or crime) harassment has been committed between (i) circumstances where a stalker follows or spies on a person either not caring whether the person detects that course of conduct or even intending that the

person should detect that course of conduct and (ii) circumstances where a person detects that the person is being followed or spied on by a stalker although that is neither the stalker's subjective intention nor even, objectively, and in light of the stalker's attempts at concealment, "likely". It would run counter to the legislative intent of the PHA to afford protection to the victim in situation (i) and to deny it to the victim in situation (ii).

100. Paragraph 30 of the RAPOC pleads, in brief, that the surveillance activities complained of in earlier paragraphs of the RAPOC constitute a course of conduct pursued by ENRC, and in the case of the later batch of activities pursued by Diligence as well, directed at Mr Gerrard in some instances and directed at both Mr and Mrs Gerrard in other instances. Paragraph 32 pleads that the conduct complained of has caused Mr and Mrs Gerrard alarm, anxiety and distress, as further set out in paragraph 44 of the RAPOC. Paragraph 33 pleads that there is and was no legitimate justification under section 1(3) of the PHA for the course of conduct complained of, and, in particular, that it was not reasonable. All these allegations are contained in the existing version of the pleading, and I do not consider that there are any grounds for striking them out if the substantive pleaded claim in harassment is otherwise one which should be permitted to go forward.
101. That substantive plea is contained in the first sentence of paragraph 31 of the RAPOC: "As each Defendant has at all times known or ought to have known, the course of conduct pursued by that Defendant amounts to harassment of the Claimants and/or the First Claimant contrary to sections 1(1) and 3(1) of the [PHA]". In the light of the above discussion concerning the course of conduct relied upon in the RAPOC, I am not persuaded that there are any grounds upon which this plea could properly be struck out.
102. These considerations have the effect of reducing the significance of the amendments which are sought to be made by the remainder of paragraph 31 of the RAPOC. It is apparent, however, that they are sought to be introduced in response to the implications of what the Court of Appeal in *Haque* referred to as non-statutory requirements which have been imported into the definition of the tort (or crime) of harassment by *Thomas* and later cases. The thrust of the remainder of paragraph 31 of the RAPOC, which relies on both general propositions and the specific course of conduct pleaded in the RAPOC, is that the conduct complained of was likely to be discovered having regard to the length of time over which it was carried out, its extent, and a number of its particular features. It is also pleaded, as a general proposition, that anyone who suspects or discovers that they are the subject of surveillance activity is very likely to be alarmed and/or distressed by it, and, among a number of other specific pleas, in reliance on the history of material events pleaded in the RAPOC, that the decision of ENRC and Diligence "to deploy and persist in the surveillance was ... made knowing that their conduct would cause [Mr and Mrs Gerrard] alarm and distress" and that in any event ENRC and Diligence "ought to have known that their conduct would cause [Mr and Mrs Gerrard] alarm and distress".

103. Among other things, it is pleaded as a general proposition that “devices planted in and around property occupied, or owned, by the subject of the surveillance [are] particularly susceptible to exposure since such devices can be readily located, especially once the subject of surveillance is on notice that s/he is or might be being surveilled, as is surveillance by physically following a person as they go about their activities”. Further, for example, it is pleaded as a specific matter that both ENRC and Diligence “persisted in conducting further acts of surveillance pleaded in [the RAPOC]” after they knew that Mr and Mrs Gerrard suspected or were aware that they were under surveillance, among other things because Diligence would have learned how its operatives had been “rumbled” by the St Lucia authorities, and would have known that it was likely that the conduct of those operatives would have been promptly reported back to Mr and Mrs Gerrard; and Diligence would have passed all this information on to ENRC, which therefore would also have known that it was likely that these matters would have been thus reported back.
104. I am not persuaded that these points and other points to like effect in paragraph 31 of the RAPOC plead a case that has no real prospect of success. Quite the contrary. The general propositions seem to me to be logical, coherent and indeed unexceptionable. The specific allegations are more than merely arguable, and, moreover, are consistent with, and indeed borne out by, the facts pleaded earlier in the RAPOC. For example, the surveillance was indeed continued after Mr and Mrs Gerrard returned from their holiday on the Caribbean island, and it was in fact in due course discovered by them. I reject the argument that it is plain beyond realistic argument to the contrary that, on the facts pleaded in the RAPOC, the surveillance that was continued in these circumstances was not “calculated” to cause distress, even if “calculated” adds some mental element to the mental element which is contained in the express words of section 1(1) of the PHA and, for that matter, even if that additional mental element requires subjective intention (which includes recklessness).
105. The plea that because all the covert surveillance activity was carried out with the aim of collecting evidence for the purpose of the Litigation, ENRC and Diligence “must have intended that at least some of the matters gathered by covert surveillance activity would be disclosed to [Mr and Mrs Gerrard], thereby disclosing the fact the surveillance had occurred and thereby causing alarm and distress to [them]” is, in my view, more fragile. If the entirety of the pleaded claim for harassment rested on this allegation alone, it might well come closer to having no real prospect of success. However, it is only a small part of that pleaded case. Moreover, I do not consider that any of the three points argued by Mr de la Mare land a knock-out blow:
- (1) The argument that the possibility that the conduct complained of would be revealed to Mr and Mrs Gerrard can have no bearing on whether the surveillance was “calculated” to cause distress is not unanswerable in light of the analysis above concerning (a) the correct interpretation of section 1 of the PHA and (b) the other pleas contained in paragraph 31 of the RAPOC.

- (2) The argument that the pleaded proposition is wrong because it proceeds on the basis that the tort would only be complete on some future occasion is not straightforward, and, in any event, *Kellett* supports the argument that the crime (or tort) is only complete when the victim learns of the material conduct.
- (3) The argument that disclosure in the course of litigation would be subject to immunity from civil suit, with the consequence that conduct revealed in that way may not form the basis of a claim in harassment, is also not straightforward. It seems to me that much may depend on the facts, which have yet to be found. For example, it is not clear to me that the defendant in *Kellett* would have been able to avoid liability for a series of otherwise harassing allegations against the employee by making those allegations to the employer if, on the facts, he knew or expected that (i) they would not be disclosed to the employee until after she had been dismissed and (ii) then only in the course of proceedings concerning that dismissal between her and her employer.
106. Similar considerations apply, in my opinion, to the letters from Jones Day. The RAPOC alleges (among other things) (i) that the first letter, dated 8 June 2020, gave notice that ENRC would withdraw the undertaking contained in the Undertakings Consent Order not, pending trial, to carry out certain forms of surveillance on Mr and Mrs Gerrard and “failed to identify any basis ... for resuming such activities”, (ii) that the second letter, dated 12 June 2020, contained a “purported” explanation, namely that the activities would be in pursuit of the Legitimate Aim, but provided no explanation as to how the Legitimate Aim would be met through further surveillance, (iii) that by the time of those letters both ENRC and Diligence (a) had been put on express notice by Mr and Mrs Gerrard of the alarm and distress which Mr and Mrs Gerrard had suffered as a result of the surveillance activities complained of in these proceedings and (b) were aware that the police regarded the surveillance of Mr and Mrs Gerrard which ENRC had instructed Diligence to carry out as potentially amounting to criminal harassment, (iv) accordingly, it is the case that, or is to be inferred that, ENRC sent the first letter knowing that it would cause Mr and Mrs Gerrard severe alarm and distress, and with the intention that it would oppress them and cause them severe alarm and distress, (v) having received a letter from their solicitors explaining that the first letter had caused Mr and Mrs Gerrard considerable distress, by the second letter ENRC’s solicitors stated that ENRC would no longer withdraw the undertaking not to carry out further surveillance upon Mrs Gerrard but “declined to explain what further surveillance it intended to carry out on [Mr Gerrard]”, and this “caused [him] further considerable distress, as [ENRC] would have known”, and (vi) “In the circumstances, and in particular in light of the fact [ENRC] was willing to send [both] letters despite knowing that they would cause [Mr and Mrs Gerrard] severe alarm and distress, it is [to be] inferred that [ENRC] instructed the acts of surveillance complained of in these proceedings similarly knowing that they would cause [them] alarm and distress”. If these allegations comprised the entirety of the pleaded claim for harassment, a thorough scrutiny of the letters to see how closely their contents match these allegations might

well be warranted. However, they are only a small part of that pleaded case. Moreover, at least some of the pleaded points appear to be right, or at least seriously arguable, and, on the face of it, aspects of the letters do call for an explanation: for example, the change of position so far as concerns the right to resume surveillance of Mrs Gerrard. Nor do I regard any of the points argued by Mr de la Mare as determinative.

107. As to those points:

- (1) First, I consider that the proposition that the exercise of a right contained in the Undertakings Consent Order is incapable in principle of amounting to conduct calculated to cause distress and indeed is self-evidently “reasonable” (for the purposes of section 1(3)(c) of the PHA) is far too sweeping. I see no reason, in principle, why the decision by a party in litigation to invoke a provision in a Consent Order could never be calculated to cause distress and/or would always, inescapably, be reasonable.
- (2) Second, the argument that “there is no evidence that the letters were in fact calculated to cause distress” and that they “set out entirely proper justifications for the exercise of the right to withdraw” depends on the facts. I consider that the relevant facts cannot be investigated and resolved in such a way or to the extent appropriate to enable summary determination of these issues to be made on the present applications.
- (3) Third, the submission that “there is no evidence that Mr and Mrs Gerrard have in fact been caused distress” is misguided. For the purposes of the present application, it is sufficient that they have pleaded that they were caused distress, and that this plea has a real prospect of success. In fact, as pleaded, they complained of being occasioned distress at the time, and this supports their case that this plea is seriously arguable.
- (4) Fourth, the submission that if there was anything in this aspect of their case Mr and Mrs Gerrard would have sought an injunction to replace the undertakings that have been withdrawn is a purely forensic point. It cannot justify a ruling that this part of the RAPOC has no real prospect of success.
- (5) Fifth, I do not accept the proposition that letters sent on instruction during the course of litigation cannot be the subject of a claim for harassment. It is clear from *Iqbal* that, in principle, letters sent during the course of litigation are capable of constituting harassment. I cannot see that the fact that such letters are sent “on instruction” by the lay client makes any difference to the principle. For example, if, in *Howlett*, the defendant had engaged solicitors to write letters which, so far as they were concerned, were perfectly proper and in accordance with his instructions, but which in fact “twisted the knife” in the claimant, I see no reason

why the defendant should be permitted to “twist the knife” with impunity simply because he elected to correspond with the claimant through the medium of solicitors rather than to do so directly.

- (6) Sixth, while I agree with Mr de la Mare, as indeed accords with the sentiments expressed in *Iqbal*, that the court should be slow to find that correspondence passing between reputable solicitors in the course of hostile litigation is capable of amounting to the tort (and crime) of harassment, I do not agree that either the invocation of ECHR rights or a purposive construction of sections 1(3)(a) to (c) of the PHA “prevent[s] any claim of harassment ... [from] arising out of the conduct of litigation”, or requires at the very least that in the case of such correspondence the claimant must show that the correspondence is actuated by malice. Nor do I agree that if Mr de la Mare’s analysis is rejected not only would solicitors have to fear criminal liability as a result of their conduct of litigation, but also it would mean that a variation/withdrawal mechanism in an Order like the Undertakings Consent Order could never in fact be lawfully operated. These submissions, again, are far too extreme. If the lay client takes the opportunity to harass and cause harm to the opposing party through the medium of correspondence which he causes to be sent, there is, as I see it, no reason in principle why the victim should be denied relief merely because of the interpolation of solicitors in the chain of events. In that situation, however, the solicitors themselves will have done nothing wrong. They therefore have nothing to fear, whether by way of civil or criminal liability. If necessary, they will be able to say that they have acted reasonably, and to rely upon section 1(3)(c). To recognise the possibility that the operation of a variation or withdrawal provision in a Consent Order may, depending on the circumstances, be capable of forming part of a material course of conduct for the purposes of the law of harassment plainly does not mean that such a provision could never be lawfully operated. This is a floodgates/doomsday scenario argument that cannot be conclusive.

108. Mr de la Mare’s arguments that the surveillance activities alleged by Mr and Mrs Gerrard could not, taken at their highest, be sufficiently grave to attract criminal liability, specifically because they would have the effect that “any private investigation firm would be engaged in a course of criminal harassment if there were any risk of its covert surveillance being detected or if it attempted to resume covert [surveillance] after an earlier episode had been detected, or because there may be some chance that the surveillance activities would be revealed in the course of legal proceedings” are also, in my view, without substance. As to the first of those points, *Kellett* provides an illustration of the kind of activity which may attract criminal liability. Although the background in that case was one of long running hostility, the subject of the criminal charges related to two letters alone. It is not obvious to me that those letters, and the effects on the victim in that case, are of a different order of gravity to the conduct complained of in the present case, and the effect that it is alleged to have had on Mr and Mrs Gerrard. Most people place a high value on the privacy and security of their

homes, and actions which intrude on those matters to any significant extent, let alone for a prolonged period, are highly likely to cause serious anxiety, distress and alarm, the effects of which may endure long after the intrusive activities have ceased. This is recognised by the law in many contexts, for example in the sentencing guidelines applicable to offences of domestic burglary.

109. The argument that the claim of Mr and Mrs Gerrard cannot have any real prospect of success because to accede to it would sound the death knell for surveillance activities which are legitimate and even necessary is also exaggerated and without foundation. Although I was not addressed in any detail on the law relating to surveillance in other contexts relating to litigation, it seems to me that the courts plainly recognise that in this context, as in many others, it is necessary to carry out a balancing exercise between competing rights and interests. Precisely how the balance falls to be struck in any particular case typically depends on an intense focus on the facts, although it is possible to identify certain general principles which govern the correct approach. There is, in my view, no reason whatsoever to conclude that because surveillance is properly to be regarded as impermissible or inappropriate (or permissible and appropriate) in one case that the same outcome will apply in another; and all those who carry out such activities already face the need to consider which side of the line their actual and proposed activities may fall. The relevant jurisprudence includes the following decided cases.
110. In *Jones v University of Warwick* [2003] 1 WLR 954 the claimant brought proceedings for personal injury. The defendant disputed that she had a continuing disability. The defendant's insurers obtained access to the claimant's home by posing as a market researcher and used a hidden camera to film the claimant without her knowledge. The defendant applied for leave to adduce the video in evidence at the trial. The claimant contended that the video should be excluded, pursuant to the court's discretion under CPR r 32.1(2), because of the inquiry agent's trespass and the infringement of her Article 8(1) rights. The Court of Appeal upheld the decision of the judge not to exclude the video evidence, but ordered the defendant to pay the costs before the district judge, the judge and that Court of resolving the issue of its admissibility, because the insurers' conduct had given rise to the litigation over that issue. Lord Woolf MR said at [24], [27] and [28]:

“... Potter LJ ... in Rall v Hume [2001] 3 All ER 248 ... commenced by saying at 254:

“In principle ... the starting point on any application of this kind must be that, where video evidence is available which, according to the defendant, undermines the case of the claimant to an extent that would substantially reduce the award of damages to which she is entitled, it will usually be in the overall interests of justice to require that the defendant should be permitted to cross-examine the claimant and her medical advisers upon it ...” (Emphasis added.)

As the Strasbourg jurisprudence makes clear, the Convention does not decide what is to be the consequence of evidence being obtained in breach of Article 8: see Schenk v Switzerland (1988) 13 EHRR 242 and PG and JH v United Kingdom The Times, 19 October 2001, para 76. This is a matter, at least initially, for the domestic courts. Once the court has decided the order, which it should make in order to deal with the case justly, in accordance with the overriding objectives set out in CPR r 1.1 in the exercise of its discretion under rule 32.1, then it is required or it is necessary for the court to make that order ...

... The court must try to give effect to what are here the two conflicting public interests. The weight to be attached to each will vary according to the circumstances. The significance of the evidence will differ as will the gravity of the breach of Article 8, according to the facts of the particular case. The decision will depend on all the circumstances. Here, the court cannot ignore the reality of the situation. This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out. The case, therefore, has to be tried. It would be artificial and undesirable for the actual evidence, which is relevant and admissible, not to be placed before the judge who has the task of trying the case ..."

111. In *Imerman v Imerman* [2009] EWHC 3486 (Fam), [2010] 2 FLR 752, Moylan J had to consider issues resulting from a husband's private and confidential information being downloaded and copied by one brother of a wife, or by others on behalf of that brother, from a computer system which the wife's two brothers and the husband (and their respective staff) used because they worked in the same premises for a number of years. The Orders made by Moylan J were subsequently varied by the Court of Appeal, which, in essence, deprecated resorts to self-help where procedures were available to obtain information pursuant to orders of the court (see *Imerman v Tchenguiz and Others*; *Imerman v Imerman* [2011] 2 WLR 592, Lord Neuberger MR at [142]). Moylan J said at [140]-[141]:

"There are, in my view, a number of principles or factors which have to be taken into account. They include:

- (a) the interests of the public that in litigation the truth should be revealed, coupled in this case with the statutory duty placed on the court to determine an application for ancillary relief by reference to all the circumstances of the case;*
- (b) the interests of the public that the courts should not acquiesce in, let alone encourage, a party (or anyone on their behalf) to use irregular means to obtain information;*
- (c) the effect on litigation generally of the conduct of the parties;*
- (d) the wife's right to a fair trial, in particular to have her application determined by reference to the true position;*

- (e) *the husband's right to respect for his private life and correspondence and his right not to have them excessively and unfairly invaded through, for example, self-help;*
- (f) *the husband's right to a fair trial by ensuring, so far as practicable, that the parties are on an equal footing and that the wife does not gain an unfair advantage through the use of irregularly obtained information.*

The weight to be attached to these respective factors will depend upon the circumstances of each case balancing, in particular, each party's right to a fair trial and the Article 8 rights of the party from whom the information has been obtained.

The product of balancing these factors will vary from case to case.”

112. In *Köpke v Germany* (2011) 53 EHRR SE26 (an admissibility decision) the applicant was a shop assistant. Prompted by accounting irregularities, her employers set up covert video surveillance of the drinks department of a supermarket. On the basis of a report prepared by a detective agency concerning the video data, they dismissed the applicant without notice for theft. She brought employment proceedings which went through four levels of court in Germany, and resulted in her dismissal being upheld. Her complaint under Article 8 was held inadmissible by the European Court of Human Rights. The admissibility ruling includes the following passages (emphasis added):

“B. The proceedings before the Labour Court

10 *The Labour Court found that the defendant party had been entitled to dismiss the applicant without notice. It considered that the defendant party had been authorised to observe the applicant by means of covert video surveillance and to use the recording obtained thereby. The losses discovered in the drinks department during stocktaking and the irregularities ... during the applicant's working time had constituted sufficient grounds for the defendant party to order her surveillance. The defendant party's property rights had been seriously interfered with.*

11 *... In case of the covert video surveillance of an employee on suspicion of theft, the employer's fundamental right to respect for his property rights had to be weighed against the employee's fundamental right to privacy vis-à-vis third persons, including his employer or his colleagues. Special circumstances were necessary to justify an interference with the employee's right to privacy, which had to be proportionate.*

12 *Weighing these competing interests in the present case ... there were no other means to protect the defendant party's property rights. The surveillance had not been random, but carried out following suspicions of theft against two employees ... There was no risk of the records being used in a different manner.*

C. Proceedings before the Labour Court of Appeal

15 *The Labour Court of Appeal ... endorsed the Labour Court's finding that the defendant party had been authorised to carry out the covert video surveillance of the cash desk area of the drinks department. Her dismissal without notice had been justified as, following the examination of the videotapes in the proceedings, the applicant had stopped contesting that she had taken money from the till on several occasions.*

17 *The Labour Court of Appeal further considered that it had not been necessary to take further evidence in the proceedings, in particular to play the videotapes, after the applicant had stopped contesting having taken money from the till and having put it in her pockets on several occasions. As this fact alone justified the applicant's dismissal without notice, the use of the impugned videotapes as evidence in the proceedings had not been necessary. Even assuming that the defendant party had illegally obtained knowledge of the fact that the applicant had taken money from the till and even if this evidence were excluded, the defendant party had not been prevented from alleging this issue and the applicant had been obliged to reply truthfully.*

D. Proceedings before the Federal Labour Court

21 *... the Labour Court of Appeal had left open whether the video surveillance of the applicant had been lawful and whether the evidence obtained thereby should have been used in the proceedings before the labour courts. It had instead based its judgment on facts uncontested between the parties. As it had considered the applicant's dismissal lawful, it had also considered her claim for damages ill-founded. The lawfulness of the video surveillance had therefore been irrelevant to the outcome of the proceedings.*

E. Proceedings before the Federal Constitutional Court

22 *... She argued, in particular, that her right to privacy had been breached by the unlawful covert video surveillance, by the processing of the data obtained thereby and by their use in the proceedings before the labour courts, which had refused to order the destruction of the video recording...*

23 *... It found that the applicant's complaint had no prospects of success as there was nothing to indicate that her fundamental rights had been violated by the decisions of the labour courts.*

THE LAW

I. Complaint under article 8 of the Convention

34 *In the applicant's submission, the covert video surveillance, ordered by her employer and carried out by a detective agency, and the recording and use of the data obtained thereby in the proceedings before the domestic courts had breached her right to privacy under Article 8 ...*

A. Applicability of Article 8

- 36 *The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name or picture (see Schussel v Austria (42409/98) February 21, 2002; and Von Hannover v Germany (2005) 40 E.H.R.R. 1 at [50]). It may include activities of a professional or business nature and may be concerned in measures effected outside a person's home or private premises (compare Peck v United Kingdom (2003) 36 E.H.R.R. 41 at [57]–[58]; Perry v United Kingdom (2004) 39 E.H.R.R. 3 at [36]–[37] (extracts); and Benediktsdottir v Iceland (38079/06) June 16, 2009).*
- 37 *In the context of the monitoring of the actions of an individual by the use of photographic equipment, the Court has found that private-life considerations may arise concerning the recording of the data and the systematic or permanent nature of the record (compare PG v United Kingdom (2008) 46 E.H.R.R. 51 at [57]; Peck at [58]–[59]; and Perry at [38]). It further considered relevant in this connection whether or not a particular individual was targeted by the monitoring measure (compare Rotaru v Romania (28341/95) May 4, 2000 at [43]–[44]; Peck at [59]; and Perry at [38]) and whether personal data was processed or used in a manner constituting an interference with respect for private life (see, in particular, Perry at [40]–[41]; and I v Finland (2009) 48 E.H.R.R. 31 at [35]). A person's reasonable expectations as to privacy is a significant though not necessarily conclusive factor (see Halford v United Kingdom (1997) 24 E.H.R.R. 523 at [45]; and Perry at [37]).*
- 38 *The Court notes that in the present case a video recording of the applicant's conduct at her workplace was made without prior notice on the instruction of her employer. The picture material obtained thereby was processed and examined by several persons working for her employer and was used in the public proceedings before the labour courts. The Court is therefore satisfied that the applicant's "private life" within the meaning of Article 8(1) was concerned by these measures.*

B. Compliance with Article 8

- 41 *The Court reiterates that, although the purpose of art.8 is essentially to protect the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see Von Hannover at [57]; I v Finland at [36]; KU v Finland (2009) 48 E.H.R.R. 52 at [42]–[43]; and Benediktsdóttir). The boundary between the state's positive and negative obligations under Article 8 does not lend itself to precise definition. In both contexts regard must be had to the fair balance that has to be struck between the competing interests—which may include competing private and public interests or Convention rights (see Evans v United Kingdom (2006) 43 E.H.R.R. 21 at [75] and [77])—and in both contexts the state enjoys a certain margin of appreciation (see Von*

Hannover; *Reklos v Greece* (1234/05) January 15, 2009 at [36] (extracts); and *Benediktsdóttir*).

- 43 *In the present case, the Court therefore has to examine whether the state, in the context of its positive obligations under Article 8, has struck a fair balance between the applicant's right to respect for her private life and both her employer's interest in protection of its property rights, guaranteed by Article 1 of Protocol No.1 to the Convention, and the public interest in the proper administration of justice.*
- 44 *... the Court finds that the Federal Labour Court, in its case law ... developed important limits on the admissibility of such video surveillance which safeguarded employees' privacy rights against arbitrary interference (see "Relevant domestic law and practice" above). In particular, an employer was only authorised to set up the video surveillance of an employee at his or her workplace if there was a prior substantiated suspicion that the employee had committed an offence and if such surveillance was altogether proportionate to the aim of investigating the offence at issue ... Moreover, it takes the view that a covert video surveillance at the workplace following substantiated suspicions of theft does not concern a person's private life to an extent which is comparable to the affection of essential aspects of private life by grave acts in respect of which the Court has considered protection by legislative provisions indispensable (see above).*
- 45 *In these circumstances, the Court is satisfied that, at least at the relevant time, respect for private life in the relations of the applicant and her employer in the context of a covert video surveillance could still adequately be protected by the domestic courts' case law, without the state having been obliged to set up a legislative framework in order to comply with its positive obligation under Article 8.*
- 46 *In examining the manner in which the domestic courts applied this case law in the concrete circumstances of the applicant's case and weighed the competing interests at issue, the Court observes, on the one hand, that the covert video surveillance of an employee at his or her workplace must be considered, as such, as a considerable intrusion into the employee's private life. It entails a recorded and reproducible documentation of a person's conduct at his or her workplace, which the employee, being obliged under the employment contract to perform the work in that place, cannot evade. However, as noted by the German courts, the video surveillance of the applicant was only carried out after losses had been detected during stocktaking and irregularities had been discovered in the accounts of the drinks department in which she worked, raising an arguable suspicion of theft committed by the applicant and another employee, who alone were targeted by the surveillance measure.*
- 47 *The Court further notes that the domestic courts were aware that the surveillance measure was limited in time—it was carried out for two weeks. They had also taken note of the fact that the measure was*

restricted in respect of the area it covered in that it did not extend to the applicant's workplace in the supermarket and the drinks department as a whole, but covered only the area behind and including the cash desk, the cashier and the area immediately surrounding the cash desk which, moreover, could not be considered a particularly secluded place as the drinks department as such was accessible to the public.

- 48 *The domestic courts further underlined that the visual data obtained were processed by a limited number of persons working for the detective agency and by staff members of the applicant's employer. They were used only for the purposes of the termination of the employment relationship with the applicant, including the proceedings the applicant brought in this respect in the labour courts. The interferences with the applicant's private life were thus restricted to what was necessary to achieve the aims pursued by the video surveillance.*
- 49 *The domestic courts further gave weight to the fact that the employer, on the other hand, had a considerable interest in the protection of its property rights under Article 1 of Protocol No.1. It must be considered essential for its employment relationship with the applicant, a person to whom it had entrusted the handling of a till, that it could rely on her not to steal money contained in that till. The Court further agrees with the labour courts' finding that the employer's interest in the protection of its property rights could only be effectively safeguarded if it could collect evidence in order to prove the applicant's criminal conduct in proceedings before the domestic courts and if it could keep the data collected until the final determination of the court proceedings brought by the applicant. This also served the public interest in the proper administration of justice by the domestic courts, which must be able to establish the truth as far as possible while respecting the Convention rights of all individuals concerned. Furthermore, the covert video surveillance of the applicant served to clear from suspicion other employees who were not guilty of any offence.*
- 50 *In respect of the balance struck between the two competing interests, the Court further observes that the domestic courts considered that there had not been any other equally effective means to protect the employer's property rights which would have interfered to a lesser extent with the applicant's right to respect for her private life. Having regard to the circumstances of the case, the Court agrees with this finding. The stocktaking carried out in the drinks department could not clearly link the losses discovered to a particular employee. Surveillance by superiors or colleagues or open video surveillance did not have the same prospects of success in discovering a covert theft.*
- 51 *Having regard to the foregoing, the Court concludes in the present case that there is nothing to indicate that the domestic authorities failed to strike a fair balance, within their margin of appreciation, between the applicant's right to respect for her private life under Article 8 and both her employer's interest in the protection of its property rights and the public interest in the proper administration of justice."*

113. Although not definitive, the tenor of the passages which I have underlined is clear. Together with *Jones* and *Imerman*, they show that it is possible to carry out surveillance which is lawful, does not amount to an impermissible interference with ECHR rights, and the fruits of which are admissible in evidence in civil or criminal proceedings. They equally show that the converse may be the case. To contemplate the prospect that Mr and Mrs Gerrard may succeed on their claim that the surveillance complained of in the present case constitutes harassment plainly does not involve the consequence that surveillance cannot lawfully be carried out in any case, no matter how ECHR compliant it may be.
114. I turn, finally, to the argument that the territorial effect of the PHA does not extend to the events which are pleaded in the RAPOC as having taken place in the Caribbean, and therefore Mr and Mrs Gerrard are unable to rely on those events as part of any material course of conduct. This point is pleaded in answer to the RAPOC, but it did not feature in the Strike Out Applications or in the Skeleton Arguments of either ENRC or Diligence.
115. Allied to that, no case law was placed before me relating to this issue of territoriality, save *Potter v Price & Anr* [2004] EWHC 781 (QB), a decision of HH Judge Mackay sitting as a Deputy Judge of the Queen's Bench Division which Mr Wolanski relied upon. However, that case seems to me, with respect, to deal with a different point, namely whether a claimant may obtain an injunction pursuant to section 3 of the PHA to restrain future acts of harassment within this jurisdiction in reliance on earlier harassing activities which were carried out by the defendant against the claimant outside the jurisdiction.
116. Accordingly, Mr Wolanski submitted that I ought not to entertain this argument. I have some sympathy with that submission. On the other hand, my initial reaction to the argument is that a prosecution could not be brought in this jurisdiction based on the acts which are alleged to have occurred in the Caribbean alone, and that as a matter of logic it would seem to follow that no tort claim could be brought solely in reliance on those acts.
117. However, I do not consider that it is necessary for me to decide these issues, because I consider that the pleas in relation to the Caribbean holiday should be permitted to go forward in any event, for three principal reasons:
- (1) First, some of those pleas relate to matters which happened in this jurisdiction, such as the advance acquisition of information about the holiday, and the boarding by Diligence operatives of the same flight from England as Mr and Mrs Gerrard took. They are therefore relevant and admissible even if the territoriality point is right.

- (2) Second, the events which are alleged to have occurred in the Caribbean are relevant to Mr and Mrs Gerrard's case that, if this is necessary for their claim, they are able to establish that subsequent acts of surveillance were likely to be discovered by them. They are therefore relevant and admissible even if they are not themselves actionable.
- (3) Third, because these events are relevant anyway to Mr and Mrs Gerrard's case (discussed below) that ENRC and Diligence are unable to rely upon litigation privilege in the light of the iniquity exception. In this regard, foreign criminality is pleaded in the RAPOC as to aspects of the activities of Diligence's operatives in the Caribbean, and it is part of the pleaded Reply of Mr and Mrs Gerrard that this is sufficient to engage the iniquity exception. Mr and Mrs Gerrard rely on the decision of Rix J in *Dubai Aluminium v Al-Alawi* [1999] 1 WLR 1964. In that case, agents employed by the claimant obtained information about the defendant in circumstances where "very strong inferences were to be drawn that the information had been obtained by means of false representation and impersonation, and that criminal offences had been committed, either in England under the Data Protection Act 1984 or in Switzerland under the banking secrecy laws". Rix J held that this conduct engaged the iniquity exception (at 1968E-F). Rix J further observed (at 1969E-F):

"It seems to me that if investigative agents employed by solicitors for the purpose of litigation were permitted to breach the provisions of such statutes or to indulge in fraud or impersonation without any consequence at all for the conduct of the litigation, then the courts would be going far to sanction such conduct. Of course, there is always the sanction of prosecutions or civil suits, and those must always remain the primary sanction for any breach of the criminal or civil law. But it seems to me that criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege."

- (v) *The contention that the proposed amendments are embarrassing*

118. In addition to the arguments addressed above, Ms Proops submitted that the Amendment Application should be refused in any event so far as concerns the proposed amendments to [31] of the RAPOC because those amendments are seriously embarrassing and involve "entirely confusing and unclear amendments". Among other things, Ms Proops submitted:

"(1) The Claimants clearly have not taken particular care when it comes to pleading their case of harassment as against Diligence ... Most obviously:

- (a) through the proposed amendments to §31, the Claimants allege that Diligence 'has at all times known or ought to have known'*

that the surveillance activities it is alleged to have pursued amounted to harassment ‘of the Claimants and/or Mr Gerrard’;

(b) in support of this allegation, reliance is then placed on a number of alleged investigations/surveillance activities by ENRC and a third party company, Black Cube, and also on the Jones Day Letters (see RAPOC, §§31(a), (e)(i), the second half of (e)(ii), and (f)-(i));

(c) however, no attempt is made in the RAPOC to explain how, on the Claimants’ case, these particular alleged investigations/surveillance activities could have resulted in Diligence having the requisite “guilty mind” or indeed could have had any bearing on Diligence’s state of knowledge at all.

(2) Moreover, it is simply not open to the Claimants to plead allegations of harassment as against Diligence on a speculative ‘and/or’ basis, as they seek to do in proposed new §31(e). Allegations amounting to allegations of criminal conduct should only be pleaded if they are non-speculative and properly evidenced based. This is not an area where the Claimants can properly seek to ‘keep their options open’ in the pleading by using the ‘and/or’ formulation. These points apply equally in respect of the opening paragraph of RAPOC, §31, where it is alleged that the Defendants’ acts amounted to harassment of ‘the Claimants and/or the First Claimant’ (emphasis added).

(3) These inadequacies are not merely minor pleading infelicities. They go to the heart of the Claimants’ case against Diligence, on the critically important guilty mind issue, and should not be tolerated by the Court.”

119. In my judgment, neither separately nor cumulatively do these points provide any sound basis for refusing to permit Mr and Mrs Gerrard to amend their pleaded case in terms of paragraph 31 of the RAPOC. I am not persuaded that the pleaded case is unclear to any material extent, or that any lack of clarity that may exist as a matter of pleaded wording was not cleared up by Mr Wolanski’s oral exposition of the pleaded case, or, if it still persists, could not be resolved by a request for Further Information. I am fortified in reaching that conclusion by the approach adopted by the Court of Appeal in *Thomas* to the pleading points which were taken in that case (albeit that I accept that the facts of that case were different, and that the Court of Appeal expressed the view that it did in the context of an appeal and, specifically, the grounds advanced in the notice of appeal).

120. By way of illustration, Ms Proops complained that the plea in paragraph 31(e) of the RAPOC that “In consequence of the following facts and matters, the First and/or Second Defendant were aware that the First and/or Second Claimant knew or suspected that they were the subject of surveillance activity” is followed at sub-paragraph (i) by the plea that “Following the incidents set out at paragraph 12B(c) above, on 10 February 2014 Dechert LLP wrote to Black Cube, the private investigation firm which

had carried out the interviews, and made it clear that it was aware of the interviews, that they had been procured on false pretences, and that they appeared to have been conducted for the purpose of obtaining confidential information. Given that Black Cube was acting on the instructions of the First Defendant, it is to be inferred that the content of this letter was brought to the First Defendant's attention shortly after it was received by Black Cube". The complaint is that it is unclear from this wording whether Mr and Mrs Gerrard are alleging that not only ENRC but also Diligence acquired the alleged awareness as a result of this incident in 2014. Mr Wolanski explained that this allegation is directed at ENRC alone, and I consider that this apparent from the wording taken as a whole. If there is any lingering uncertainty, it could be cured by the addition in sub-paragraph i. and elsewhere to the extent that this is appropriate of words such "For the avoidance of doubt, this sub-paragraph is relied upon with regard to the First Defendant alone". Consideration might be given to making that change and similar changes to the RAPOC before it is served.

121. I was told during the course of the hearing that it is estimated that the costs of this litigation will amount to around £4m in total, while the claims are only worth something of the order of £100,000 in total. If those figures are right, the proceedings would not appear to make much sense if viewed in purely commercial terms. However, other considerations may be in play. Although the court has extensive costs and case management powers, resolution of these issues ultimately lies in the hands of the parties. In the meantime, issues of detail concerning the parties' pleaded cases ought to be capable of resolution fairly inexpensively through the medium of relatively low-key correspondence rather than via contested hearings involving Leading Counsel on all sides.

THE LITIGATION PRIVILEGE ISSUE

(i) How the issue arises

122. The way in which this issue arises can be taken from the following extracts from the Skeleton Argument of Mr de la Mare:

- (1) At [13]-[14] and at [24]-[26] of its Amended Defence, ENRC sets out its case that the engagement of Black Cube and Diligence to carry out the investigation into Mr Gerrard was for the dominant purpose of litigation, and thus that all documents created during the course of that investigation are subject to litigation privilege, including without limitation (see [25] of ENRC's Amended Defence):

“(1) The instructions provided to Black Cube and Diligence by ENRC;

(2) All information gathered pursuant to those instructions including any personal data regarding [Mr and Mrs Gerrard] thereby obtained;

(3) Communications between Black Cube, Diligence, and/or ENRC; and

(4) *Documents created using the information gathered during the course of the Investigation.*”

- (2) At [8] of the Reply, Mr and Mrs Gerrard deny that litigation privilege applies. This contention is advanced on three grounds: (a) the documents were generated as a result of iniquitous conduct, and thus the iniquity exception to privilege applies; (b) the documents generated by the surveillance cannot be confidential “vis-a-vis [them]”; and (c) the documents were not generated for the dominant purpose of litigation.
- (3) The first two of these allegations are bad in law or otherwise stand no real hope of success, and thus should be struck out.

123. As appears from this summary, there will continue to be an issue as to whether litigation privilege applies, regardless of whether the Strike Out Applications succeed. This is because ENRC and Diligence accept that whether and to what extent activities were carried out, and documents were generated, for the dominant purpose of litigation depends upon factual issues, which cannot be determined summarily on the papers alone.

(ii) *The submissions of ENRC and Diligence*

124. Mr de la Mare submitted as follows:

- (1) The “iniquity” exception to privilege was established in connection with legal advice privilege, and provides that communications between a client and a solicitor made for a criminal or fraudulent purpose cannot be confidential and thus subject to privilege (*JSC BTA Bank v Ablyazov* [2014] 2 CLC 263, Popplewell J at [76]).
- (2) It is “only in very exceptional circumstances” that the privilege can be displaced in this way (*Derby & Co Ltd v Weldon (No7)* [1990] 1 WLR 1156, Vinelott J at 1159).
- (3) The iniquitous conduct that may give rise to the exception is limited to crime, fraud or dishonesty. In *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch); [2011] Ch. 296, Norris J reviewed the relevant authorities and concluded that, while the authorities have expanded the type of conduct that may attract the exception beyond crime and fraud *per se*, the iniquity exception applied only in cases where:

“...the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial

men would say was a fraud or which the law treats as entirely contrary to public policy.”

- (4) In *Holyoake v Nicholas Candy* [2017] EWHC 52 (QB), Warby J at [90]-[95] refused to treat the iniquity exception as being sufficiently expansive to include acts allegedly amounting to unlawful surveillance.
- (5) Where the iniquitous conduct relied upon is the conduct alleged in the civil claim, the party disputing privilege must show a “strong *prima facie* case” of criminal conduct in order to defeat privilege at an interlocutory stage. See *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734, Longmore LJ at [42]:

“the fraud exception ...can only be used in cases in which the issue of fraud is one of the issues in the action where there is a strong (I would myself use the words “very strong”) prima facie case of fraud, as there was in Dubai Aluminium Co Ltd v Al-Alawi [1999] 1 WLR 1964.”

- (6) Where iniquity is established, the rule only deprives the disclosing party of privilege in respect of documents that were created as a result of (or reported on) the iniquitous conduct (*Derby v Weldon; R v Gibbins* [2004] EWCA Crim. 311 CA at [49]; and per Lord Goff in *R v Central Criminal Court; Ex parte Francis & Francis* [1989] 1 AC 346, at 396–397). Thus, in *Dubai Aluminium*, documents had been obtained in circumstances where there was a “strong *prima facie* case” that the act of obtaining the documents itself amounted to a crime under both English and Swiss law. Rix J found that, in those circumstances, a party was entitled to “any documents generated by or reporting on” the criminal conduct.

125. Mr de la Mare further submitted that, applying these legal principles to the pleaded case of Mr and Mrs Gerrard, paragraphs 8(a)(ii), 8(a)(iii), 8(b), 8(d)(ii)(2), 8(e)(i), and 8(e)(ii) of the Reply should be struck out, because:

- (1) The following allegation in [8] of the Reply “during the course of and/or for the purposes of surveillance activities that were unlawful and in certain cases involved dishonest conduct, as set out in the Particulars of Claim and at paragraphs 8(c) to 8(e)” constitutes an assertion that the allegations of mere civil wrongdoing set out in the Particulars of Claim (as opposed to the allegations of criminal wrongdoing referred to in paragraphs 8(c) to 8(e) of the Reply) are sufficient to engage the iniquity principle, which is wrong in law.
- (2) Mr and Mrs Gerrard have not alleged any form of criminal conduct which is sufficient to engage the iniquity exception. In particular, as the civil claim for harassment is misconceived as a matter of law, the allegation that the conduct complained of constituted a criminal act pursuant to section 2(1) of the PHA is also misconceived.

- (3) As the allegation that the conduct complained of was capable of constituting criminal conduct is fanciful, Mr and Mrs Gerrard cannot satisfy their burden of establishing a “strong *prima facie* case” in this regard.
- (4) In any event, the iniquitous conduct must be causative of the relevant documents being obtained by the disclosing party. The fact that surveillance activities which were otherwise lawful were also *ex hypothesi* harassing of Mr and Mrs Gerrard does not mean that any documents generated were generated by the harassment. Unlike in *Dubai Aluminium* (where the documents were only obtained as a result of a criminal or fraudulent act) there is nothing unlawful about covert surveillance *per se*. The fact that a crime was committed that is in some way related to the surveillance, but which was not itself causative of the documents being obtained, does not remove the privilege that would otherwise attach to those documents. For example, if a private investigator following a target committed a speeding offence that would not render photographs obtained by the investigator during the course of that surveillance the product of iniquity to which no privilege could attach (even where such photographs would not have been obtained but for the speeding). This is particularly so where the criminal conduct was allegedly carried out by a party (Diligence) other than the party asserting privilege (ENRC).
- (5) As to the actions of the Diligence operatives in seeking to gain entry to the Caribbean holiday island, Mr and Mrs Gerrard cannot establish a “strong *prima facie* case” that the alleged conduct would constitute a crime under the law of St Lucia. The allegation regarding Article 22 to Part 2 of Schedule 3 of the Customs (Control and Management) Act, Cap 15.05 applies to “Nightscope binoculars and similar night vision instruments or apparatus of a kind generally used by the armed forces”, and does not apply merely to “cameras adapted for night vision use”. In any event, as Mr and Mrs Gerrard’s own pleaded case is that Diligence’s operatives failed in their alleged efforts to carry out surveillance of them on the island, the allegedly criminal conduct was not causative of any relevant documents being created, and would be hopelessly remote with regard to any documents that were created by Diligence in the course of other surveillance (particularly given that the allegedly criminal conduct was carried out by Diligence and not ENRC).

126. Although, as set out above, the Strike Out Application of Diligence is in different terms to that of ENRC, Ms Proops’ submissions were to the identical effect. In particular, with regard to the allegations relating to St Lucia, Ms Proops submitted as follows:

- (1) Mr and Mrs Gerrard have not established that the acts that they claim to be criminal under the law of St Lucia are in fact criminalised under that law (and this is an issue on which they bear the burden of proof).

- (2) Moreover, their case with respect to these allegations is self-defeating: it is to the effect that the Diligence operatives were frustrated in their efforts to carry out surveillance on Mr and Mrs Gerrard on the private island, which itself presupposes that there are no documents in existence in respect of which the alleged criminal conduct could be said to be causally relevant.
- (3) Further and in any event, even if the alleged acts occurred and were criminal in nature, under the law of St Lucia, and even if thereafter Diligence had conducted surveillance of them on holiday on the island, so as to generate surveillance records, Mr and Mrs Gerrard would still have no viable case on the application of the iniquity principle. This is because the criminal acts relied on for these purposes would plainly be too remote from the surveillance activities themselves. On this point, it is important to recall that the right to legal privilege is a fundamental human right: that right cannot be said to fall away simply because a surveillance agent, at a time and place that is distant from the actual surveillance activities themselves, commits an incidental criminal act. On the case of Mr and Mrs Gerrard, the iniquity exception would be engaged where (for example) a covert surveillance agent accidentally went over the speed limit when following a target, which cannot be the right result.
- (4) The alleged facts of the present case are notably a world away from those of *Dubai Aluminium*.
- (5) All these points apply with even greater force given that this is a case where it is not alleged that ENRC was itself complicit in the alleged wrongdoing.

127. I should also mention Ms Proops' reliance on the decision of Warby J in *Holyoake v Nicholas Candy* [2017] EWHC 52 (QB). Ms Proops described this as "currently the leading case on operation of the iniquity principle in a surveillance privacy case". Ms Proops appeared for Mr Holyoake in that case. However, in spite of her arguments, Warby J was not persuaded that what he described at [95] as "the quite radical extension of the iniquity principle that is advocated on behalf of Mr Holyoake" was required by the Human Rights Act 1998 or the EU Charter of Fundamental Rights.

128. The broad proposition which was advanced by Ms Proops in that case was (see [87]) that breach of a human right is to be equated with crime or fraud for the purposes of the iniquity exception. Warby J's primary conclusion appears from [90]:

"First and foremost, the argument founders on the facts, for substantially the same reasons as set out above. The court will not set aside a claim to LPP on the basis of the iniquity principle unless there is at least a prima facie case of wrongdoing. There is no such case. There has been much talk in the course of submissions about the evils of surveillance, but the evidence does not support the conclusion that USG engaged in any surveillance. There is no worthwhile evidence that the firm did more than carry out investigation ... There is no

direct evidence as to the nature of the investigation undertaken by USG ... [and no] inferential case that USG's investigation ... was unlawful".

129. At [91], Warby J said that, having reached those conclusions, he could deal relatively shortly with the points of law, and that “[t]he authorities relied on are of no real assistance to the argument” and did not support “the much broader submission that the court is duty bound to allow an incursion into LPP whenever the documents for which protection is sought may evidence a breach of any human right”. At [92], he said that “the argument seeks a substantial expansion of the iniquity principle which would, on the face of it, significantly erode the right to LPP ... [and] fails properly to recognise that the right to LPP is itself a fundamental human right”. At [93], Warby J turned to Ms Proops’ alternative argument “that the court should adopt a balancing approach, weighing one competing right against another”, but he rejected that approach because “it would create a new exception of uncertain ambit” and “would also appear to be inconsistent with House of Lords authority”. At [94], he observed that “the HRA has not abrogated the doctrine of precedent, which continues to apply subject to certain exceptions ... It is not submitted that the exceptions apply here”.
130. In my judgment, this decision is of no real assistance in the present case. The holding that the iniquity exception does not extend to any breach of a human right is entirely unsurprising, and has no obvious impact on the submissions of Mr and Mrs Gerrard.

(iii) The submissions of Mr and Mrs Gerrard

131. Mr Wolanski began by setting the scene as follows:

- (1) Litigation privilege features in the pleadings in this case, in brief, because ENRC and Diligence contend that they are unable to admit or deny much of Mr and Mrs Gerrard’s pleaded case on the ground of litigation privilege. Specifically, they contend that ENRC engaged Diligence for the dominant purpose of the Litigation, and that “the documents created in the course of that engagement – including the instructions provided by ENRC, the product of the engagement and any personal data regarding [Mr and Mrs Gerrard] thereby obtained by ENRC – are subject to legal professional privilege” (see [2](4) of ENRC’s Defence; and, further, [24]-[26] of ENRC’s Defence, and [7]-[10], [17] of Diligence’s Defence).
- (2) Further, the Defences make litigation privilege a substantive issue in the claim to be determined at trial. Thus: (a) ENRC disputes Mr and Mrs Gerrard’s claim to the delivery up of documents relating to them on grounds which include that many such documents will be privileged (see [65](1) of ENRC’s Defence); and (b) Diligence denies that it has wrongly failed to comply with Mr Gerrard’s subject access requests under the Data Protection Act 1998, Data Protection Act 2018 and the General Data Protection Regulation on grounds including that the requested data was privileged (see [45] and [49]-[51] of Diligence’s Defence).

- (3) It is in response to these pleas that Mr and Mrs Gerrard address the subject of litigation privilege in the Reply. In [8] of the Reply, they dispute the pleaded assertions of litigation privilege on three grounds (as identified by Mr de la Mare).
 - (4) Further, the Reply does not plead to the invocation of privilege by ENRC and Diligence in relation to delivery up and Mr Gerrard's subject access requests. Accordingly, pursuant to CPR 16.7(2), ENRC and Diligence are required to prove those allegations at trial.
132. Against this background, Mr Wolanski raised a threshold point, namely that, so far as they relate to the Reply, the Strike Out Applications are inappropriate because (a) they seek the determination of questions of privilege prematurely, in advance of any specific claims to privilege over any specific documents and (b) they invite the Court to undertake a mini-trial - without any relevant evidence - of questions of privilege which are to be determined at trial and in relation to which ENRC and Diligence bear the burden of proof. In developing this argument, Mr Wolanski submitted:
- (1) It is settled law (see *Starbev GP v Interbrew Central European Holding* [2013] EWHC 4038, Hamblen J (as he then was) at [11] to [13] and the cases there cited) that: (a) the party claiming privilege has the burden of proof to establish the claim; (b) elements of a claim to privilege (such as whether the relevant communication was for a privileged purpose) are facts which must be proved by evidence; (c) the claiming party's statement that the relevant communication is privileged is not determinative, and the Court will subject the evidence in support of the claim to "anxious scrutiny"; and (d) in certain circumstances the Court may inspect the relevant communication to determine whether it is in fact privileged as claimed.
 - (2) These principles underlie the procedure by which privilege over documents is claimed: (a) when giving disclosure, the party claiming privilege must disclose the relevant documents but indicate in its disclosure list that it claims a right to withhold inspection of the documents (CPR 31.10(4)), and state the grounds on which it claims that right (CPR 31.19(3)(b)); (b) while the general practice is to describe such documents compendiously, the Court can order the claiming party to provide a more detailed description of the relevant documents - sometimes known as a 'privilege log' - which may include information about the date of the documents and their recipients (see Hollander, *Documentary Evidence*, 13th Edition, §15-07); and (c) the other party can then consider the claim to privilege, and may make an application contesting the claim (CPR 31.19(5)).
 - (3) At the disclosure stage in the present claim, even if the harassment plea is struck out, the remainder of the pleaded claims (for trespass, data protection breaches, and misuse of private information) will subsist, and the parties will be obliged to

give disclosure in relation to them. At that point (leaving aside the Strike Out Applications) ENRC and Diligence will make their privilege claims; and it will be open to Mr and Mrs Gerrard to challenge all or some (or none) of those claims.

(4) The Strike Out Applications seek to circumvent the Court's usual process and have questions of privilege decided in the abstract, before any specific claims to privilege are made. That is wrong in principle, and unfair to Mr and Mrs Gerrard.

133. As to principle, Mr Wolanski submitted as follows. It is for ENRC and Diligence to make specific claims to privilege and then justify those claims with evidence (for example, by a verified disclosure list stating that privileged documents exist but are immune from inspection). It would be wrong in principle to permit them to escape that obligation by determining privilege questions on the Strike Out Applications. The tests for privilege focus on documents and other communications and must be applied to each communication or document (see *R (Jet2.com) v CAA* [2020] 2 WLR 1215, Hickinbottom LJ at [100(i)]). As there are no specific claims to privilege yet in the present proceedings, ENRC and Diligence are effectively asking the Court to determine what are, at present, merely academic or abstract questions. At the present time, however, neither Mr and Mrs Gerrard nor the Court are aware of what potentially privileged documents exist, or the specific grounds on which it could be said that those documents are, or are not, subject to privilege. It may be, depending on what documents are in fact held by ENRC and Diligence, that at least some of Mr and Mrs Gerrard's pleaded averments will not in due course arise for consideration.
134. As to unfairness to Mr and Mrs Gerrard, Mr Wolanski submitted that they have not had the opportunity to question and assess the position of ENRC and Diligence in the usual way by, for example, determining precisely what potentially privileged documents exist by calling for the production of a privilege log (or seeking an order to that effect if one is refused), or by considering any specific privilege claims that may be made alongside disclosure that is not privileged.
135. Further, Mr Wolanski submitted that it is relevant to note that aspects of the Strike Out Applications rely on submissions about matters of fact, for example the Court is invited to hold (i) that Mr and Mrs Gerrard are unable to show a very strong *prima facie* case that the iniquity exception to privilege applies; and (ii) that no disclosable documents were generated as a result of some of the alleged iniquitous conduct.
136. In addition, he submitted that because questions of privilege will feature as substantive issues at trial, the Strike Out Applications effectively invite a mini-trial of those questions, on the basis of mere assertion from ENRC and Diligence as to the claims to privilege, and without evidence from them as to the foundation of that assertion.

137. For all these reasons, Mr Wolanski submitted that the Court should dismiss the Strike Out Applications in so far as they rely upon privilege. This would allow the parties to give disclosure by reference to the issues in dispute, and ENRC and Diligence to make their claims to privilege in accordance with CPR 31. Mr and Mrs Gerrard may then seek to challenge some or all of those claims, or instead leave the whole question of privilege to be considered at trial. There is no good reason to depart from that procedure.

138. If, contrary to that threshold point, the Court decides that it is appropriate to resolve arguments about litigation privilege on these applications, Mr Wolanski accepted for those purposes that it should be assumed that the first and third of the conditions identified by Lord Carswell in *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610 at [102] apply:

“communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial.”

139. Turning to the first ground upon which Mr and Mrs Gerrard contend that the protection of litigation privilege is not available to ENRC and Diligence in the present case, Mr Wolanski’s overarching submission was that communications relating to Diligence’s surveillance activities would have been generated during the course of, or for the purpose of, activities which were unlawful, and in some instances dishonest, and accordingly could not be privileged because they are within the iniquity exception.

140. In this regard, Mr Wolanski submitted:

(1) It has been established since *R v Cox and Railton* [1884] 14 QBD 153 that no privilege attaches to communications made as part of or in furtherance of a crime, fraud or other iniquity. While this is described as an ‘exception’ to privilege, the label is, strictly, inapt because the illegal object of communications falling within it mean they are never privileged in the first place: see, for example, Thanki, *Law of Privilege*, 3rd Edition, at §8-001 and §8-002; and Hollander, *Documentary Evidence*, 13th Edition, at §25-10.

(2) The exception applies to litigation privilege as well as legal advice privilege, including where the iniquity alleged is the same wrongdoing as that alleged in the litigation. That is to say, there does not need to be any wrongdoing independent of that alleged in the litigation for the exception to apply. But in cases where the iniquity is that alleged in the litigation, the exception will not be engaged unless the party challenging privilege can show a strong, and perhaps a very strong,

prima facie case that the wrongdoing was committed: *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734 at [42] (Longmore LJ).

- (3) The exception is not restricted to criminal or fraudulent conduct, but extends more broadly:
 - (a) In *Crescent Farm (Sidcup) Sports v Sterling Offices* [1972] 1 Ch 553 at 565D, Goff J held that while the exception was not engaged by conduct amounting to the torts of inducing a breach of contract or conspiracy, nevertheless “fraud in this connection is not limited to the tort of deceit and includes all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances.”
 - (b) In *Barclays Bank v Eustice* [1995] 1 WLR 1238, it was held that the exception was engaged when debtors entered into an undervalue transaction for the purpose of prejudicing their creditors. Schiemann LJ (with whom Aldous and Butler-Sloss LJ agreed) rejected a submission that the exception was engaged only where there is dishonesty (at 1250G), and went on to hold that the debtors’ purpose of prejudicing their creditors was “sufficiently iniquitous” to engage the exception (at 1252C). Schiemann LJ further expressed the view that his judgment would make it more difficult for individuals to carry out “sharp practice” like that occurring in the case before the Court (at 1252H).
 - (c) In *BBGP Managing General Partner v Babcock & Brown Global Partners* [2011] Ch 296, Norris J held that the exception was engaged by conduct amounting to breaches of fiduciary duty, regardless of whether the breaches were motivated by a desire to secure a personal advantage ([63] to [65]). As to the applicable principle, see Norris J at [62] (also cited by Mr de la Mare).
 - (d) In *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 at [68], Popplewell J stated that the exception “is not confined to criminal purposes, but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice.”
 - (e) See, further, *Dubai Aluminium v Al-Alawi* [1999] 1 WLR 1964.
- (4) Applying these principles, Mr and Mrs Gerrard have at least a real prospect of establishing that the surveillance activities complained of in the present case engage the iniquity exception:

- (a) If the allegation that Diligence’s surveillance activities amounted to criminal harassment (Reply [8](a)(ii)) is made out, the communications made during the course of, or for the purpose of, the harassment would not be privileged.
- (b) It is alleged that the surveillance activities are, taken as a whole, sufficiently wrongful and (in some cases) dishonest as to engage the iniquity exception (Reply [8](a)). Those activities have involved installing highly intrusive camera surveillance equipment at Mr and Mrs Gerrard’s home, attempting to conduct surveillance of them while on holiday, lying to immigration authorities, lying to former employees of Mr Gerrard’s firm to entice them to sham job interviews for the purposes of obtaining personal information about him, following him by car, and attaching a tracking device to his car. That is a course of deliberate and persistent conduct which could fairly be described as “trickery, dishonesty, sharp practice, underhand or contrary to public policy”.
- (c) There is a close analogy to the decision in *Dubai Aluminium*. The allegation that Diligence’s activities have involved the commission of criminal offences, breaches of data protection laws, and the use of impersonation relates to conduct which is very similar to that which engaged the exception in that case. It is also relevant in this connection that *Dubai Aluminium* is described in Hollander, *Documentary Evidence*, 13th Edition at §25-16 as “an important development in the law” which may lead to a greater tendency for the courts to “enquire as to the sources of information obtained by private investigators”.
- (d) As regards the attempted holiday surveillance, it is alleged that Diligence’s operatives lied to the St Lucia authorities and carried with them unlawful surveillance equipment (Reply §§8(a)(iii) and 8(d)(iii)). Lying in this way to the government authorities of a friendly foreign state could fairly be described as “trickery, dishonesty, sharp practice, underhand or contrary to public policy”. Further, the lies amounted to a crime under section 36(1)(e)(ii) of the St Lucia Immigration Act, Cap 10.01 (Reply [8](a)(ii)(2)). This provision applies when a passenger intending to enter St Lucia wilfully gives an untrue answer to a question posed by an immigration officer. Such foreign criminal conduct is plainly capable of engaging the exception. So far as concerns the surveillance equipment, Diligence’s operatives attempted to bring a camera adjusted for night vision into St Lucia. It is alleged that doing so amounted to an offence under section 84(2) and article 22 to part 2 of Schedule 3 of the St Lucia Customs (Control and Management) Act, Cap 15.05 (Reply [8](a)(iii)). This prohibits the importation of “[n]ightscope binoculars and similar night vision instruments or apparatus of a kind generally used by the armed

forces, para military [or] other law enforcement agencies.” Again, foreign criminal conduct of this nature is plainly capable of engaging the exception.

141. Mr Wolanski answered the principal submissions of ENRC and Diligence as follows:

- (1) The contention that Diligence’s surveillance activities were insufficiently iniquitous is wrong. While it has been questioned whether the exception can apply in cases not involving dishonesty (see, for example, Thanki, *Law of Privilege*, 3rd Edition, §4.49), *Eustice* remains binding authority, which has been applied in a number of cases since, including *BBGB* and *Ablyazov*. Moreover, in two recent decisions the Court of Appeal declined to reconsider *Eustice* and, in one of them, indicated that, whatever the broader principle involved, the decision is correct on its own facts: see *Z v Z* [2018] 4 WLR 52 at [54] to [57]; and *Curless v Shell International* [2020] ICR 431 at [59]. (I would add that in *Re McE* [2009] AC 908 the House of Lords referred to *Eustice* with apparent approval, save only that Lord Neuberger at [109] said that he would leave open the question of whether *Eustice* was correctly decided.) In any event, *Eustice* is right in principle: although legal professional privilege is a fundamental right, it is equally important that it should not be used as a cloak to hide or further serious wrongdoing.
- (2) As to the St Lucia Customs (Control and Management) Act, it is clear on the face of the statute that cameras adapted for night vision use could be, for example, “night vision ... apparatus of a kind generally used by ... law enforcement agencies.” In any event, the meaning of a St Lucia statute is a matter for expert evidence on the law of St Lucia, and none has (as yet) been adduced.
- (3) The contention that the iniquity exception cannot be engaged because it is not alleged that ENRC was complicit in the wrongdoing of Diligence’s operatives is wrong:
 - (a) First, the RAPOC (at [31]) sets out why both ENRC and Diligence are liable.
 - (b) Second, as a matter of law, it is sufficient that Diligence acted as ENRC’s agent in conducting its surveillance activities: see *Dubai Aluminium*, in which Rix J held that no privilege applied to documents relating to the claimant’s agents’ investigations, despite indicating that he was in no position to find exactly what wrongdoing had been committed (at 1968F), and on the basis that it was enough that the investigators were the claimant’s agents: “[i]t seems to me that if investigative agents employed by their solicitors ...”. Alternatively, if that contention is wrong, ENRC’s

state of mind is a matter for trial, and is not capable of being determined on the Strike Out Applications.

- (c) Third, and in any event, it would make no difference if ENRC had no legal or factual connection to the wrongdoing at all, because it is settled that the exception can apply even where the client is wholly innocent, but is used as the tool or a mechanism of a third party seeking to carry out an iniquitous purpose: see, for example, Passmore, *Privilege*, 4th Edition, at §8-008; Matthews and Malek, *Disclosure*, 5th Edition, at §11.78; Thanki, *Law of Privilege*, 3rd Edition, at §4.57. As to this:
- (i) The principle emerges from the decision of the House of Lords in *R v Central Criminal Court; Ex parte Francis & Francis* [1989] 1 AC 346, in which the client consulted a solicitor about transactions funded with money provided to the client by a third party. The case proceeded on the assumptions that: (i) the third party gave the money to the client, a family member, in order to launder the proceeds of drug trafficking; but (ii) both the client and the solicitors were innocent of any wrongdoing (as recorded by Lord Bridge at 369D-E). The majority of the House nevertheless held that the exception applied to documents held by the solicitor in relation to the transactions. As stated by Lord Goff (at 396E), it is “immaterial to that exception whether it is the client himself, or a third party who is using the client as his innocent tool, who has the criminal intention.” See also Lord Griffiths at 385B and Lord Brandon at 381C, concurring. The decision in that case concerned the effect of a statutory provision relating to privilege which is not in issue in this case, but Lord Goff was explicit in saying that his judgment covered the common law of privilege (see 395F).
- (ii) In *Owners of Kamal XXVI v Owners of Ariela* [2011] 1 All ER (Comm) 477, the claimant prosecuted a fraudulent claim against the defendant, with financial support from underwriters. After the fraud was discovered the defendants sought a non-party costs order against the underwriters, and in that connection sought the production of documents passing between the underwriters and their solicitors. The defendant made no allegation that the underwriters or their solicitors were complicit in the fraud, but argued that, applying *Francis & Francis*, the exception applied because they were the innocent tool of the fraudulent claimant. Burton J accepted this argument and ordered the production sought, holding that the underwriters and the solicitors were used as a “mechanism” for the claimant’s fraud (at [32]).

- (iii) In *Accident Exchange v McLean* [2018] 1 WLR 26, Andrew Smith J considered *Francis & Francis* (and other authorities) in detail, and concluded that the hallmark of cases where third party wrongdoing will deprive an innocent client of privilege will be the presence of a relationship or “nexus” between the third party and the client, separate from the client’s dealings with the solicitor, which is used by the third party to advance the wrongdoing (at [49]). Such a nexus was present in *Francis & Francis* (where the client and the wrongdoer were relatives) and *Owners of Kamal XXVI* (where the client was the wrongdoer’s underwriter), but absent from the case before Andrew Smith J.
- (d) Applying these principles to the present case, it is at the very least reasonably arguable that the reasoning in *Francis & Francis* applies, even if ENRC is entirely innocent of any wrongdoing, because: (i) there was a nexus or relationship between the client (ENRC) and the wrongdoer (Diligence), in that ENRC engaged Diligence to carry out the surveillance activities; (ii) Diligence thereupon embarked upon an iniquitous course of conduct to obtain surveillance information about Mr and Mrs Gerrard by unlawful means; and (iii) Diligence used ENRC as a tool or mechanism of its wrongdoing because the wrongdoing was undertaken in return for, and made possible by, the fees (presumably) paid by ENRC to Diligence for its services.
- (4) The contention that the iniquity exception cannot be engaged because Mr and Mrs Gerrard cannot establish a very strong *prima facie* case that the alleged iniquity was committed is misconceived. The Strike Out Applications are made in advance of any specific claims to privilege, whereas questions of whether a strong *prima facie* case exists fall to be considered when those claims to privilege are made, and if Mr and Mrs Gerrard seek to challenge any of those claims. The unreality and unfairness of the position of ENRC and Diligence is borne out by the consideration that the Court has power, where appropriate, to inspect the documents for which privilege is claimed to determine whether the exception applies, whereas the Court is being invited to conclude that there is insufficiently strong evidence of iniquity to apply the exception at a time when it is in no position to take that approach, as there have been no specific claims to privilege.
- (5) The contention that there is no basis on which it could reasonably be inferred that any disclosable document was generated as a result of the allegedly iniquitous conduct concerning the holiday on the island, is, also, misconceived. The Court is in no position on the Strike Out Applications to form any view on the likelihood of whether disclosable documents relating to the island episode exist. In effect, ENRC and Diligence invite the Court to pre-judge the outcome of their disclosure exercises, which is inappropriate. In any event, disclosable documents relating to

that episode may exist. Although the attempts of the Diligence operatives to conduct surveillance on the island were unsuccessful, disclosable documents in this category might include communications discussing the travel plans of Mr and Mrs Gerrard, communications discussing Diligence's plan to gain access to the island by means of false pretences, and communications recording what the Diligence operatives said and did in their attempts to gain access to the island.

(6) Finally, as to the argument that the iniquity exception, even if engaged, would apply only to communications which revealed or were the product of the relevant iniquitous conduct:

(a) Mr and Mrs Gerrard accept that there may be documents which, while relating to Diligence's surveillance activities, may not have been generated during the course of, or for the purposes of, the iniquity alleged. However, that is not a reason to grant the Strike Out Applications; instead, it is a further indication of the misconceived nature of those applications. As matters stand, Mr and Mrs Gerrard cannot be specific about the documents engaged by the exception, because there have been no specific privilege claims by ENRC and Diligence. That flows from the context in which the Strike Out Applications are made. Mr and Mrs Gerrard will be in a position to be more specific after the privilege claims are made and they have had the opportunity to scrutinise those claims.

(b) In any event, given the nature of Mr and Mrs Gerrard's allegations, and the means by which Diligence carried out its surveillance activities, there is no reason to believe that any population of documents falling outside the exception is likely to be significant or extensive.

142. The next contention of Mr and Mrs Gerrard (see [8](b), [8](d)(ii)(1), and [8](e)(i) and (ii) of the Reply) is that some categories of documents cannot be privileged because they do not record matters confidential as regards them (i.e. those which record the surveillance of them, such as video or audio tapes or transcripts of conversations) or cannot be confidential at all (i.e. those which record communications between Diligence operatives and third parties, such as immigration officials and security guards, when the operatives were attempting to gain access to the holiday island).

143. Mr Wolanski put at the forefront of his argument under this head a passage from Hollander, Documentary Evidence, 13th edition, at §16-09, which begins:

“No privilege attaches to communications between claimant and defendant, or between opposing parties, save for the rather different without prejudice privilege. There can be no confidence in such communications. It follows that there can be no confidentiality and no privilege in notes or reports of matters at which both sides were present”.

144. Mr Wolanski further referred to Matthews and Malek, *Disclosure*, 5th Edition, at §§11.32 and 11.35; and Thanki, *Law of Privilege*, 3rd Edition, at §3.36, and to the following authorities: *Grant v Southwestern and Country Properties* [1975] 1 Ch 185, per Walton J (at 199E-G) (“It is, of course, well established that a communication from the other side in litigation cannot be privileged, and it is obvious common sense that a communication to the other side in litigation cannot be privileged.”); *Parry v News Group Newspapers* [1990] 140 NLJ 1719 (including the statement of Lord Bingham MR that “A bare record of what passed is in my view entitled to no legal professional privilege, whether it is a solicitor’s memorandum, a transcript, or an exchange of letters.”); *Faraday Capital v SBG Roofing* [2006] EWHC 2522, per Cooke J at [16]-[20] (holding that statements recording certain interviews were not privileged on the basis that they recorded communications from the opposing party to litigation then in contemplation); and *Barclay v Barclay* [2020] EWHC 1179 (in which the defendants made covert recordings of conversations between the claimants in the Ritz hotel, and Warby J said at [56(1)] that “it is perfectly clear, and has been conceded from the outset by those representing the defendants, that no claim could be made that the covert recordings themselves were protected by LPP.”)
145. Mr Wolanski then referred to authorities from Hong Kong and Australia. In *Chun Wo Building Construction v Metta Resources* [2015] HKCFI 1475, Chan J in the Hong Kong High Court held that photographs recording the physical state of a construction site were not privileged, saying (at [11]) that “I can accept that litigation was contemplated at the time the photos were taken, but it is not at all clear why the photos are confidential in nature and thus should be regarded as privileged.” In *J Corp v Australian Builders Labourers Federated Union of Workers* (1992) 110 ALR 510, the defendant’s solicitor caused a videotape to be made of events on a picket line at the claimant’s premises. French J in the Australian Federal Court held (at 515) that the video was not privileged, saying that it was:
- “real evidence of events which occurred in public. They were not taken in circumstances to which any confidentiality attached. To attach legal professional privilege to these materials would be to accord excessive respect to the adversarial aspects of litigation and insufficient weight to the objective of determining in litigation the facts in issue.”*
146. Mr Wolanski acknowledged that Hollander, *Documentary Evidence*, 13th edition, at §16-12 expresses the view that a surveillance video tape is no different from a document, and is therefore privileged if created for the purpose of litigation (notwithstanding that the “Australian courts seem to have found the issue less straightforward”). He submitted, however, that this passage is of limited assistance, because no reasons are given for it. Mr Wolanski also accepted that, in Passmore, *Privilege*, 4th Edition, at §3-048 the decision in *Chun Wo* is said to be questionable on the basis that the photographs in that case could be said to betray the ‘trend of the advice’ given to the party which commissioned the photographs. He submitted that

even if, which is not accepted, this objection is correct, it is one of fact not principle, given that it assumes that the photographs would reveal the trend of the advice given.

147. Mr Wolanski submitted that, in addition to the absence of confidentiality, a further consideration underlying this body of authority is that events or other facts cannot be cloaked with privilege merely because they are recorded in documents or other communications which are created for the purpose of litigation. The position may be different if such documents or communications contain annotations or analysis which makes them more than a mere recitation of observable fact (see *The Stax Claimants v Bank of Nova Scotia Channel Islands* [2007] EWHC 1153 at [10]), or where a solicitor copies unprivileged documents in a way which, taken as a whole, would reveal the “trend of the advice” given to the client (see *Ventouris v Mountain* [1991] 1 WLR 607 at 615F). Otherwise, however, no privilege can attach; and the relevant documents or other communications are disclosable where relevant.
148. Mr Wolanski submitted that, applying these principles, Mr and Mrs Gerrard have at least a real prospect of establishing that communications recording the surveillance carried out on them are not privileged. Things said and done by Mr and Mrs Gerrard, or by third parties in proximity to them or their property, are not confidential in any relevant sense, and thus are not privileged. Further, so far as concerns Mr Gerrard: at the time of Diligence’s surveillance activities he was an actual or anticipated party to the Litigation, which comprises adversarial litigation brought by the party for whom Diligence was acting (ENRC); recordings of things said and done by him are recordings of the words and actions of the other side to litigation; and such communications can, as a matter of law, never be privileged. The fact that the surveillance also recorded the words and actions of Mrs Gerrard and third parties does not change that analysis, as it is the case of ENRC and Diligence is that Mr Gerrard was the only target of the surveillance, and that the surveillance of others was merely incidental (see, for example, paragraph 2(3) of ENRC’s Amended Defence).
149. The communications in question are accordingly very closely analogous to those in the decided cases cited above: there is a very close analogy between a solicitor’s or investigator’s note recording something said by the other side to litigation, and a surveillance record of something said or done by the other side to litigation. Further, the photographs in *Chun Wo* and the video in *J Corp* are very similar to the types of documents which may exist in this case; and those decisions accord with English law.
150. Mr Wolanski further submitted that another way of approaching the issue is through the principle that events or facts cannot be cloaked in privilege by being recorded in a communication made for litigation purposes. He suggested that his point can be tested by considering what might happen at trial in this case: if Diligence operatives give evidence, they can be cross-examined as to what they saw Mr and Mrs Gerrard say or do, and where that occurred; those facts cannot be privileged, and accordingly the operatives would be obliged to answer questions to that end; that being so, it is hard to

see how documents or other communications recording what the operatives saw could be privileged. Mr Wolanski accepted that different considerations might apply in relation to documents or other communications in which (for example) Diligence provided an analysis of the surveillance to ENRC (the disclosure of which might reveal the ‘trend of advice’ being given to ENRC by its solicitors); he submitted, however, that those types of documents are not the ones under consideration.

151. Further and for substantially the same reasons, Mr Wolanski submitted that Mr and Mrs Gerrard have at least a real prospect of establishing that documents recording communications between Diligence operatives and third parties when attempting to gain access to the holiday island are not privileged. The analysis here is similar to that as regards surveillance recordings of third parties made as an incidence of the surveillance of Mr and Mrs Gerrard. Any communications between Diligence operatives and (for example) St Lucia immigration officials and security guards would have taken place (i) in public or semi-public spaces, and (ii) in circumstances where it could not credibly be suggested that there was any agreement by the third parties that the communications were confidential.

152. Finally, Mr Wolanski submitted that the arguments of ENRC and Diligence to the opposite effect are without substance. The arguments to the effect that “confidentiality in the context of legal professional privilege ... refer[s] to the confidentiality of the documents/records in respect of which privilege is asserted rather than to the confidentiality of the activities described therein” (see [22] of the 3rd witness statement of Mr Brown) are incorrect in the light of authorities like *Grant* and *Parry*, where the key consideration was that the notes in question recorded non-confidential events. Similarly, the contention of Diligence that “information does not cease to be confidential vis-à-vis an individual because it happens to concern them, their activities or their activities in a public place” cannot stand in the light of those same authorities, in which information was held not to be confidential because it concerned the relevant individuals’ activities. Further, there is nothing in the point that the arguments of Mr and Mrs Gerrard mean that privilege could never be claimed over the fruits of investigations undertaken for litigation purposes. On the contrary, those arguments focus on documents recording the surveillance, or conversations with third parties as regards the island episode. There is a clear distinction between such documents, and other documents containing (say) information about what investigators did, what that revealed, and the significance of what was revealed. The relevant analogy in this context is between a solicitor’s note of a hearing, which is not privileged; and a solicitor’s note of advice based on what occurred at a hearing, which is privileged.

(iv) *Discussion and conclusion*

153. In my judgment, Mr Wolanski’s threshold argument is correct. This is not the occasion on which to attempt to determine the contentions advanced by ENRC and Diligence. Instead (to the extent that those contentions do not raise issues which can only be

determined at trial), that should be done after the parties have provided disclosure by lists of documents, and at a time when those contentions can be considered on a concrete basis, having regard to the nature and extent of (i) the claims to privilege which are advanced by ENRC and Diligence in due course by reference to specific documents or classes of documents and (ii) any dispute as to those claims which Mr and Mrs Gerrard elect to pursue after they have had the opportunity to see what those claims involve. In addition, following that course will mean that all the arguments concerning privilege which are capable of being determined in advance of the trial can be considered on one occasion by a single Judge, and will avoid the hands of that Judge being tied or restricted by decisions made by me on more incomplete materials.

154. That conclusion makes it unnecessary for me to resolve the many arguments which have been ventilated before me. In case this litigation goes further, however, I will consider those arguments, albeit more briefly than I would if I was seeking to resolve them conclusively, and in terms which are not intended to bind any subsequent Judge.
155. As set out above, the first submission of ENRC and Diligence is that paragraphs 8(a)(ii), 8(a)(iii), 8(b), 8(d)(ii)(2), 8(e)(i) and 8(e)(ii) of the Reply should be struck out because they include an assertion that allegations of mere civil wrongdoing set out in the RAPOC (as opposed to the allegations of criminal wrongdoing referred to in paragraphs 8(c) to 8(e) of the Reply) are sufficient to engage the iniquity exception, and that is wrong in law. In my judgment, this is not a ground for striking out any of these paragraphs of the Reply, for the following principal reasons.
156. The allegation contained in paragraph 8(a)(ii) of the Reply is, in brief, that in undertaking the surveillance activities complained of in the RAPOC both ENRC and Diligence committed an offence or offences of harassment contrary to section 2(1) of the PHA. That is plainly an allegation of more than mere civil wrongdoing. Further, in accordance with my conclusions concerning the claim for harassment, it cannot be said that Mr and Mrs Gerrard's case in this regard has no real prospect of success. Accordingly, I am not persuaded that paragraph 8(a)(ii) should be struck out.
157. The allegations relied on in paragraph 8(a)(iii) of the Reply are, in brief that: (1) the making of false representations by two of the first three Diligence operatives upon their arrival in St Lucia and then separately by the fourth Diligence operative upon his arrival in St Lucia in circumstances where (it is pleaded) (a) all those representations, if they had been made by a person who is not a British citizen seeking to enter the United Kingdom, would have amounted to the commission of criminal offences under English law; and (b) the representations made by the fourth operative amounted to the commission of an offence contrary to the law of St Lucia; and (2) bringing or attempting to bring in to St Lucia a camera adjusted for night vision use which (it is pleaded) amounted to the commission of an offence contrary to the law of St Lucia.

158. Neither of these two sets of allegations is, in my view, properly characterised as constituting reliance on allegations of “mere civil wrongdoing” set out in the RAPOC.
159. The paragraph 8(a)(iii) allegations give rise to an issue as to the extent of the iniquity exception, including and in particular the extent to which the iniquity exception applies to actions which are contrary to the criminal law of a foreign country.
160. As to the first, and more general, aspect of that issue, the case law cited by the parties included the statement by Norris J in *BBGP* at [62] that the iniquity exception applies in cases where “...the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy” and the statement by Popplewell J in *Ablyazov* at [68] that the exception “is not confined to criminal purposes, but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice”. In my judgment, the argument that the conduct pleaded in this part of the Reply is within the ambit of these statements has a real prospect of success.
161. On the case pleaded in the Reply, it is clearly conduct which amounts to more than a civil wrong. Moreover, it was, on the face of it, underhand, and indeed dishonest; and it was carried out in circumstances where honesty was required. It is also difficult to see how it can be said to accord with public policy. The extent to which actions carried out abroad should be taken into consideration, let alone attract opprobrium, under English law in the context of privilege was not explored in detail before me, and in principle such factors may make a difference for the purposes of the iniquity exception. However, that is, in my judgment, a matter which should properly be determined when the facts have been found (including as to the law of St Lucia, and whether the camera adjusted for night vision use which the fourth operative is alleged to have been attempting to import into St Lucia constituted “[n]ightscope binoculars and similar night vision instruments or apparatus of a kind generally used by the armed forces, para military [or] other law enforcement agencies” within the meaning of section 84(2) and article 22 to part 2 of Schedule 3 of the St Lucia Customs (Control and Management) Act, Cap 15.05), and not on the Strike Out Applications.
162. I turn to the second, and narrower, aspect of the issue raised by the paragraph 8(iii)(a) allegations. In *Dubai Aluminium* Rix J held with regard to conduct which, it was to be inferred, was contrary to the law of Switzerland, that “criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege”. In the present case, it appears likely that few, if any, documents were generated *by* the conduct alleged in paragraph 8(a)(iii) of the Reply (as the false representations were detected, and the use of the camera adjusted for night

vision was prevented). Even if that is right, however, it does not follow that no documents were generated by *reporting on* such conduct. If and to the extent that any such documents were generated and are otherwise disclosable, it seems to me that, on the basis of Mr and Mrs Gerrard's pleaded case, they may well, in the words of Rix J, "fall outside the legitimate area of legal professional privilege".

163. I therefore do not consider that paragraph 8(a)(iii) of the Reply should be struck out.
164. If my understanding of these paragraphs of the Reply is correct, they do not extend to placing reliance on all the allegations contained in the RAPOC as coming within the iniquity exception. Nevertheless, that is how, at least at times, Mr Wolanski characterised the case that is pleaded in paragraph 8(a) of the Reply. As set out above, he submitted that paragraph 8(a) of the Reply alleges that the surveillance activities taken as a whole are sufficiently wrongful and (in some cases) dishonest to engage the iniquity exception because they involved (i) installing highly intrusive camera surveillance equipment at Mr and Mrs Gerrard's home, (ii) attempting to conduct surveillance of them while on holiday, (iii) lying to immigration authorities, (iv) lying to former employees of Mr Gerrard's firm to entice them to sham job interviews for the purposes of obtaining personal information about him, (v) following him by car, and (vi) attaching a tracking device to his car, all of which constitutes a course of deliberate and persistent conduct which could fairly be described as "trickery, dishonesty, sharp practice, underhand or contrary to public policy". If and in so far as a broader pleaded case to that effect is the, or part of the, true target of the Strike Out Applications, I would decline to strike out any part of paragraph 8(a) of the Reply for the like reasons as I have given above in respect of the paragraph 8(a)(iii) allegations.
165. The contention advanced in paragraph 8(b) of the Reply is that documents recording the surveillance carried out on Mr and Mrs Gerrard are not privileged as against them because those documents record matters that are not confidential vis-à-vis them.
166. The contentions advanced in paragraph 8(d)(ii)(2) of the Reply are, in brief, that documents recording communications between Diligence operatives and third parties in the course of attempting to gain access to the private island for the purpose of carrying out surveillance of Mr and Mrs Gerrard on it (including communications with security guards on the private island and the St Lucia authorities) were neither (1) confidential; nor (2) from the perspective of the third parties, who those operatives sought to mislead as to the reason why they sought to visit St Lucia/the private island, carried out for the purposes of conducting litigation. It is further pleaded that, for either or both of these reasons, litigation privilege does not attach to these documents.
167. The contentions advanced in paragraphs 8(e)(i) and 8(e)(ii) of the Reply all relate to the surveillance of Mr and Mrs Gerrard's property. It is pleaded, in sum: (1) that surveillance of Mr and Mrs Gerrard themselves would record matters which are not confidential vis-à-vis them and which therefore are not privileged as against them; and

(2) that surveillance covering (a) matters taking place in a public place, such as the entrance to their property from the road, (b) matters which were known or which would shortly have become known to them, such as the identity of persons leaving or entering their property, and (c) matters taking place on their property, is not capable of being confidential, either at all or vis-à-vis Mr and Mrs Gerrard.

168. These three sets of contentions give rise to different issues than arise from the allegations in paragraphs 8(a)(ii) and 8(a)(iii). My provisional view, for the like reasons as are set out above in respect of the paragraph 8(a)(iii) allegations, is that documents “recording communications between Diligence operatives and third parties in the course of attempting to gain access to the private island for the purpose of carrying out surveillance of Mr and Mrs Gerrard on it” may well, on the basis of the overall case pleaded by Mr and Mrs Gerrard, be caught by Rix J’s proposition that “criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by ... such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege”.
169. Whether or not that provisional view is correct, the question arises as to whether the pleaded contentions that the documents in question are not privileged because they are not confidential are contentions which have no real prospect of success. In this regard, Ms Proops submitted that it is well established (a) that “documents which record factual matters, [even] where those documents are themselves publicly available, can be protected by the legal privilege doctrine provided that they have been gathered together specifically for the dominant purposes of litigation” and (b) that “documents created for that dominant purpose are deemed to be confidential”.
170. Ms Proops put at the forefront of her submissions the case of *Lyell v Kennedy* (No. 3) (1884) 27 Ch D 1. That case involved a claim to be an heir to an estate. In the course of considering whether collections of public records and photographs taken of tombstones were privileged, Cotton LJ stated at pp 25-26:

“What ought we to do here? Here is a litigation about pedigree and the heirship to a lady who died many years ago; and it is sworn by the Defendant that for the purpose of defending himself against various claimants he has made inquiries, and he has obtained every one of those documents for the purpose of protecting himself, and that he has got them, not himself personally, but that his solicitors have got them, for the purpose of his defence, for the purpose of instructing his counsel, and for the purpose of conducting this litigation on his behalf. Now no case has been quoted where documents obtained under such circumstances have been ordered to be produced. In my opinion it is contrary to the principle on which the Court acts with regard to protection on the ground of professional privilege that we should make an order for their production; they were obtained for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him to fully investigate a case for the purpose of instructing counsel if we required

documents, although perhaps publici juris in themselves, to be produced, because the very fact of the solicitor having got copies of certain burial certificates and other records, and having made copies of the inscriptions on certain tombstones, and obtained photographs of certain houses, might shew what his view was as to the case of his client as regards the claim made against him.”

171. Ms Proops pointed out that this case was followed by McKechnie J in the High Court in Ireland in *Hansfield Developments v Irish Asphalt Ltd* [2009] IEHC 420.
172. Ms Proops further submitted, with regard to the cases relied upon by Mr Wolanski, that cases such as *Grant* and *Parry* related to *inter partes* engagements and were not remotely on point, and that the cases of *Chun Wo Building Construction v Metta Resources* [2015] HKCFI 1475 and *J Corp v Australian Builders Labourers Federated Union of Workers* (1992) 110 ALR 510 had been wrongly decided.
173. In my judgment, the basis of the decision in *Lyell* is not that documents will be protected by litigation privilege wherever (in the words used by Ms Proops) “they have been gathered together specifically for the dominant purposes of litigation”, but is instead that identified in *Hansfield* at [66], namely that:

“it is possible for a collection of documents which otherwise would not be privileged to be so where they were obtained by solicitors, or on their behalf, for the dominant purpose of litigation ... by virtue of the fact that production of the documents could show the line of legal inquiry of the plaintiff’s legal team and give clues as to how they will seek to run the litigation.”

174. Whether or not documents are privileged on this basis seems to me to be a question which falls to be decided on the facts of each particular case. It is not possible, in my view, to say that any documents which come into existence for, or are collected together for, the dominant purpose of litigation are necessarily protected by privilege, although it may often happen that they will be. Whether and to what extent privilege attaches is, in my opinion, properly, and certainly better, assessed on a concrete basis at the disclosure stage, rather than in the abstract on the Strike Out Applications. At that stage (for example): ENRC and Diligence may or may not succeed in arguing that providing details of the documents in respect of which privilege is claimed will reveal the scope or objectives of the investigations into Mr and Mrs Gerrard and that those matters are privileged, and the Court may or may not decide that such issues can be determined without itself inspecting the documents; but all that is for another day.
175. As to the issue of confidentiality more generally, Matthews and Malek, *Disclosure*, 5th Edition, states as follows at §11.32 and §11.35 respectively:

“It is crucial for the existence of the privilege that the contents of the communication should be confidential. Thus endorsements on counsel’s brief as to the order of the court, depositions taken in the presence of the other

party in the course of an action (whether filed in court or not), shorthand or other notes of proceedings in open court, or of proceedings at an arbitration between the same parties, and correspondence or notes of meetings or conversations between opposing lawyers are not capable of being covered by privilege, because their contents are not confidential. In Australia both video and audio tapes of non-confidential views and conversations have been held not privileged, even though made for the purpose of obtaining legal advice. But a lawyer's "work product", or other results of the exercise of professional skill and judgment, (e.g. notes of research into or collections of extracts from public documents) can nonetheless be sufficiently confidential as to attract privilege.

Confidential communications made, after litigation is commenced or even contemplated, between: (a) a lawyer and his client, (b) a lawyer and his nonprofessional agent, or (c) a lawyer and a third party, for the sole or dominant purpose of such litigation (whether for seeking or giving advice in relation to it, or for obtaining evidence to be used in it, or for obtaining information leading to such obtaining) are privileged from production. As with "advice" privilege, it is necessary that the communication in question be confidential and the considerations relevant in the context of "advice" privilege will be relevant here also. Thus no communication made by the opposite party can be confidential. Accordingly, no privilege will attach to attendance notes or recordings or transcripts of conversations between the parties, or to video and audio tapes made by one party of the other party ..."

176. The authority cited in support of the references in these passages to video tapes is *J Corp v Australian Builders Labourers Federated Union of Workers* (1992) 110 ALR 510; the authority cited in support of the references in these passages to audio tapes is *Telebooth Pty Ltd v Telstra Corporation Ltd* [1994] 1 V.R. 337 Sup.Ct.Vic.
177. These passages run counter to Ms Proops' general submission that "documents created for the dominant purpose of litigation are deemed to be confidential", as well as her more specific submission that *J Corp* was wrongly decided.
178. As it happens, I consider that the statement in Matthews and Malek that "no privilege will attach to attendance notes or recordings or transcripts of conversations between the parties, or to video and audio tapes made by one party of the other party" may well be too sweeping. It seems to me to be contradicted by *Feuerheerd v London General Omnibus Company Ltd* [1918] 2 KB 565. In that case, the plaintiff and her sister-in-law signed a statement when they were under the impression that the person to whom they made it was the representative of the plaintiff's solicitor. In fact, that person was the defendants' claims inspector, although their misapprehension was not induced by any deceit on his part. In the plaintiff's action claiming damages for negligence the defendants claimed privilege in respect of that statement, on the basis that it had been obtained for the purpose of being laid before their solicitors for the defence of the action. The Court of Appeal upheld that claim the privilege. Having said that, Bankes LJ stated at p570: "The case would be quite different if the person making the statement

was under a misapprehension wrongfully and improperly induced by the person to whom the statement was made”. That suggests that a person may not be able to claim privilege where that would involve taking advantage of their (or their agent’s) own wrongful act. Whether that has the effect that a claim to privilege is likely to face greater difficulties with regard to audio or video recordings of the actual or prospective opposing party in litigation that are made covertly and in circumstances where he or she has no reason to believe that they are being recorded or filmed than with regard to those which are made openly or in circumstances where the opposing party may expect to be recorded or filmed was not debated in front of me.

179. For the purposes of the Strike Out Applications, I do not need to decide whether Ms Proops is right, or whether the authors of Matthews and Malek are right. It is sufficient to say that I am not persuaded that there is no real prospect that the views which I understand the authors of Mathews and Malek to be expressing are correct.
180. Accordingly, paragraphs 8(b), 8(d)(ii)(2), 8(e)(i) and 8(e)(ii) should not be struck out.
181. The next two submissions made by Mr de la Mare can be taken together. In my judgment, contrary to those submissions, for the reasons discussed above in respect of their claim for harassment, Mr and Mrs Gerrard have alleged criminal conduct which is sufficient to engage the iniquity exception (specifically conduct which constitutes one or more criminal offences contrary to section 2(1) of the PHA), and they have a *prima facie* case or, if that is necessary, a strong *prima facie* case in this regard.
182. Turning to Mr de la Mare’s argument based on the proposition that the iniquitous conduct must be causative of the relevant documents being obtained by the disclosing party, it seems to me that the question of whether and to what extent documents generated by the surveillance activities about which Mr and Mrs Gerrard complain (i) were generated by lawful activities or (ii) were only obtained as a result of activities which constitute harassment depends upon the facts. In the words of his submissions, the crime or crimes in the present case may be only “in some way related to the surveillance” or it or they may be “causative of the documents being obtained”.
183. The analogy of the private investigator who commits a speeding offence while carrying out surveillance, which was invoked by both Mr de la Mare and Ms Proops, does not appear to me to be apt. If the surveillance was otherwise entirely lawful, and its product would otherwise be protected by privilege, it may be understandable as a matter of policy that the privilege in relation to any resulting photographs should not be lost solely as a result of a motoring offence. In contrast, in the case of surveillance which is contrary to section 2 (and section 3) of the PHA, the crime is more serious and is or may be difficult to separate out from the obtaining of the photographs, and therefore it would be understandable as a matter of policy if the result was different.

184. Nor do I consider that the argument that the alleged criminal conduct was carried out by Diligence while ENRC is the party asserting privilege takes matters any further. Whether and to what extent ENRC was complicit in any crime or crimes which may have been committed are matters of fact. Mr and Mrs Gerrard have pleaded that ENRC is liable for the first batch of activities and that both ENRC and Diligence are liable for the second. In addition, I consider that Mr Wolanski's arguments that it is sufficient to engage the iniquity exception that Diligence acted as ENRC's agent in conducting its surveillance activities, alternatively that it would make no difference if ENRC had no legal or factual connection to the wrongdoing, but was exploited by Diligence to enable Diligence to behave with iniquity, have a real prospect of success.
185. Mr de la Mare's final arguments were that (a) Mr and Mrs Gerrard could not establish a strong *prima facie* case that the actions of the Diligence operatives in seeking to gain entry to the Caribbean holiday island would constitute a crime under the law of St Lucia, (b) in any event, that as their own pleaded case is that the operatives failed in their alleged efforts to carry out surveillance of them on the island, the allegedly criminal conduct was not causative of any relevant documents being created, and (c) that conduct would be hopelessly remote with regard to any documents that were created by Diligence in the course of other surveillance.
186. As to the first of these points, Mr and Mrs Gerrard's case as to criminality under the law of St Lucia is pleaded in paragraph 8(a)(iii) of the Reply, which I have addressed above. I consider that this pleads a clear case, which cannot be said to have no real prospect of success, that the actions of the Diligence operatives were criminal in accordance with that law. Whether or not Mr and Mrs Gerrard can make out that case eventually is a matter that cannot be determined on the Strike Out Applications.
187. The second of these points has also been addressed above. It does not follow that because the efforts of the Diligence operatives to gain access to the island were unsuccessful there were no documents "generated by or reporting on such conduct".
188. The third of these points may well be correct. However, it is not, in my judgment, germane: the claim for privilege in relation to documents created in connection with other surveillance is said to be unavailable for other reasons, as discussed above.

CONCLUSION

189. For these reasons: (1) the Amendment Application is allowed; (2) the Strike Out Applications are dismissed; and (3) the Costs Applications are yet to be determined.
190. I ask Counsel to agree an order which reflects the above rulings. I will deal with the Cost Applications, and submissions on any points which remain in dispute as to the form of the order, any other issues such as the costs of and occasioned by and thrown

away by the Amendment Application and the Strike Out Applications, and permission to appeal, either (if all Counsel agree to this) on the basis of written submissions alone, or else on an adjourned hearing on some convenient date. It is my intention that the time for seeking permission to appeal should not start running in the meantime.

APPENDIX

(1) Extracts from the RAPOC

1. “The surveillance activities giving rise to the claims” are pleaded in summary in paragraphs 5-6 of the RAPOC as follows:

“5. On various dates from at least 1 January 2019, the Second Defendant’s Operatives carried out unlawful covert surveillance activity on the Claimants. Pending disclosure and/or the provision of further information, the best particulars that the Claimants are able to give as to the nature and extent of the said activity are set out at paragraphs 7 to 12 below (together, “the Surveillance Activities”).

6. The unlawful covert Surveillance Activities include, but is (sic) not limited to:

a. Video camera surveillance of the Claimants’ Property as described further at paragraph 7 below.

b. Obtaining advance information about the Claimants’ travel arrangements and attempting physical surveillance of the Claimants on holiday as described further at paragraph 8.

c. Physical surveillance of the First Claimant’s place of work as described further at paragraph 10 below.

d. Obtaining advance information about the First Claimant’s lunch engagement, loitering in a location in which the First Claimant was expected to be present and then physically following and observing him as described further at paragraph 12 below.”

2. Under the heading “Video Camera Surveillance of the Claimants’ Property”, paragraph 7 pleads:

“Without the knowledge or consent of the Claimants, the Second Defendant’s Operatives installed and operated a covert video camera system at the Claimants’ Property for the purposes of monitoring and recording access to and egress from the Claimants’ Property and thereby obtaining information about their movements and associations as follows:

a. On a date or dates unknown, the Second Defendant’s Operatives entered upon the Claimants’ Property and attempted to install a wirelessly-operated video camera.

b. On a date or dates unknown, but from at least 1 January 2019, the Second Defendant's Operatives entered upon the Claimants' Property and installed a wired video camera system.

c. The video camera was installed by means of a tie to a tree branch situated on private land at the main entrance to, and which formed part of, the Claimants' Property. It captured video images in high quality colour, was triggered by movement, and was positioned so as to record the time and date of any and all movements to and from the driveway of the Claimants' Property. It was able to, and did, record: i. vehicle make, model and colour; ii. vehicle registration numbers; iii. facial characteristics of incoming drivers and front passengers; iv. partial facial characteristics of outgoing drivers; and v. appearance, including clothing, demeanour and facial characteristics, of incoming and outgoing pedestrians, cyclists and others.

d. Whilst the video camera did not possess night vision capability, it was able to and did detect movement at night, and recorded the headlights of vehicles emerging from or entering the driveway, thereby recording the date and time of access and egress.

e. The video camera was connected by a cable to a purpose-built hide, approximately 20 metres south of the camera, on neighbouring private land. The hide was situated within a shallow depression in the ground, and covered with chicken wire and foliage. The hide contained a wireless cellular router, 4 tracer batteries, an EE SIM card and a SD data storage card.

f. To avoid detection, the video camera, cable and hide were all concealed by means of sophisticated camouflage.

g. The SIM card was installed for the purpose of enabling remote access to the video camera on a live, real-time basis, so that the Claimants' activities could be observed as they were occurring.

h. The SD data storage card was installed for the purpose of recording and storing video files captured by the camera for retrieval on a periodic basis. It contained a large number of video files dating from 26 March 2019 to 17 April 2019 inclusive and included images as described at (c) and (d) above. In particular, they contained: i. images of each of the Claimants entering and leaving the Claimants' Property; and ii. images of visitors entering and leaving the Claimants' Property, including friends and family members.

i. The video camera system was discovered and reported to the Claimants on 16 April 2019, who subsequently reported it to the police."

3. Under the heading “Attempted Physical Surveillance of the Claimants on Holiday”, paragraph 8 pleads:

“The Second Defendant’s Operatives obtained advance information about the Claimants’ travel arrangements and attempted physical surveillance of the Claimants on holiday, as follows:

- a. *In January 2019 the Claimants went on holiday to a private island in the Caribbean archipelago (“the Island”) with a number of their friends. The Island’s security is provided and maintained by a private security company, and access to the Island is highly limited. One of the only lawful ways to enter the Island is via St Lucia, and travellers are not admitted to the Island unless they can prove pre-booked accommodation. The Claimants selected the Island as a holiday destination in part because it is private, access to it is limited, and security is tight.*
- b. *Travel arrangements were made. These included flights to and from St Lucia via London, both of which were booked by the First Claimant’s personal assistant (via a travel agency) on the same occasion, and accommodation at a villa on the Island, which was booked separately by the Second Claimant. The flight details were as follows: i. 12 January 2019 – BA flight from London Gatwick (South Terminal) to St Lucia; and ii. 26 January 2019 – BA flight from St Lucia to London Gatwick (South Terminal).*
- c. *The Claimants travelled from London to St Lucia on 12 January 2019 as planned. From there they travelled on to the Island. The Second Claimant travelled home from St Lucia to London on 26 January 2019, as planned, while the First Claimant’s plans changed such that he travelled back to the UK via New York.*
- d. *On a date or dates unknown to the Claimants, one or more of the Second Defendant’s Operatives, without the Claimants’ consent, obtained advance information about the flight from London Gatwick to St Lucia, and details of the villa on the Island at which the Claimants were staying. The Claimants do not know what means the First and/or Second Defendant deployed to obtain this information, but reserve the right to rely upon those means in these proceedings as constituting further unlawful acts of misuse of private information and/or pursuant to the Data Protection Act 2018.*
- e. *Thereafter, four of the Second Defendant’s Operatives travelled to St Lucia.*
- f. *The identities of the four Second Defendant’s Operatives are as follows: (1) Grant Douglas Yates; (2) Sion Thomas Bailey; (3) David John Kell; and (4) Jason Fielding.*
- g. *Two of the Second Defendants’ Operatives, Mr Yates and Mr Bailey, travelled to St Lucia on 12 January 2019 on the same flight as the Claimants. As a result, it is to be inferred that they observed and/or monitored and/or recorded the Claimants’ activities during the flight,*

which took approximately 9 hours. The means by which Mr Kell travelled to St Lucia are not known to the Claimants.

- h. On 15 January 2019 two of the Second Defendant's Operatives (the Claimants are unable to say which of Mr Yates, Mr Bailey or Mr Kell this was) attempted to gain access to the Island by means of false claims to the St Lucia authorities that they were nephews of the Claimants, to whom they claimed to be making a surprise visit. In doing so, they referred to the Claimants as "David" and "Elizabeth" Gerrard, rather than the names by which the Claimants are generally known (i.e. Neil and Ann), and provided details of the villa that the Claimants were staying in.*
- i. As travel to the Island is not permitted without pre-booked accommodation, the St Lucia authorities telephoned a friend of the First Claimant who was staying with them and informed him of the above. The friend's suspicions were aroused by the reference to the Claimants by their first, as opposed to middle, names. As a result, the friend informed one of the Claimants' daughters who confirmed that the claims were false. The falsity of the claims was reported back to the St Lucia authorities and the Second Defendant's Operatives were denied entry.*
- j. The Claimants were informed of the attempt by the Second Defendant's Operatives to gain access to the Island, and of the presence of a third individual on St Lucia, during the course of that same day by the St Lucia authorities, who were alarmed by the attempts, and concerned for the Claimants' safety.*
- k. On 17 January 2019 Mr Fielding travelled out to St Lucia from London Gatwick, this time with an advance booking to stay at a hotel located on the Island ('the Hotel'). The Hotel booking was made by another of the Second Defendant's Operatives, James McIlroy. In the circumstances it is to be inferred that this last minute, advance booking at the Hotel was made with the intention of securing access to the Island and, in consequence, to the Claimants in the knowledge that at least two of the other three Second Defendant's Operatives had been denied entry by the St Lucia authorities.*
- l. Mr Fielding was intercepted by the authorities at St Lucia airport and interviewed because the Hotel had alerted them to his impending arrival.*
- m. On questioning, Mr Fielding refused to explain himself to the authorities other than falsely to claim that he was going on holiday, and that the holiday was being paid for by his employer who he claimed was an extremely rich individual.*
- n. Upon examination of his effects, Mr Fielding was found to be in possession of a large amount of electronic equipment including a camera adjusted for night vision use. In the circumstances, it is to be inferred that Mr Fielding intended to deploy the equipment for the purposes of observing, monitoring and recording the Claimants' activities and associations, including during the hours of darkness.*

- o. As a result of his suspicious behaviour, Mr Fielding was denied entry to the Island.*
 - p. The Claimants were informed of Mr Fielding's attempt to gain access to the Island on 17 January 2019.*
 - q. Following their return to the UK, at least two of the Second Defendant's Operatives were traced and interviewed by UK police. During questioning, one of them disclosed that he worked for the Second Defendant and had been tasked to carry out surveillance on the First Claimant to identify his associates. He would not disclose who had instructed the Second Defendant or for what reason."*
4. Under the heading "Physical Surveillance of the First Claimant's place of work", paragraph 10 pleads:

"On 18 January 2019 an individual who, it is to be inferred, was one of the Second Defendant's Operatives attended at the lobby on the ground floor at the offices of Dechert at 160 Queen Victoria Street, London, UK EC4V 4QQ and proceeded to take photographs of the model of the building located there. The individual left the building when approached by security."

5. Under the heading "Physical Surveillance of the First Claimant in a restaurant", paragraph 12 pleads:

"The Second Defendant's Operatives obtained advance information about the First Claimant's lunch engagement, loitered in the location at which he had booked, and then followed him and observed and monitored him as follows:

- a. On a date which the First Claimant cannot recall exactly, but which was shortly prior to 4 February 2019, the First Claimant made a booking for lunch with a friend at Diciannove Italian Restaurant, 19 New Bridge Street, London ("the Restaurant"). The Restaurant is close to the First Claimant's place of work. It is located within the Crowne Plaza Hotel.*
- b. On a date or dates unknown to the Claimants, one or more of the Second Defendant's Operatives obtained advance information about the First Claimant's lunch booking by some means which are unknown to the Claimants. The Claimants do not know what acts the First and/or Second Defendant carried out to obtain this information, but reserve the right to rely upon those acts in these proceedings as constituting further unlawful acts of misuse of private information and/or pursuant to the Data Protection Act 2018.*
- c. In consequence, at approximately 10.30am on 4 February 2019, two of the Second Defendant's Operatives attended the lobby of the Crowne Plaza Hotel and waited for the First Claimant to arrive.*
- d. When the First Claimant arrived at around 1pm, the Second Defendant's Operatives followed him into the Restaurant, which was not busy, walked past 10 to 15 empty tables and sat at a table near to where the*

First Claimant was seated. Throughout the First Claimant's meal, one of the Second Defendant's Operatives was using a laptop and the other a mobile phone.

- e. In the circumstances, it is to be inferred that the two Second Defendant's Operatives sat near to the First Claimant's table and utilised the laptop and the mobile phone for the purpose of observing the First Claimant's behaviour, demeanour and associations, and monitoring and recording the same.*
- f. The First Claimant's suspicions were aroused by the facts that the men: i. were not wearing suits; ii. were approximately 30 years old and of a physically fit appearance; iii. refused to make eye contact with him; and iv. sat unusually close to him in an otherwise near-empty restaurant. Accordingly, the First Claimant asked the Restaurant's manager about the men and was told that the manager had never seen them before, that they had arrived earlier that day, and that they were "very interested" in the First Claimant."*

6. Under the heading "Other Surveillance Activities Giving Rise to the Claims", paragraphs 12A and 12B plead:

"12A. On various dates the First Defendant has, through individuals who were at all material times acting under its direction and control and/or acting on its behalf, whether as employees or agents or otherwise ("the First Defendant's Operatives"), carried out unlawful covert surveillance activity on the First Claimant. Pending disclosure and/or the provision of further information, the best particulars that the First Claimant is able to give as to the nature and extent of the said activity are set out at paragraphs (sic) 12B below (together, "the Other Surveillance Activities").

12B. The Other Surveillance Activities are as follows:

- a. In January or February 2014 one of the First Defendant's Operatives observed the First Claimant during a meeting at the Goring Hotel, 15 Beeston Place, Westminster, London SW1W 0JW, followed him out of the hotel after the meeting, got into a Volkswagen Golf driven by another of the First Defendant's Operatives and thereafter followed the First Claimant, who had caught a cab, back to his office. The First Claimant knew that the Volkswagen Golf was following him because it did so despite the First Claimant's cab taking various unnecessary route changes on the journey.*
- b. In 2013 or 2014 one or more of the First Defendant's Operatives placed a tracking device on the First Claimant's car.*
- c. In December 2013 and January 2014, one or more of the First Defendant's Operatives approached a number of ex-Dechert employees with knowledge of the underlying factual background to*

the Commercial Court Proceedings, and invited them to attend a series of job interviews. Upon attendance, it became apparent that such interviews were not genuine, and were in fact staged in order to obtain personal information regarding the First Claimant.

[d. and e. deleted]

f. In the circumstances, it is to be inferred that the First Defendant's Operatives carried out the Other Surveillance Activities for the purpose of observing the First Claimant's movements, location, behaviour, demeanour and associations, and monitoring and recording the same."

7. Under the heading "Harassment", paragraphs 30-33 of the RAPOC plead as follows.

8. Paragraph 30 pleads:

"The Other Surveillance Activities constitute a course of conduct pursued by the First Defendant and directed at the First Claimant, and the Surveillance Activities constitute a course of conduct pursued by the Defendants and directed at each of the Claimants, with the exception of the matters pleaded at paragraphs 10 above and 12 above, which constitute a course of conduct directed at the First Claimant alone."

9. Paragraph 31 pleads:

"As each Defendant has at all times known or ought to have known, the course of conduct pursued by that Defendant amounts to harassment of the Claimants and/or the First Claimant contrary to sections 1(1) and 3(1) of the Protection from Harassment Act 1997 ("the PHA"). In this regard the Claimants rely on the following facts and matters:

a. As pleaded above, the First Defendant has been seeking to obtain personal information relating to the First Claimant since at least December 2013. The First Defendant has been conducting surveillance in relation to the First Claimant from at least 2014.

b. As pleaded above, the Second Defendant has been conducting surveillance on the First and/or Second Claimant from on or after February 2017 and since at least 1 January 2019.

c. As, it is to be inferred, the Defendants know, any surveillance activity, whether covert or otherwise, carries an inherent and ongoing risk of exposure of the same to the subject of the surveillance, whether at the time or subsequently. In general terms, the longer the surveillance subsists, the greater the risk of discovery, since anyone who begins to suspect that s/he might be subject to surveillance is likely to be alert to any signs of further surveillance. Surveillance by means of the use of devices planted in and around property occupied, or owned, by the subject of the surveillance is particularly susceptible to exposure since

such devices can be readily located, especially once the subject of surveillance is on notice that s/he is or might be being surveilled, as is surveillance by physically following a person as they go about their activities.

- d. *A person who suspects or discovers that they are the subject of surveillance activity is very likely to be alarmed and/or distressed by it.*
- e. *In consequence of the following facts and matters, the First and/or Second Defendant were aware that the First and/or Second Claimant knew or suspected that they were the subject of surveillance activity:*
 - i. *Following the incidents set out at paragraph 12B(c) above, on 10 February 2014 Dechert LLP wrote to Black Cube, the private investigation firm which had carried out the interviews, and made it clear that it was aware of the interviews, that they had been procured on false pretences, and that they appeared to have been conducted for the purpose of obtaining confidential information. Given that Black Cube was acting on the instructions of the First Defendant, it is to be inferred that the content of this letter was brought to the First Defendant's attention shortly after it was received by Black Cube.*
 - ii. *As pleaded at paragraph 35(a) below, on 7 March 2018 the First Claimant made a Subject Access Request to the Second Defendant in respect of personal data held by it about the First Claimant as a result of private investigatory work that the First Claimant believed had been carried out by it. The First Claimant also made a Subject Access Request to Black Cube on the same date. Given that the Second Defendant and Black Cube were acting on the instructions of the First Defendant, it is to be inferred that the content of each requests was brought to the First Defendant's attention shortly after it was received by the Second Defendant/Black Cube.*
 - iii. *As pleaded at paragraphs 8(h) and (i) above, the Second Defendant's Operatives were denied entry to the Island after falsely claiming to be nephews of the Claimants on 15 January 2019. In the circumstances:*
 - 1. *It is to be inferred that the Second Defendant knew that it was likely that these matters would have been reported to the Claimants by the St Lucian authorities on or shortly after that date.*
 - 2. *It is to be inferred that the Second Defendant informed the First Defendant that the Second Defendant's operatives had been denied entry to the Island and why; therefore the First Defendant must have known that it was likely that these matters would have been reported to the Claimants on or shortly after that date.*

- iv. *As pleaded at paragraphs 8(k) to (o) above, Mr Fielding was denied entry to the Island on 17 January. In the circumstances, and in particular in light of the facts and matters pleaded at subparagraph (iii) above:*
1. *It is to be inferred that the Second Defendant knew that it was likely that the denial of entry of Mr Fielding and reasons for it would have been reported to the Claimants on or shortly after that date;*
 2. *It is to be inferred that the Second Defendant informed the First Defendant that Mr Fielding had been denied entry to the Island and why; therefore the First Defendant must have known that it was likely that this would have been reported to the Claimants on or shortly after that date.*
- v. *As pleaded at paragraph 10 above, the Second Defendant's Operative was observed at the First Claimant's place of work on 18 January 2019 and left when approached by security. In the circumstances:*
1. *It is to be inferred that the Second Defendant knew that this activity of its operative would be reported to the Claimants on or shortly after that date;*
 2. *It is to be inferred that the Second Defendant informed the First Defendant that its operative had been intercepted whilst photographing the model of the building and therefore the First Defendant must have known that it was likely that this would have been reported to the Claimants on or shortly after that date.*
- vi. *On a date unknown between 15 January 2019 and 17 May 2019 two of the Second Defendant's Operatives who had attempted to gain access to the Claimants on the Island were traced and interviewed by Sussex Police in relation to incidents of surveillance against the Claimants. During those interviews they were asked whether they were instructed, or intended, to intimidate the First Claimant or were instructed to cause him or his family harm. Therefore:*
1. *If (which is denied) the Second Defendant was not already aware by the time of these interviews that the Claimants knew or suspected that they had been under surveillance, the Second Defendant would have become aware of this as a result of the interviews;*
 2. *It is to be inferred that the Second Defendant informed the First Defendant about the police interviews when they occurred; and therefore if (which is denied) the First Defendant did not already know or suspect by the time of the interviews that the Claimants were aware they had been*

under surveillance, the First Defendant would have learned this at the time of the interviews or shortly thereafter.

- f. The Defendants therefore knew that the Claimants suspected or were aware they were under surveillance as a result of the matters pleaded in paragraph 31(e) above, from February 2014 onwards, alternatively from each of the dates of knowledge pleaded in paragraph 31(e). Despite this, the Defendants persisted in conducting further acts of surveillance pleaded in these Particulars of Claim.*
- g. Further and in any event, on the Defendants' case, all covert surveillance activity was carried out with the aim of collecting evidence for the purpose of the Proceedings (as defined at paragraphs 2(1) of the First Defendant's Defence). In the premises the Defendants must have intended that at least some of the matters gathered by covert surveillance activity would be disclosed to the Claimants, thereby disclosing the fact the surveillance had occurred and thereby causing alarm and distress to the Claimants.*
- h. It is to be inferred from the facts and matters in paragraphs 31(a) to (g) above that the Defendants' decision to deploy and persist in the surveillance was therefore made knowing that their conduct would cause the Claimants alarm and distress. In any event, the Defendants ought to have known that their conduct would cause the Claimants alarm and distress.*
 - i. In support of this contention, the Claimants will further rely upon letters sent to the Claimants by the First Defendant through its solicitors on 8 and 12 June 2020 ("the 8 June letter" and "the 12 June letter"):*
 - ii. In the 8 June letter the First Defendant stated that it would withdraw an undertaking given on 17 October 2019 not, pending trial, to carry out certain forms of surveillance on the Claimants. The letter also suggested that, were it not for the Covid-19 pandemic, the First Defendant would withdraw its undertaking not to carry out other types of surveillance on them, including physical surveillance. By the 8 June letter the First Defendant signalled its intention to resume surveillance of the Claimants immediately upon expiry of its undertaking.*
 - iii. The 8 June letter failed to identify any basis, let alone any purportedly legitimate basis, for resuming such activities. In the 12 June letter the First Defendant purported to provide an explanation, namely that the activities would be in pursuit of the 'legitimate aim' relied upon in the First Defendant's defence of these proceedings, but refused to give any explanation for how that so called legitimate aim would be met through further surveillance.*
 - iv. By the time of the 8 June letter the Claimants had, through the Particulars of Claim in these proceedings and through their*

witness statements dated 20 September 2019, put the Defendants on express notice of the alarm and distress they had suffered as a result of the surveillance activities complained of in these proceedings. Moreover on or around 16 April 2019 the Sussex Police wrote to the Second Defendant to inform it that a criminal investigation of the Second Defendant was now being pursued for harassment against the First Claimant and his family. It is to be inferred that the Second Defendant made the First Defendant aware of this investigation, and that the First Defendant was therefore aware that the police regarded the surveillance of the Claimants which the First Defendant had instructed the Second Defendant to carry out as potentially amounting to criminal harassment.

- v. *The First Defendant therefore sent the 8 June letter in the knowledge that the letter would cause the Claimants severe alarm and distress. It is to be inferred that the First Defendant's intention in sending the 8 June letter was to oppress the Claimants and cause them severe alarm and distress.*
- vi. *On 11 June the Claimants' solicitors wrote to the First Defendant's solicitors explaining that the 8 June letter had caused considerable distress to the Claimants and seeking, amongst other things, clarification of what surveillance activities the First Defendant was intending to carry out. In response, in the 12 June letter, the First Defendant's solicitors stated that the First Defendant would, in fact, no longer withdraw the undertaking not to carry out further surveillance upon the Second Claimant; but declined to explain what further surveillance it intended to carry out on the First Claimant. The 12 June letter caused the First Claimant further considerable distress, as the First Defendant would have known.*
- vii. *In the circumstances, and in particular in light of the fact the First Defendant was willing to send the 8 and 12 June letters despite knowing that they would cause the Claimants severe alarm and distress, it is inferred that the First Defendant instructed the acts of surveillance complained of in these proceedings similarly knowing that they would cause alarm and distress towards the Claimants."*

10. Paragraph 32 pleads that "By reason of the Defendants' conduct the Claimants have been caused alarm, anxiety and distress as set out at paragraph 44 below." Paragraph 33 then pleads:

"Further, and without prejudice to the burden of proof (which rests on the Defendants in this regard), there is and was no legitimate justification under section 1(3) of the PHA for the course of conduct pursued by that Defendant. In particular, the Defendants cannot legitimately contend that the course of conduct was reasonable when:

- a. *the installation and operation of the video camera was obviously unlawful; and*
- b. *for the purpose of their attempts to obtain access to the Claimants on the Island, the Second Defendant's Operatives lied to the authorities on St Lucia as set out at paragraphs 8 h. and m. above; and*
- c. *in relation to the First Defendant only, the installation and operation of the tracking device on the First Claimant's car was obviously unlawful."*

11. Under the heading "Damages", paragraph 44 pleads:

"The Claimants will rely on the following matters in support of their claims for general and aggravated damages:

- a. *Following notification by the St Lucia authorities of the attempts by the Second Defendant's Operatives to gain access to them while on holiday on the Island, the Claimants feared for and were obliged to adopt measures designed to ensure their ongoing safety and security as follows:*
 - i. *The guard security detail on the Island was increased by a significant number patrolling outside the Claimants' villa and the beaches for the duration of their stay; and*
 - ii. *The First Claimant was obliged to make arrangements to secure the safety and well-being of the Second Claimant for her return home to the UK when, in the event, she travelled without the First Claimant at the end of the holiday.*
- b. *The Claimants were shocked and concerned to learn from the St Lucia authorities about the attempts by the Second Defendant's Operatives to gain access to them while on holiday on the Island and in particular:*
 - i. *that this meant that the Second Defendant's Operatives must have had access to information about the Claimants' travel and accommodation plans;*
 - ii. *the fact that the Second Defendant's Operatives were prepared to and did tell lies to the St Lucia authorities in order to try to gain access to the Claimants as set out at paragraphs 8.h. and m above;*
 - iii. *the persistence of the Second Defendant's Operatives attempts to gain access to the Claimants, in that they were prepared to tell lies to do so as set out at paragraphs 8.h to 8.q above and that Mr Fielding was despatched to attempt to gain access after the other three had tried and failed to do so; and*
 - iv. *the fact that Mr Fielding had in his possession a camera adjusted for night vision use, which indicated that he intended to monitor the Claimants during the hours of darkness as well as during daylight hours.*

- c. *Also as a result of the attempts by the Second Defendant's Operatives to gain access to them on the Island, the Claimants are deeply concerned about how to manage future holidays. They are worried that even the Island will not be safe enough, and if they do decide to return, this will necessitate prior discussions and planning about the security situation there.*
- d. *As a result of the Surveillance Activities and Other Surveillance Activities, and following the discovery and examination of the video camera in particular, both counter-terrorism and armed response police attended at the Claimants' Property in order to survey the property and assess the Claimants' security arrangements.*
- e. *As a result of the Surveillance Activities and Other Surveillance Activities, the Claimants have become greatly concerned for their safety and well-being and have taken extensive measures to try to ensure their ongoing safety and security.*
- f. *The facts that the Second Defendant's Operatives obtained advance notification of the Claimants' holiday travel plans and of the First Claimant's lunch booking at the Restaurant has caused the Claimants to be greatly concerned about the security of their IT systems, and the Claimants have instructed specialist experts to assess their IT security.*
- g. *The Claimants have been obliged to notify their two daughters and their respective husbands of the Surveillance Activities and of the potential threat, by their association with the Claimants, to their own safety and security. Both daughters have young children and, as well as being concerned for their parents, are concerned about staying at the Claimants' Property. Experiencing their daughters' distress and concern has increased the distress caused to the Claimants.*
- h. *The Claimants have also been obliged to notify several of their close friends, who visit the Claimants' Property and/or holiday with the Claimants, of the potential threats to their safety and security. This has caused distress to those friends, who are concerned about visiting the Claimants' Property or associating with the Claimants. Experiencing the distress and concern of their friends has increased the distress caused to the Claimants.*
- i. *Paragraphs 31(h) and (i) above are repeated. The 8 June letter caused the Claimants great shock, anxiety and distress. The Claimants' distress was further compounded by the fact that the 8 June letter called into question the veracity of their evidence set out in their witness statements dated 20 September 2019 as to the effects that the Defendants' activities have had on them, and specifically questioned the Second Claimant's evidence of sleepless nights and anxiety."*

(2) Extracts from the Reply

12. Under the heading “The Defendants’ assertions of litigation privilege”, paragraph 8 of the Reply pleads:

“8. *As regards the Defendants’ assertions that matters relevant to these proceedings are covered by litigation privilege, and/or that they unable to plead to certain matters as to do so waives or risks waiver of privilege, the Claimants’ position is as follows.*

a. *It is denied that communications or documents relating to the surveillance at issue are privileged. The said communications took place and the said documents were generated during the course of and/or for the purposes of surveillance activities that were unlawful, and in certain cases involved dishonest conduct, as set out in the Particulars of Claim and at paragraphs 8(c) to 8(e) below. Further:*

[deleted]

(ii) *For the reasons set out at paragraphs 30 to 33 of the Amended Particulars of Claim in undertaking the surveillance activity complained of the Defendants committed an offence or offences of harassment 195 contrary to section 2(1) of the Protection from Harassment Act 1997. Pursuant to section 2(1), a person who pursues a course of conduct in breach of section 1(1) is guilty of a criminal offence.*

(iii) *The actions of the Second Defendant’s Operative(s):*

1. *In making false representations as pleaded at paragraphs 8(h) and (m) of the Amended Particulars of Claim were plainly iniquitous. In this regard, the Claimants will rely on the fact that they would, if committed by a person who is not a British citizen seeking to enter the United Kingdom, have amounted to the commission of offences contrary to section 24A of the Immigrations Act 1971. Pursuant to section 24A, such a person is guilty of an offence if, by means which include deception by him, he obtains or seeks to obtain leave to enter or remain in the United Kingdom.*

2. *In making false representations as pleaded at paragraph 8(m) of the Amended Particulars of Claim amounted to the commission of an offence contrary to the law of St Lucia. Section 36(1)(e)(ii) of the Immigration Act, Cap 10.01 provides that any person who, being a passenger intending to enter or entering St Lucia, wilfully gives an untrue answer to a question posed by an immigration officer, is guilty of an offence.*

3. *In bringing or attempting to bring in to St Lucia the camera adjusted for night vision use, as pleaded at paragraph 8(n) of the Amended Particulars of Claim, amounted to the commission of an offence contrary to the law of St Lucia. Pursuant to section 84(2) and article 22 to Part 2 of*

Schedule 3 of the Customs (Control and Management) Act, Cap 15:05, it is an offence to import goods into St Lucia without observing the applicable restrictions and conditions. These provide that cameras adapted for night vision use, cannot be imported except with the written permission of the Comptroller of Customs. The Second Defendant's Operative did not have such permission. In the premises it is denied that privilege can attach to them, as a matter of law. Sub-paragraphs (b) to (e) below are pleaded without prejudice to the generality of the foregoing.

- b. It is denied that documents recording the surveillance carried out on the Claimants are privileged as against the Claimants. The said documents record matters that are not confidential vis-à-vis the Claimants. No privilege can therefore arise in such documents. The specific matters below are pleaded without prejudice to this position.*
- c. As regards documents relating to meetings carried out by Black Cube:
 - i. The purported purpose of such meetings was to conduct a job interview with current and former associates of Dechert. They were therefore not arranged, from the perspective of the interviewees, for the purposes of conducting litigation (let alone for the dominant purpose of conducting litigation).*
 - ii. Accordingly, it is irrelevant that the subjective purpose of Black Cube and/or the First Defendant in procuring the meeting is alleged to have been to obtain information for the Proceedings. Even if this was true (which is not admitted), it would merely mean that the meetings were arranged on false pretences. In such circumstances it is the ostensible purpose of the meeting which, as a matter of law, is relevant in assessing if privilege arises.*
 - iii. Such meetings were also procured on a dishonest basis, and for this reason it is denied that the meetings are capable of being privileged in any event.*
 - iv. It is inferred that the First Defendant instructed Black Cube to obtain the meetings on a false and dishonest basis, or otherwise authorised Black Cube to do so.**

Accordingly, it is denied that any privilege arises in relation to any of the categories of documents referred to at paragraph 25 of the First Defendant's Defence, as regards the interviews procured by Black Cube.

- d. As regards documents relating to the attempted surveillance of the Claimants on the Island:
 - i. It is denied that such documents were created for the dominant purpose of conducting litigation:**

1. *There was no reason for the Defendants (or either of them) to believe that the Claimants would engage in activities on the Island that were of any relevance to the Proceedings, given (a) the trip to the Island was a family holiday, (b) the trip took place many years after the events complained of in the Proceedings, and (c) the lack of any basis (pleaded or otherwise) for believing that the First Claimant would have engaged on activities relevant to the Proceedings while he was present on the Island.*
 2. *In the circumstances it is inferred that the actual purpose of such surveillance was either to seek to gather material which was potentially compromising of or embarrassing to the First Claimant but which was not relevant to the Proceedings or to intimidate and/or harass the Claimants (or either of them).*
- ii. *Further and in any event, documents recording communications between operatives of the Second Defendant and third parties in the course of attempting to gain access to the Island for the purpose of carrying out surveillance of the Claimants on it (including communications with security guards on the Island and the St Lucia authorities) were neither:*
1. *Confidential; nor*
 2. *From the perspective of the third parties, who the Second Defendant's Operatives sought to mislead as to the reason why they sought to visit St Lucia/the Island, carried out for the purposes of conducting litigation. They are therefore not privileged.*
- iii. *Further or alternatively, paragraph 8(a)(iii) above is repeated. Accordingly, it is denied that any privilege arises in relation to any of the categories of documents referred to at paragraph 25 of the First Defendant's Defence or at paragraphs 8 and 9 of the Second Defendant's Defence as regards the attempted surveillance on the Island.*
- e. *As regards the surveillance of the Claimants' Property:*
- i. *As noted above, surveillance of the Claimants themselves would record matters that are not confidential vis-à-vis the Claimants. Records of such surveillance are therefore not privileged.*
 - ii. *Further, insofar as the surveillance sought to record or did record:*
 1. *matters taking place in a public place (e.g. the entrance to the Claimants' Property from the road);*

2. *matters which were known or would have become known to the Claimants shortly thereafter (e.g. the identity of persons leaving or entering the Claimants' Property); or*
 3. *matters taking place on the Claimants' Property, including matters recorded by means of trespass on the Claimants' Property; it is denied that the relevant matters are capable of being confidential, either at all or vis-à-vis the Claimants.*
- iii. *Further or alternatively, it is denied that such documents were created for the dominant purpose of conducting litigation:*
1. *There was no reason for the Defendants (or either of them) to believe that the Claimants would engage in activities at the Claimants' Property that were of any relevance to the Proceedings, given: (a) that the Property is their family home, (b) the surveillance took place many years after the events complained of in the Proceedings, and (c) the lack of any basis (pleaded or otherwise) for believing that the First Claimant would have engaged on activities relevant to the Proceedings while he was at the Claimants' Property.*
 2. *In the circumstances it is inferred that the actual purpose of such surveillance was either to seek to gather material which was potentially compromising of or embarrassing to the First Claimant but which was not relevant to the Proceedings or to intimidate and/or harass the Claimants (or either of them). Accordingly, it is denied that privilege arises in relation to any of the categories of documents referred to at paragraph 25 of the First Defendant's Defence or paragraphs 8 and 9 of the Second Defendant's Defence as regards surveillance of the Claimants' Property."*